CHAPTER TWO

LEGAL AID AND ADVICE

Introduction. It is important to appreciate that nothing in the Convention requires any country to introduce new forms of free legal aid or advice, or to alter the principles upon which financial contribution may be made to the cost of litigation or of legal advice. One country may have a highly developed system of free legal aid covering every type of court proceedings; another may be able to offer only a limited contribution to the cost of litigation in a narrowly-defined range of cases; each could become party to the Convention without altering its policies. The objectives of the Convention in its Chapter on Legal Aid may be defined as the removal of discrimination on grounds of nationality or residence in the operation of such legal aid schemes as exist and the improvement of facilities for transmitting requests for legal aid from one country to another.

Civil and commercial matters. The Convention is primarily concerned with legal aid "for court proceedings in civil and commercial matters". (Art. 1, para. 1.) It may be helpful to reproduce the comment on the phrase "civil and commercial matters" which appeared in the Explanatory Documentation on The Hague Conventions on The Service of Process, Etc. (Commonwealth Secretariat 1979):

> "This phrase is used in many Hague Conventions, dating back to 1905, and in all the U.K. bilateral conventions. It has never given rise to difficulties in practice under the latter conventions, but it is recognised that civil-law and common-law countries do have a different approach. A common law country will usually interpret the phrase to include almost anything which is not a criminal matter. Civil law countries have a different approach to the use of legal categories. They tend to make more use of a greater number of exclusive categories and would in some cases regard Public Law or Family Law or Fiscal Law as separate and distinct from Civil Law and Commercial Law. So, for example, a building contract between a government agency and a company might be regarded as falling outside the field of "civil and commercial matters" because of its "public law" content.
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> This is a well-known problem, so deep-seated that it is insoluble except within a group of states such as those of the European community which has institutions (notably the Court of Justice) capable of developing a special "community" understanding of "civil and commercial" (see L.T.U. v Eurocontrol, decided by the Court in 1976).

Perhaps because it is such a well-known problem, there are few occasions on which the matter is allowed to hinder the working of the Conventions. This is certainly the case under the Service of Process Convention."

In the context of the present Convention the importance of the issue is much reduced by Article 1, para. 3, which provides that in States where legal aid is provided in administrative, social or fiscal matters, the provisions of Article 1 apply to cases brought before the courts or tribunals competent in such matters. (The 1954 Convention extended to administrative but not to social or fiscal matters.) Any difference of opinion as to whether a "social" matter, e.g. one relating to a claim for social security benefit, was or was not within the phrase "civil or commercial matter" is now immaterial; the case will certainly fall within Article 1 of the Convention, which is the only question of practical significance.

Court proceedings. Article 1 of the Convention is concerned with "legal aid for court proceedings". This, slightly awkward, phrase is a translation of the convenient French expression "assistance judiciaire". It includes legal aid in any relevant matters before a court, judge or tribunal; no magic attaches to the word "court". Similarly the legal aid to be granted may include the assistance of one or two counsel, of a solicitor, or may be restricted to certain fees and costs; as has already been stressed, the Convention is not concerned to define the type of provision that any country should make, but only to outlaw discrimination in its availability.

Although cases before tribunals are within the general term "courts", the matter is placed beyond doubt in Article 1, 3rd paragraph, which deals with administrative social and fiscal matters. The English text specifically mentions both "courts and tribunals"; the French word tribunaux covers both.

Non-discrimination. Legal aid schemes are naturally formulated with the needs of a country's own citizens and residents in mind. The basic principle of the Convention (Article 1, 1st paragraph) is that

(i) nationals of any Contracting State; and

(ii) persons habitually resident in any Contracting State

should be entitled to legal aid on the same conditions as if they were nationals of and habitually resident in the State granting legal aid.

So far as nationals of other Contracting States are concerned, the Convention merely confirms the established principle of the 1954 Convention. The inclusion of persons

habitually resident in any Contracting State was a major extension of the principle of non-discrimination, and it became evident in the course of discussions at The Hague that not all Member States of the Conference were ready to accept this extension; this was the case with a group of civil law countries led by France, whereas no common law jurisdiction felt any difficulty over the extension. The resulting compromise allows a State signing or acceding to the Convention to make a Reservation excluding persons whose link with another Contracting State is solely that of habitual residence, i.e. class (ii) above. (Article 28, first paragraph.) The Reservation can only apply if there is no reciprocity of treatment between the reserving State and the State of which the applicant for legal aid is a national; as by definition the latter State will not be a Contracting State of the present Convention any such reciprocity of treatment would have to be found under some other bilateral or multi-lateral agreement. It is, however, most unlikely that any common law country would wish to make any such Reservation, so the complexities of the matter need not be pursued.

Legal aid is also made available under the Convention to a limited but important class of persons who do not fall within the more general provisions. These are persons who were formerly habitually resident in a Contracting State and who are involved in current or pending litigation in that State based on a cause of action arising out of their former habitual residence in that State. It may be, for example, that a dispute arises as a person prepares to move his place of residence from one State to another, perhaps a claim for unpaid wages or a dispute with the purchaser of the house he is leaving. It was thought desirable to ensure that such a plaintiff enjoyed the benefits of the Convention. If the State to which he moved was itself a Contracting State there would be no difficulty; being habitually resident in such a State, he would be within Article 1, first paragraph. But if the new State of residence were not a Contracting State he might well be deprived of the right to legal aid; Article 1, second paragraph operates in such a case to preserve to him the benefits of the Convention. The same freedom to make a Reservation exists on this point as on that dealt with above (Article 28, first paragraph); as in the previous case, it is thought that common law jurisdictions will not wish to make any such Reservation.

Legal advice. In a number of States, facilities exist for free or subsidised legal advice to be given to those whose financial resources are such that they cannot afford the usual professional charges. This is quite distinct from legal "aid" which pre-supposes some litigation; all that is entailed is the giving of explanations and of suggestions for action falling short of litigation. In some countries the concept of legal advice may extend to the giving of limited practical assistance, in the drafting of a formal letter, or the completion of official forms. As in other

contexts it must be stressed that nothing in the Convention requires the introduction or modification of any such schemes; the Convention is concerned only with discrimination in their provision based on nationality or residence, discrimination which in practice seems already not to exist in practice.

Article 2 accordingly provides that legal advice is to be available on the same basis as legal aid, that is article 1 applies equally to legal advice, "provided that the person seeking advice is present in the State where the advice is sought". This proviso is important, for it means that the Convention does not entail the creation of elaborate machinery for giving legal advice by post across State boundaries with all the difficulties of communication and translation that might be involved. It deals only with the person present in the jurisdiction and in need (perhaps especially because he is an alien) of legal advice.

Machinery for legal aid. Articles 3 to 13 provide for machinery designed to assist those involved in litigation in another country to obtain the legal aid to which the Convention entitles them. The Convention uses the device of "Central Authorities" familiar from earlier Hague Conventions on Service of Process and Evidence. As is the case under those Conventions, a "Central Authority" does not have to be in any particular form, and the phrase is unfortunate insofar as it suggests anything elaborate or expensive. All that is required is an address, an office with which other Central Authorities can communicate. It is in Commonwealth practice commonly the Registry of the High Court or sometimes in the Ministry of Justice or of Foreign Affairs; the work will be carried out by an official as part of a much wider remit.

Receiving Central Authorities. Article 3 requires Contracting States to designate a Central Authority to receive, and take action on, applications for legal aid submitted under the Convention. Provision is made for Federal States and for other States which have more than one legal system (e.g. the United Kingdom) to designate more than one Central Authority, but that is optional.

Transmitting authorities. Previous Hague Conventions in this field have required the designation of Central Authorities only as receiving offices. In practice, those same Authorities have tended to be used as transmitting offices also; familiarity with Convention procedures, possession of the necessary forms, and knowledge of the practical snags in identifying and describing individuals and procedures under foreign legal systems, all make a combination of functions desirable. A receiving office is more likely to find the applications in order, and so capable of prompt and efficient execution, if they have been prepared by an officer with some experience of the system.

Accordingly, Article 4, first paragraph, requires the designation of "one or more transmitting authorities" whose function is to send the application for legal aid to the appropriate (receiving) Central Authority. The Convention does not require a State to designate the same office as Central Authority (for receiving requests) and as a transmitting authority, although this may well be general practice. Larger States may wish to decentralise the transmitting function for the convenience of applicants, and this they are able to do.

Communication between the authorities. The mode of communication established by the Convention is direct. A transmitting authority sends the documents directly to the relevant Central Authority, and no other agency is involved (see Article 4, second paragraph). This eliminates any need to sue consular or diplomatic channels, although Article 4, third paragraph preserves the right of transmitting States to use the diplomatic channel if they so require. As this would entail action not only by the embassy of the transmitting State but also by the Ministry of Foreign Affairs of the receiving State it is not likely to commend itself for general use; the object of the Convention is to produce simple, expeditious procedures.

Other modes of application. The expectation is that applications for legal aid under the Convention will (unless the applicant is already in the State in which he requires legal aid, in which case he will apply in the usual way) be made via a transmitting authority in the Contracting State in which the applicant has his habitual residence (Article 5, first paragraph). There are, however, two other possibilities:

(a) if the applicant does not reside in a Contracting State (but is entitled to legal aid, for example, because of his nationality of one such State) he may submit an application through consular channels (Article 9).

(b) in any case, it is open to a Contracting State to declare that its receiving Central Authority will accept applications submitted by other channels (e.g. the consular channel where the facts do not fall within the case just described) or by other methods (e.g. not using the prescribed forms). It is in fact difficult to envisage cases in which such a declaration would be advantageous except perhaps where two neighbouring States wish to adopt a simpler approach, enabling legal practitioners in the other State to approach the receiving Central Authority directly.

Form of application. Model forms are provided in the Annex to the Convention (which also contains, in Article 30, a procedure for amending the prescribed forms if their

revision is found to be desirable), and an application made via a transmitting authority must be in the model form. The forms are self-explanatory, and quite detailed information is required as to the financial means and obligations of the applicants. It is thought that the information will be sufficient to enable any necessary assessment to be made of the applicant's eligibility for assistance under a legal aid scheme which is in any way means-tested, but the receiving Central Authority can require further information in appropriate cases (Article 5, second paragraph). Item 21 in the Statement concerning the applicant's financial circumstances is perhaps a little obscure: "Real property (please state value(s) and obligations)". In this context "obligations" is the English term for the French charges, and the English term "charges" might well have been clearer; a mortgage, for example, would be noted here, the repayments being included in Item 23.

The transmitting authority is to assist the applicant in completing the forms and supplying necessary supporting documents (Article 6, first paragraph). All the papers must be in one of the official languages of the requested State, or, if it is not feasible to obtain such a translation in the requesting State, in English or French (Article 7). A Contracting State may by declaration specify other languages as acceptable to its Central Authority (Article 24) and may also make a Reservation (Article 28, second paragraph, item a) excluding the use of English, or French, or both. If a translation is required the transmitting authority must "assist the applicant in obtaining [such a translation] without charge ... where such assistance is appropriate" (Article 6, third paragraph). The meaning of the final phrase is not clear, but presumably such assistance will be needed by most applicants in cases where a translation is required. Given the option of using English where the relevant official language is one for which translations are not feasible, this set of provisions should not be unduly onerous for Commonwealth jurisdictions.

Further action by the transmitting authority. A transmitting authority is given the right, by Article 6 paragraph 2, of refusing to transmit an application which is "manifestly unfounded". This right is limited, for it refers only to the application for legal aid and not the underlying cause of action. It is the duty of the transmitting authority to ensure that the formal requirements of the Convention are met (Article 6, first paragraph) and it may be that the provision merely re-inforces this; until the application is in order, the authority can refuse to send it. The Form for Transmission of Application for Legal Aid contains spaces to be completed by the transmitting authority for "Remarks concerning the application and the statement, if any" and "Other remarks, if any". It would be possible to indicate here, for example, any reasons for the paucity of information in the accompanying Statement

of financial circumstances, or even any doubts entertained by the authority as to the applicant's good faith.

If any request is later received from the appropriate Central Authority for further information, it is the duty of the transmitting authority to reply (Article 6, fourth paragraph).

Action by the receiving Central Authority. Article 8 provides that the receiving Central Authority shall itself determine the application or take such steps as are necessary to obtain its determination by the competent authority. The latter is perhaps likely to be the more frequent; there will be machinery in the State for dealing with applications for legal aid, and the Central Authority will lay the application before the appropriate body.

If the Authority finds that further information is required or if other difficulties arise it is to communicate with the transmitting authority; and will similarly notify that authority of the outcome of the application (Article 8, second paragraph). All such communications will normally be in one of the official languages of the requested State, but if the application was sent in English or French (because the language of the requested State was unfamiliar), the communications in reply must also be in either English or French (Article 7, paragraph 3).

The Convention contains a general provision that applications should be handled expeditiously (Article 12).

Fees and charges. Translation costs will be borne in the country in which they are incurred (Article 7, paragraph 4). No other charges arise under the Convention, either in respect of the transmission and reception of the application or in respect of its eventual determination (Article 11). No form of legalisation is required (Article 10).

Subsequent proceedings. Article 13 contains two distinct provisions which apply once an application for legal aid has been made under the Convention and the application has succeeded. The first concerns later procedural steps in the relevant litigation. If any documents have to be served upon a defendant or other person in another Contracting State, or if Letters of Request are issued or social enquiry reports sought in such other Contracting State, no charges are to be levied, except for fees paid to experts or interpreters (Article 13, first paragraph). It is thought unlikely that fees would normally be required in such cases, but if local legislation does so provide exemptions would have to be granted.

The second provision concerns the steps which may have to be taken in another Contracting State to obtain recognition or enforcement there of a judgment obtained

in the initial proceedings. To avoid tedious delays it is provided in Article 13, second paragraph, that once the original applicant has been granted legal aid in a Contracting State he shall be entitled to legal aid in another Contracting State where he seeks to obtain such recognition or enforcement. Although this provision is obviously of advantage to the plaintiff, it can cause difficulties for the governments concerned. In the case of means-tested schemes, it is difficult to operate the rule: it seems that an applicant once given some financial assistance in one Contracting State will be entitled to completely free legal aid in all other Contracting States in which he seeks recognition or enforcement of the judgment, and whatever the likelihood of success in those subsequent proceedings. With the support of delegates from common law countries, the authors of the Convention agreed to permit a reservation excluding Article 13, second paragraph, and it is anticipated that Commonwealth jurisdictions would wish to make such a reservation.