

International Conventions concerning Applications for and Awards of Maintenance

Explanatory Documentation
prepared for
Commonwealth Jurisdictions



Commonwealth Secretariat

INTERNATIONAL CONVENTIONS
CONCERNING APPLICATIONS FOR
AND AWARDS OF MAINTENANCE

Explanatory documentation prepared
for Commonwealth Jurisdictions by
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with the Commonwealth Secretariat

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PREFACE

This is the fourth in a series of 'accession kits' being prepared by the Commonwealth Secretariat to assist governments in acceding to selected international conventions. At present these are confined to the area of private international law and include

- (i) The Hague Conventions on the Service of Process, The Taking of Evidence and Legalisation
- (ii) International Conventions in the Field of Succession
- (iii) The Hague Convention on the Civil Aspects of International Child Abduction

The present 'accession kit' has been prepared for the Commonwealth Secretariat by Professor David McClean, whose continued assistance with work in this field is acknowledged with gratitude.

A fifth 'kit', on arbitration, is in the course of preparation by Professor Keith Patchett.

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INTRODUCTORY NOTE

This paper examines three international conventions concerning applications for and awards of maintenance as between parties living in different countries, and also contains legislative proposals which contain a revised version of the established Commonwealth scheme as to facilities for the enforcement of maintenance orders and provisions for implementing two of the three international conventions.

The question of the enforcement of maintenance orders in the context of intra-Commonwealth legal relations was considered by Commonwealth Law Ministers in 1973. The Winnipeg Meeting of Law Ministers in 1977 received a full report on this and other matters by Professor J.D. McClean and Professor K.W. Patchett (The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth - a Further Report), chapter 3 being devoted to maintenance orders.

As a result of the Law Ministers' deliberations there were two related developments. The first was the growth of co-operation between the Commonwealth Secretariat and The Hague Conference on Private International Law, the leading international body in that field. As part of that development, a number of "accession kits" are being prepared, analysing particular conventions produced at The Hague (with other relevant international conventions on similar subject-matter), and providing details of accession procedures and draft legislation. This paper is one of that series.

The other development was the examination of the Commonwealth position in respect of maintenance orders and other matters at a series of regional meetings of legal officers in the course of which proposals for the revision of the existing intra-Commonwealth scheme were developed and draft legislation to this end elaborated. The work was reported to and generally endorsed by the Barbados Meeting of Law Ministers in 1980.

This paper therefore examines two Hague Conventions, that on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations ("the Enforcement Convention") and that on the Law Applicable to Maintenance Obligations ("the Applicable Law Convention"), together with a related United Nations Convention on the Recovery Abroad of Maintenance. Model legislation is provided which embodies a revision of the intra-Commonwealth scheme and provisions for giving effect to the Enforcement Convention and the U.N. Convention, together with notes on accession procedures.

The English text of the Conventions is provided, but not the official texts in French or, in the case of the U.N. Convention, other languages.

The Commonwealth Secretariat will endeavour to supply further information on points of detail at the request of any Government. The address of the Permanent Bureau of the Hague Conference, which can supply information on the Hague Conventions analysed in this paper is 2C Javastraat, The Hague, Netherlands.

CHAPTER ONE

THE HAGUE ENFORCEMENT CONVENTION

Introduction. The Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations was drafted at the Twelfth Session of The Hague Conference on Private International Law in October 1972 and formally signed on 2 October 1973. By 1980 it was in force as between seven member States of the Conference:

Czechoslovakia
France
Norway
Portugal
Sweden
Switzerland
United Kingdom

In addition, Belgium, Finland, the German Federal Republic, Italy, Luxembourg, the Netherlands, and Turkey had signed but not yet ratified the Convention. At the 1980 Session of the Conference it was indicated that Denmark, Japan and Spain were also taking active steps with a view to becoming parties to the Convention.

Scope: maintenance obligations. The Convention applies to a broad category of maintenance obligations, specified in article 1. They are those "arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation towards an infant who is not legitimate, between - (1) a maintenance creditor and a maintenance debtor; or (2) a maintenance debtor and a public body which claims reimbursement of benefits given to a maintenance creditor."

The Convention follows the example of Commonwealth legislation in avoiding a direct definition of maintenance, in terms of the content of the concept. Plainly the basic idea of maintenance is provision by one person of the means whereby some other person may be supported, and it is the relationship between the parties which is central. Although the Convention does not actually say so, the payment of money is envisaged, and indeed article 22 contains a reference to the "transfer of funds payable as maintenance."

Scope: categories of persons. The Convention speaks of "a family relationship" including parentage, marriage or affinity, and specifically includes obligations towards an illegitimate child. It is now widely excepted in Commonwealth jurisdictions that discrimination against those who are born out of wedlock should be removed; in some jurisdictions the status of illegitimacy has been abolished, and in many more the disadvantages once attaching to the status have been overridden. So far as enforcement of maintenance orders is concerned, the original 1920 Commonwealth scheme excluded affiliation orders from its scope, but all the more recent models reverse this policy; affiliation orders providing for periodical payments are included, as are such orders requiring payment of specific sums for medical, nursing or funeral expenses.

Other types of family relationship exist which give rise to maintenance obligations in only a small number of legal systems. So in some European states there may in certain circumstances be an obligation to maintain a collateral or a relative by marriage or a grand-parent. An order to enforce such an obligation would fall within the scope of the Hague Convention in principle; but article 26(2) (a) (b) enables a Contracting State to make a reservation, reserving the right not to enforce maintenance obligations between persons related collaterally or between persons related by affinity. Common law countries will probably wish to make such a reservation; as they will not themselves make such orders they will be in no way disadvantaged by the provision of article 26, final paragraph, that a state making a reservation in respect of certain classes of order cannot insist on orders which it may make itself and which fall in the prescribed classes being enforced in other Contracting States.

It is interesting to note that the United Kingdom made a qualified reservation on this point, something not expressly envisaged in the Convention but which seems to be within its spirit. The United Kingdom reserved the right not to recognise or enforce a decision or settlement in respect of maintenance obligations between persons related collaterally or by affinity "unless that decision or settlement requires the maintenance debtor to make payments to a person who is a child of the family" for the purposes of the law of the relevant part of the United Kingdom. This ensures that the United Kingdom will enforce orders made abroad in cases where its own courts would be prepared to make orders even though the child in question might fall within the specified categories (collaterals and relatives by affinity) and would not be entitled by virtue of being in those categories to maintenance under U.K. law.

The United Kingdom legislation expressly refers to the reservation and applies it only as against other Hague Convention countries. So far as other countries, almost exclusively Commonwealth countries, are concerned, the legislation retains the traditional Commonwealth formula which defines a maintenance order in terms which speak of "a person whom the person liable to make payments under the order is, according to the law applied in the place where the order was made, liable to maintain." This ensures that a country which is within the Commonwealth scheme as it applies in the United Kingdom, and which is prepared to order the payment of maintenance to a wider range of persons than is the United Kingdom, can nonetheless be sure that its orders will be recognised and enforced in the U.K.

Scope: forms of payment. The Convention is not limited to cases in which periodical payments are ordered, although this must be the practice in the great majority of cases in almost all jurisdictions. There is however provision on this point also for a Contracting State to make a reservation excluding cases in which the relevant order does not provide for the periodical payment of maintenance. Here again the United Kingdom legislation applies the reservation only as against Hague Convention countries. So far as the Commonwealth scheme is concerned, it is primarily concerned with periodical payments but, as has already been noted, lump sums ordered in affiliation proceedings in respect of medical or funeral expenses are within the scheme. There was discussion at the Commonwealth Regional Meetings of the possibility of including lump sums ordered in matrimonial proceedings within the maintenance

order enforcement scheme but there was no general agreement on the limits which should be set to any such extension, and it was not included in the Model Bill prepared as a result of those Meetings.

Scope: orders in favour of public bodies. The Convention applies to orders for the reimbursement by the maintenance debtor to a "public body" of benefits given to a maintenance creditor. An illustration familiar in some Commonwealth jurisdiction is the ability of a state or local government agency which finds itself providing for the support of an illegitimate child to obtain on its own application an affiliation order against the putative father. A clear majority of those consulted on this point at the Commonwealth Regional Meetings were content to see the Commonwealth scheme for the enforcement of maintenance orders amended to make express reference to these types of order, although there were some from countries with a less well-developed social security system which did express some unease.

Scope: "decisions" and "settlements" included. The familiar case is that of a maintenance order made by a foreign court, but the Hague Convention is rather wider in its scope. It applies (article 1, first paragraph) to "decisions" - a term which is not defined, though the Convention makes it clear (in article 2, first paragraph) that the actual description of the decision as a judgment, order, arrêt, or whatever is immaterial - rendered by judicial or administrative authorities. It does not matter, therefore, whether the authority concerned is a court, a tribunal, or a government agency. This accords with the position in recent versions of the Commonwealth scheme (e.g. the U.K. Act of 1972, s.21(1), definition of "court"). Other provisions of the Convention, notably article 6 considered below, make it clear that the proceedings giving rise to the decision must comply with the basic rules of natural justice and to that extent must be at least quasi-judicial.

Article 1, final paragraph, indicates that the Convention also applies to certain "settlements". The text of the Convention betrays the awkwardness of this concept in terms of traditional common law categories; the English text actually quotes the French word "transaction" as a gloss. The "settlement" must be made "by or before" a judicial or administrative authority (cf. the French text: devant ces autorités). What is intended is an agreement between the parties settling the dispute between them and in some way approved or noted or registered in or before the court or other authority so that it becomes enforceable in the country in which it is made. Some common law jurisdictions have the practice of making certain types of maintenance agreement, especially those made at the time of a divorce, "rules of court"; this seems to be an example of what is meant by "settlement" for the purposes of the Convention.

Decisions or settlements the sole effect of which is to amend or vary an earlier decision or settlement are included (article 2, second paragraph: see further below); a decision or settlement which covers other matters as well as maintenance is within the Convention so far as it does deal with maintenance (article 3).

Scope: limits of applicability. The Convention is based on reciprocity (see its first preambular clause), and so it only extends to decisions and settlements originating in other Contracting States (article 1, first paragraph). If however a decision (or settlement) is given

in a non-Contracting State but is subsequently varied in a Contracting State, the decision (or settlement) effecting the variation will be entitled to recognition and enforcement under the Convention. Strictly speaking that is all that the Convention requires, but the United Kingdom legislation giving effect to the Convention provides that when an order (from whatever country) is varied by a competent court in a Hague Convention country, the order as varied is enforceable, so giving effect to what was probably the intention of the draftsmen of the Convention.

Conditions for recognition and enforcement. Chapter II of the Convention, which consists of articles 4 to 12 inclusive, sets out rules for the recognition and enforcement of "decisions". Article 21 deals with "settlements" and provides that a settlement enforceable in the State of origin will be recognised and enforced subject to the same conditions as a decision, so far as such conditions are applicable to it. This is in effect a drafting device, enabling the draftsmen of the Convention to avoid frequent repetition of the phrase "decisions or settlements". The same device will be used here, so that in the following discussion "decision" will include "settlement" so far as the context allows.

The basic rule is that a decision rendered in another Contracting State will be recognised if two conditions are satisfied. One is that it is no longer subject to "ordinary forms of review" in the State of origin; the other that the authority rendering the decision is treated as having jurisdiction with the terms of the Convention (article 4, first paragraph).

"Ordinary forms of review". The requirement that the foreign decision should be no longer subject to the ordinary forms of review in the country of origin corresponds to certain aspects of the requirement, familiar in Commonwealth money-judgment practice, that the order be "final and conclusive". However it does not operate, as that formula does, to prevent the enforcement of orders subject to later variation: variability is an important feature of maintenance orders, and is one of the factors which dictates their treatment in separation from ordinary money-judgments.

The notion of "ordinary forms of review" is not one on which there is international uniformity. In some countries a second appeal, to a Cour de Cassation or Supreme Court on a point of law, is regarded as "ordinary", in others as "extra-ordinary". The relevant question under the Convention is how the law of the State of origin views the matter, and the party seeking enforcement must produce the relevant documents establishing that the condition is indeed satisfied in that country (see article 17, item 2).

No express provision on this point is included in the United Kingdom legislation giving effect to the Hague Convention, nor in the Model Bill printed in this paper. It is very unlikely that an order not complying with this requirement would be transmitted for enforcement.

Jurisdiction. Four bases of jurisdiction are established by the Convention. The first is that either the maintenance debtor or the maintenance creditor had his habitual residence in the State of origin at the time when proceedings were instituted. No definition is given of "habitual residence"; this accords with the traditions

of The Hague Conference and with practice in common law countries which have passed legislation to give effect to Hague Conventions. Habitual residence is intended to be a factual matter, not one subject to the sort of technical legal rules which have come to surround the concept of domicile. It will be noted that it is sufficient if one party is habitually resident in the State of origin. So far as the maintenance creditor is concerned, that is the claimant, jurisdiction on this basis was a novelty and controversial from the point of view of some civil law countries; it does of course present no difficulties to one brought up in the common law tradition. Although the Convention is drafted with the needs of unitary states in mind, article 28 contains provisions applicable to federal or other composite states. Article 28(4) provides that in such cases references to habitual residence are to habitual residence in the relevant territorial unit. This point was not reflected in the United Kingdom legislation but is in the Model Bill in this present paper.

The second basis is that both parties were nationals of the State of origin at the time when proceedings were instituted. The Convention does not attempt to resolve the various questions of dual nationality that could arise; but it would seem to be sufficient to show that each party did possess the relevant nationality in accordance with the law of that State, other possible nationalities being irrelevant.

The third basis is that the defendant had submitted to the jurisdiction of the authority, either expressly or by defending on the merits of the case without objecting to the jurisdiction. It is to be noted that this basis is drafted by reference to "the defendant", who may be in some cases the maintenance creditor. An example would be where the debtor is seeking to have recognised an order varying, in his favour, an earlier order.

The fourth basis is set out in article 8. This applies "if the maintenance is due by reason of a divorce or a legal separation, or a declaration that a marriage is void or annulled." It is not essential that maintenance should be ordered in the same proceedings only that it is due by reason of those proceedings. To a common law practitioner, the reference to a "declaration" might suggest some special type of order distinct from a nullity "decree"; but in the context of an international convention no such distinction can have been intended. In these cases the jurisdiction of the authority ordering maintenance is recognised if the divorce or other decree was granted in the same Contracting State and the jurisdiction exercised in the divorce or other proceedings would be recognised in the State addressed, i.e. that in which recognition or enforcement was sought.

An example might make this last basis clearer. The enforcement of a maintenance order is sought in State A. The order was made in State B, in which the husband and wife were both domiciled (as that concept is understood in State A) but in which they were neither habitually resident nor had citizenship. Prima facie, the order is not entitled to recognition under the Convention. If however the maintenance was ordered as a result of a divorce in State B, and if State A applies the common law rule that divorce decrees of the common domicile of the parties are entitled to recognition, the order will be enforceable by virtue of article 8.

The United Kingdom legislation giving effect to The Hague Convention does not follow the text of the Convention very closely at this point. It speaks of this basis of jurisdiction in these

terms: "in the case of an order made by reason of a divorce ..., the court is recognised by the law of the part of the United Kingdom in which enforcement is sought as having jurisdiction to make the order". Given that jurisdiction to make the maintenance order will in fact follow jurisdiction in the matrimonial proceedings themselves, the result will be that envisaged by the Convention. An alternative draft, closer to the text of the Convention, is to be found in the Model Bill printed in this paper.

Findings as to jurisdiction. Article 9 provides that the authority of the State addressed is bound by the findings of fact on which the authority of the State of origin based its jurisdiction. This provision corresponds to one in The Hague Convention on the Recognition of Divorces and Legal Separations. The point is clear enough, though the drafting is not very clear. What is intended is that a decision in the State of origin that a party was habitually resident, or was a national or (presumably) had submitted, may not be re-opened (except in the case of fraud: article 5,2) in the State in which recognition and enforcement is sought. The phrase "findings of fact" is doubly ambiguous: it is not clear whether the "finding" has to be expressed in the decision itself or whether it can be proved in some other way; and the description of some of these matters as "findings of fact" is presumably not meant in any restrictive sense, as excluding any finding regarded for some purposes as a decision on a point of law.

Provisionally enforceable decisions and provisional measures. In some countries, especially perhaps in those in which delays in litigation are a major problem, there is provision for decisions which are "provisionally enforceable". Such decisions are by definition interim in nature; further proceedings, which may include the ordinary forms of review, are contemplated; but the decision so far reached can be enforced. Article 4, final paragraph, provides for the enforcement of such provisional decisions under the Convention, but only in Contracting States which themselves use the device of provisionally enforceable decisions. This is thought not to be the case in Commonwealth jurisdictions.

It must be emphasised that the "provisional (maintenance) order" which is one of the most distinctive features of the Commonwealth scheme in this area, does not fall within article 4, final paragraph. Such an order is one which has "no effect unless and until confirmed"; it is not enforceable as it stands, and does not therefore meet the conditions set by article 4.

Severance. The decision presented for recognition or enforcement may deal with a number of different matters. Article 10 allows the authority of the State addressed to sever the decision, requiring it to enforce that part of the decision which is entitled to enforcement under the Convention.

Refusal of recognition or enforcement. As in all international conventions on the recognition and enforcement of foreign judgments, the cardinal principle is that there may be no review of the merits of the decision. This is affirmed in article 12, which adds "unless this Convention otherwise provides."

M. Verwilghen, the rapporteur of The Hague Convention says in this connection: "It is most important to remember that the authority addressed qualitate qua can, in no case, modify the contents of the foreign decision. For example, it is not for it to reduce the amount of the maintenance allowance, to change the periodicity of payments or to allow days of grace. Its role is restricted to the granting or refusal of the recognition or enforcement of a maintenance decision, and nothing more."

It is therefore surprising to observe, in the United Kingdom legislation giving effect to the Convention, provision for the variation of orders registered in the U.K. under The Hague Convention. The U.K. Government has taken the view that The Hague Convention is silent on the question of variation, and therefore does not forbid it; i.e. variation in subsequent proceedings is permissible, even though the initial decision must be to recognise and enforce the order in the form in which it is presented. The Model Bill printed in this paper does not adopt the U.K. provisions, partly because of the doubts which remain as to the appropriateness of their inclusion but also because of difficulties over the service of process aspects. This does mean that any variation proceedings would have to be taken in the country of origin, or in some third state having jurisdiction.

The qualification in article 12 ("unless this Convention otherwise provides") is not, it is thought, a real exception to the prohibition of a review of the merits. All that appears to be intended is that the receiving court may check that the Convention is applicable, and may rely upon articles 5 and 6 which set out certain grounds for refusing recognition or enforcement.

Grounds for refusing recognition or enforcement. Articles 5 and 6 set out five grounds upon which recognition or enforcement may be refused.

The first is that recognition or enforcement would be "manifestly incompatible with the public policy (ordre public) of the State addressed". The English text contains the reference to the French expression ordre public; this, and the word "manifestly" points to a restricted use of this ground.

The second is that the decision was obtained by fraud "in connection with a matter of procedure". This does not involve the merits of the case, so that it would not be possible to re-open in the court of the State addressed the question of the means of either party, even if it were argued that the court in the State of origin had been misinformed. But if the pleadings or other documents had been forged, or if a false certificate of service, for example, had been relied upon, then "fraud unravels all".

The third ground for refusing recognition or enforcement is that proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted. This is the case of lis alibi pendens, although M. Verwilghen has suggested in his Report that technically it is not quite that case for there is no requirement as in the classic case, that the same "cause of action" should be relied upon in each litigation. Nothing seems to turn on this: if maintenance claims are pending in two States, the courts in which the first claim was made may (not must) refuse to recognise and enforce the order made in the other State.

The fourth ground deals with a related problem. If there are in existence two incompatible decisions, both entitled to enforcement, the State addressed must be able to choose between them. This applies to decisions which are between the same parties and having the same purpose (in the sense just discussed), and in cases where either one decision was made in the State addressed itself or where both decisions were made elsewhere, each being entitled to recognition and enforcement in the State addressed. The latter case is not limited to cases in which both decisions are from Contracting States; and the entitlement of a decision to recognition and enforcement is a matter for the law of the State addressed whether based on the Convention or not.

The fifth case deals with default judgments. Article 6 provides that a decision rendered by default is to be recognised and enforced only if two conditions are both satisfied. One is that notice of the proceedings (including notice of the substance of the claim) has been served in accordance with the law of the State of origin. The other is that, having regard to the circumstances, the defendant had sufficient time to enable him to defend the proceedings. It will be noted that article 6 is limited to default decisions: a defendant who does actually appear and take part in the proceedings in the State of origin cannot resist recognition and enforcement by alleging that he had insufficient time to prepare a defence - to allow that would be to permit a review of the merits.

The time factor. Articles 11 and 24 each contain provisions relating to the operation of the Convention in point of time. In principle the Convention applies to all decisions rendered in Contracting States irrespective of their date (article 24, first paragraph). Similarly, in the case of a decision providing for the periodical payment of maintenance, enforcement relates to arrears, that is in respect of payments already due, as well as to future payments (article 11). However, article 24, second paragraph provides that where a decision has been rendered before the date upon which the Convention entered into force as between the State of origin and the State addressed, it is to be enforced in the latter state only for payments falling due after that date.

Procedure for recognition or enforcement. Chapter III of the Convention, which consists of articles 13 to 17 inclusive, deals with procedure. The general rule is that procedure for recognition or enforcement is governed by the lex fori, that is the law of the State addressed (article 13). However this is subject to the later provisions of the Chapter which establish some points of principle and also provide a minimal outline of the procedure to be followed.

Procedural principles. Three matters are dealt with in this Convention which reflect principles developed and protected by other Hague Conventions. They concern legal aid, security for costs, and legalisation.

Article 15 provides that where the maintenance creditor received legal aid in the State of origin, and this includes "complete or partial legal aid or exemption from costs or expenses", he shall be entitled in the State addressed "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." This means that in the latter State the maintenance creditor does not have to comply

with local rules as to his means in order to qualify for a particular level of assistance; if he has the status of a legally-aided person in the State of origin the maximum assistance provided to any litigant in the appropriate jurisdiction of the State addressed must be furnished to him.

Articles 16 and 17, final paragraph, forbid the requirement of any form of security for costs in relation to enforcement proceedings and the requirement of legalisation or other like formality in relation to foreign documents. Both these rules follow well-established principles.

Partial recognition or enforcement. Article 14 does contain a provision which may override the usual rules of the lex fori. It provides that partial recognition or enforcement of a decision can always be applied for. This is not the same thing as the severance of the enforceable from the un-enforceable (noted above). To use the language of the Explanatory Report prepared when the Convention was in a draft form, this provision enables the creditor to "tone down" the application, perhaps to minimise the risk of the application of the public policy provision.

Documentation. Article 17 lists the documents which the party seeking recognition or enforcement must furnish. The list is largely self-explanatory, but attention is drawn to item 5, a translation (presumably into the language of the State addressed) of the required documents; however, the authority of the State addressed may dispense with the need for such a translation.

If the documentation is incomplete or insufficient for the purpose of enabling a check to be made that the decision does come within the scope of the Convention, article 17, second paragraph, provides that the authority must allow a specified period of time for the production of the necessary documents. The purpose of this provision is to prevent a creditor, with limited resources, being wholly non-suited on a technical ground. In most common law jurisdictions, the provision is almost certainly unnecessary, as the application would be adjourned rather than dismissed, or if dismissed would be readily renewable.

Additional provisions relating to public bodies. These provisions are contained in articles 18 to 20 which form Chapter IV of the Convention. Two different situations are covered. One is that in which the original decision (in the State of origin) was in favour of a public body; the other is that in which a public body seeks to obtain recognition or, more likely in practice, enforcement for its own benefit of a decision originally given in favour of an individual maintenance creditor.

In the first case, a public body - a term not given any formal definition - claiming reimbursement of benefits provided for a maintenance creditor may obtain recognition and enforcement of a decision awarding such reimbursement if both reimbursement can be obtained by the public body under the law to which it is subject and the existence of a maintenance obligation between the creditor and debtor is provided for by the internal law applicable under the rules of private international law of the State addressed. This requires some further commentary.

By definition, the public body's claim for reimbursement will have been successful in the State of origin; in most cases the court or other authority in that State will have applied its own law to test the claim, and that law will be the law to which the body is subject. However, article 18 by referring to that latter law enables the State addressed to review the matter independently, to insist on being satisfied that whatever law it regards, under its own rules of private international law, as being the law to which the body is subject, does in fact enable the body to make its claim. Similarly, in this context the State addressed is enabled to apply its own rules of private international law to determine the existence of the primary obligation between maintenance debtor and maintenance creditor, to which obligation that asserted by the public body is in a sense ancillary.

Article 19 deals with the case where the parties to the original decision were the individual maintenance creditor and maintenance debtor themselves. In accordance with the basic principles of the Convention that decision cannot be re-examined on the merits. But if a public body now seeks to have that decision recognised or enforced the question of its entitlement so to act can be examined. Article 19 provides that the body will succeed only if it is entitled to seek recognition or claim enforcement in place of the creditor "ipso jure, under the law to which it is subject" - a law identified in accordance with the rules of private international law of the State addressed.

It is thought that in the great majority of cases these, apparently complex, provisions will give rise to no difficulty at all. It is only in rare cases, where perhaps a public body in one State claims the reimbursement of payments made to a person who has since changed his residence or nationality, that close attention will have to be paid to the issues raised in these articles.

Actes authentiques. Article 25 enables Contracting States to make declarations extending the scope of the Convention, so far as dealings with other Contracting States which have made the same declaration are concerned, to "official deeds"; these deeds are also referred to in the English text by reference to the French term "actes authentiques". In certain civil law systems certain notarial acts or documents executed by court bailiffs can be directly enforceable; such countries may wish to make use of article 25, but it will be of no interest to common law jurisdictions.

Administration. A practical difficulty often experienced by maintenance creditors is that of delay caused by exchange control and similar procedures. Article 22 (based on a similar provision in the United Nations Convention) requires Contracting States which have such restrictions on the transfer of funds to "accord the highest priority to" the transfer of funds payable as maintenance or in respect of costs or expenses of claims made under the Convention.

Relation to other Conventions. The Convention replaces an earlier Hague Convention of 15 April 1958, which was limited to maintenance obligations in respect of children (article 29). Of much greater interest to Commonwealth member countries is article 23 which declares that the Convention does not restrict the application of other rules of law, derived from an international instrument or not, as to the recognition and enforcement of maintenance orders. Accession is, therefore, without prejudice to the existing Commonwealth scheme.

APPENDIX: TEXT OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF DECISIONS RELATING TO MAINTENANCE OBLIGATIONS, 1973

The States signatory to this Convention,
Desiring to establish common provisions to govern the reciprocal recognition and enforcement of decisions relating to maintenance obligations in respect of adults,
Desiring to coordinate these provisions and those of the Convention of the 15th of April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children,
Have resolved to conclude a Convention for this purpose and have agreed upon the following provisions:

CHAPTER I — SCOPE OF THE CONVENTION

Article 1

This Convention shall apply to a decision rendered by a judicial or administrative authority in a Contracting State in respect of a maintenance obligation arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation towards an infant who is not legitimate, between —

- (1) a maintenance creditor and a maintenance debtor; or
- (2) a maintenance debtor and a public body which claims reimbursement of benefits given to a maintenance creditor.

It shall also apply to a settlement made by or before such an authority ('transaction') in respect of the said obligations and between the same parties (hereafter referred to as a 'settlement').

Article 2

This Convention shall apply to a decision or settlement however described.

It shall also apply to a decision or settlement modifying a previous decision or settlement, even in the case where this originates from a non-Contracting State.

It shall apply irrespective of the international or internal character of the maintenance claim and whatever may be the nationality or habitual residence of the parties.

Article 3

If a decision or settlement does not relate solely to a maintenance obligation, the effect of the Convention is limited to the parts of the decision or settlement which concern maintenance obligations.

CHAPTER II — CONDITIONS FOR RECOGNITION AND ENFORCEMENT OF DECISIONS

Article 4

A decision rendered in a Contracting State shall be recognised or enforced in another Contracting State —

- (1) if it was rendered by an authority considered to have jurisdiction under Article 7 or 8; and
- (2) if it is no longer subject to ordinary forms of review in the State of origin.

Provisionally enforceable decisions and provisional measures shall, although subject to ordinary forms of review, be recognised or enforced in the State addressed if similar decisions may be rendered and enforced in that State.

Article 5

Recognition or enforcement of a decision may, however, be refused –

- (1) if recognition or enforcement of the decision is manifestly incompatible with the public policy ('ordre public') of the State addressed; or
- (2) if the decision was obtained by fraud in connection with a matter of procedure; or
- (3) if proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted; or
- (4) if the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed.

Article 6

Without prejudice to the provisions of Article 5, a decision rendered by default shall be recognised or enforced only if notice of the institution of the proceedings, including notice of the substance of the claim, has been served on the defaulting party in accordance with the law of the State of origin and if, having regard to the circumstances, that party has had sufficient time to enable him to defend the proceedings.

Article 7

An authority in the State of origin shall be considered to have jurisdiction for the purposes of this Convention –

- (1) if either the maintenance debtor or the maintenance creditor had his habitual residence in the State of origin at the time when the proceedings were instituted; or
- (2) if the maintenance debtor and the maintenance creditor were nationals of the State of origin at the time when the proceedings were instituted; or
- (3) if the defendant had submitted to the jurisdiction of the authority, either expressly or by defending on the merits of the case without objecting to the jurisdiction.

Article 8

Without prejudice to the provisions of Article 7, the authority of a Contracting State which has given judgment on a maintenance claim shall be considered to have jurisdiction for the purposes of this Convention if the maintenance is due by reason of a divorce or a legal separation, or a declaration that a marriage is void or annulled, obtained from an authority of that State recognised as having jurisdiction in that matter, according to the law of the State addressed.

Article 9

The authority of the State addressed shall be bound by the findings of fact on which the authority of the State of origin based its jurisdiction.

Article 10

If a decision deals with several issues in an application for maintenance and if recognition or enforcement cannot be granted for the whole of the decision, the authority of the State addressed shall apply this Convention to that part of the decision which can be recognised or enforced.

Article 11

If a decision provided for the periodical payment of maintenance, enforcement shall be granted in respect of payments already due and in respect of future payments.

Article 12

There shall be no review by the authority of the State addressed of the merits of a decision, unless this Convention otherwise provides.

CHAPTER III — PROCEDURE FOR RECOGNITION AND ENFORCEMENT OF DECISIONS

Article 13

The procedure for the recognition or enforcement of a decision shall be governed by the law of the State addressed, unless this Convention otherwise provides.

Article 14

Partial recognition or enforcement of a decision can always be applied for.

Article 15

A maintenance 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.

Article 16

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the proceedings to which the Convention refers.

Article 17

The party seeking recognition or applying for enforcement of a decision shall furnish –

- (1) a complete and true copy of the decision;
- (2) any document necessary to prove that the decision is no longer subject to the ordinary forms of review in the State of origin and, where necessary, that it is enforceable;
- (3) if the decision was rendered by default, the original or a certified true copy of any document required to prove that the notice of the institution of proceedings, including notice of the substance of claim, has been properly served on the defaulting party according to the law of the State of origin;

- (4) where appropriate, any document necessary to prove that he obtained legal aid or exemption from costs or expenses in the State of origin;
- (5) a translation, certified as true, of the above-mentioned documents unless the authority of the State addressed dispenses with such translation.

If there is a failure to produce the documents mentioned above or if the contents of the decision do not permit the authority of the State addressed to verify whether the conditions of this Convention have been fulfilled, the authority shall allow a specified period of time for the production of the necessary documents.

No legalisation or other like formality may be required.

CHAPTER IV — ADDITIONAL PROVISIONS RELATING TO PUBLIC BODIES

Article 18

A decision rendered against a maintenance debtor on the application of a public body which claims reimbursement of benefits provided for a maintenance creditor shall be recognised and enforced in accordance with this Convention —

- (1) if reimbursement can be obtained by the public body under the law to which it is subject; and
- (2) if the existence of a maintenance obligation between the creditor and the debtor is provided for by the internal law applicable under the rules of private international law of the State addressed.

Article 19

A public body may seek recognition or claim enforcement of a decision rendered between a maintenance creditor and maintenance debtor to the extent of the benefits provided for the creditor if it is entitled *ipso jure*, under the law to which it is subject, to seek recognition or claim enforcement of the decision in place of the creditor.

Article 20

Without prejudice to the provisions of Article 17, the public body seeking recognition or claiming enforcement of a decision shall furnish any document necessary to prove that it fulfils the conditions of sub-paragraph 1, of Article 18 or Article 19, and that benefits have been provided for the maintenance creditor.

CHAPTER V — SETTLEMENTS

Article 21

A settlement which is enforceable in the State of origin shall be recognised and enforced subject to the same conditions as a decision so far as such conditions are applicable to it.

CHAPTER VI — MISCELLANEOUS PROVISIONS

Article 22

A Contracting State, under whose law the transfer of funds is restricted, shall accord the highest priority to the transfer of funds payable as maintenance or to cover costs and expenses in respect of any claim under this Convention.

Article 23

This Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining recognition or enforcement of a decision or settlement.

Article 24

This Convention shall apply irrespective of the date on which a decision was rendered.

Where a decision has been rendered prior to the entry into force of the Convention between the State of origin and the State addressed, it shall be enforced in the latter State only for payments falling due after such entry into force.

Article 25

Any Contracting State may, at any time, declare that the provisions of this Convention will be extended, in relation to other States making a declaration under this Article, to an official deed ('acte authentique') drawn up by or before an authority or public official and directly enforceable in the State of origin insofar as these provisions can be applied to such deeds.

Article 26

Any Contracting State may, in accordance with Article 34, reserve the right not to recognise or enforce –

- (1) a decision or settlement insofar as it relates to a period of time after a maintenance creditor attains the age of twenty-one years or marries, except when the creditor is or was the spouse of the maintenance debtor;
- (2) a decision or settlement in respect of maintenance obligations
 - a) between persons related collaterally;
 - b) between persons related by affinity;
- (3) a decision or settlement unless it provides for the periodical payment of maintenance.

A Contracting State which has made a reservation shall not be entitled to claim the application of this Convention to such decisions or settlements as are excluded by its reservation.

Article 27

If a Contracting State has, in matters of maintenance obligations, two or more legal systems applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system which its law designates as applicable to a particular category of persons.

Article 28

If a Contracting State has two or more territorial units in which different systems of law apply in relation to the recognition and enforcement of maintenance decisions –

- (1) any reference to the law or procedure or authority of the State of origin shall be construed as referring to the law or procedure or authority of the territorial unit in which the decision was rendered;

- (2) any reference to the law or procedure or authority of the State addressed shall be construed as referring to the law or procedure or authority of the territorial unit in which recognition or enforcement is sought;
- (3) any reference made in the application of sub-paragraph 1 or 2 to the law or procedure of the State of origin or to the law or procedure of the State addressed shall be construed as including any relevant legal rules and principles of the Contracting State which apply to the territorial units comprising it;
- (4) any reference to the habitual residence of the maintenance creditor or the maintenance debtor in the State of origin shall be construed as referring to his habitual residence in the territorial unit in which the decision was rendered.

Any Contracting State may, at any time, declare that it will not apply any one or more of the foregoing rules to one or more of the provisions of this Convention.

Article 29

This Convention shall replace, as regards the States who are Parties to it, the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children, concluded at The Hague on the 15th of April 1958.

CHAPTER VII — FINAL CLAUSES

Article 30

This Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twelfth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 31

Any State which has become a Member of the Hague Conference on Private International Law after the date of its Twelfth Session, or which is a Member of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to this Convention after it has entered into force in accordance with the first paragraph of Article 35.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the twelve months after the receipt of the notification referred to in sub-paragraph 3 of Article 37. Such an objection may also be raised by Member States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 32

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the

date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The extension shall have effect as regards the relations between the Contracting States which have not raised an objection to the extension in the twelve months after the receipt of the notification referred to in sub-paragraph 4 of Article 37 and the territory or territories for the international relations of which the State in question is responsible and in respect of which the notification was made.

Such an objection may also be raised by Member States when they ratify, accept or approve the Convention after an extension.

Any such objection shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 33

If a Contracting State has two or more territorial units in which different systems of law apply in relation to the recognition and enforcement of maintenance decisions, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time thereafter.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial unit to which the Convention applies.

Other Contracting States may decline to recognise a maintenance decision if, at the date on which recognition is sought, the Convention is not applicable to the territorial unit in which the decision was rendered.

Article 34

Any State may, not later than the moment of its ratification, acceptance, approval or accession, make one or more of the reservations referred to in Article 26. No other reservation shall be permitted.

Any State may also, when notifying an extension of the Convention in accordance with Article 32, make one or more of the said reservations applicable to all or some of the territories mentioned in the extension.

Any Contracting State may at any time withdraw a reservation it has made. Such a withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Such a reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 35

This Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 30.

Thereafter the Convention shall enter into force
– for each State ratifying, accepting or approving it subsequently, on the first day of the third calendar month after the deposit of its

instrument of ratification, acceptance or approval;

- for each acceding State, on the first day of the third calendar month after the expiry of the period referred to in Article 31;
- for a territory to which the Convention has been extended in conformity with Article 32, on the first day of the third calendar month after the expiry of the period referred to in that Article.

Article 36

This Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 35, even for States which have ratified, accepted, approved or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 37

The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 31, of the following -

- (1) the signatures and ratifications, acceptances and approvals referred to in Article 30;
- (2) the date on which this Convention enters into force in accordance with Article 35;
- (3) the accessions referred to in Article 31 and the dates on which they take effect;
- (4) the extensions referred to in Article 32 and the dates on which they take effect;
- (5) the objections raised to accessions and extensions referred to in Articles 31 and 32;
- (6) the declarations referred to in Articles 25 and 32;
- (7) the denunciations referred to in Article 36;
- (8) the reservations referred to in Articles 26 and 34 and the withdrawals referred to in Article 34.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 2nd day of October, 1973, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel to each of the States Members of the Hague Conference on Private International Law at the date of its Twelfth Session.

CHAPTER TWO

THE HAGUE APPLICABLE LAW CONVENTION

Introduction. In common law countries, a court asked to make a maintenance order, including an order for maintenance made in or in consequence of divorce or similar proceedings, will always apply its own law. It is immaterial that the parties are domiciled or resident abroad or are foreign nationals; provided the court has jurisdiction it will apply the lex fori.

Not only is this the present practice, there is also no evidence of any serious dissatisfaction with it. Given that most maintenance applications are dealt with in subordinate courts, there are strong arguments of convenience for excluding reference to foreign legal principles. Some would argue further that the elements of discretion which may be involved make the correct application of foreign principles in this area peculiarly difficult.

That being so, it might be expected that there would be little interest among common law countries in a Convention which would require the abandonment of present practice and the application in some cases of a foreign law. The preparation of the Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations was followed by the holding of meetings of a Special Commission in 1973, and this Commission prepared a parallel Convention on the Law Applicable to Maintenance Obligations. This Convention entered into force in 1977, but only three States (France, Portugal and Switzerland) are parties to it. Five other States, Belgium, Italy, Luxembourg, the Netherlands and Turkey are signatories but have yet to ratify.

In these circumstances, it has been decided to include in the present paper the text and a short commentary upon the Convention, but not to prepare draft legislation or associated documentation.

Scope: maintenance obligations. The scope of the Convention is similar to that of the Enforcement Convention; it applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including obligations in respect of illegitimate children (art. 1). Special provisions apply to the right of public bodies to claim reimbursement of benefits provided (art. 9; see below).

Scope: limits of applicability. Unlike the Enforcement Convention, this Convention does not rest upon reciprocity. The law identified as applicable is to be applied whether or not it is the law of a Contracting State (art. 3). In fact, this Convention is in effect a Model Law, its preamble speaking of a desire to establish "common provisions". It is intended to deal with cases which are international in nature; article 17 makes it clear that it need not be adopted in respect of conflicts arising between two or more territorial units within a single sovereign State.

Article 2 provides that the Convention governs "only conflicts of laws in respect of maintenance obligations", and that decisions rendered in application of the Convention are without prejudice to

the existence of any of the relationships referred to in article 1 (e.g. marriage or paternity) on which the obligation may be founded. The effect appears to be that a decision in State A that F is bound to maintain C because the applicable law would so hold in view of its recognition of F's paternity does not render the paternity issue res judicata in State A. A considerable body of case-law has gathered around a similar question arising under the earlier Hague Convention on the same topic (but limited to children), and the point bristles with technical difficulties.

The applicable law. In summary, a court in a Contracting State would apply

- (i) the internal law of the habitual residence of the maintenance creditor;
- (ii) if under the above law, the creditor was unable to obtain maintenance from the debtor, the law of the common nationality of the maintenance creditor and the maintenance debtor; and
- (iii) if the parties had no common nationality, or the creditor would not be able to obtain maintenance from the debtor under the law of their common nationality, the lex fori (i.e. the law of the country in which the court was sitting). (Articles 4-6.)

The applicable law would govern inter alia whether, to what extent and from whom the creditor might claim maintenance; who was entitled to bring proceedings and the time limits for their institution; and, in the case of a claim for reimbursement by a public body, the extent of the debtor's obligation to pay (article 10).

Special cases: divorce, separation and nullity of marriage. In practice many decisions as to maintenance arise in the context of divorce, legal separation or (less frequently) nullity of marriage. In this important group of cases, special provisions apply. By article 8, notwithstanding the general rules summarised above, "the law applied to a divorce" will (both in the Contracting State granting the divorce and in a Contracting State recognising the decree) govern the maintenance obligations between the divorced spouses, including future variations. The same rule applies, mutatis mutandis to legal separation and nullity cases.

It is important to note that this special rule applies only in respect of maintenance obligations between the spouses. Obligations towards the children of the marriage do not fall within article 8, so that the general rules apply. This was a matter of controversy at the time of the preparation of the Convention; the division of an ex-spouse's obligations in this way can, in some cases, be extremely unrealistic.

Where article 8 does apply, it is necessary to identify the law applied to the divorce. In common law jurisdictions, this will almost always be the lex fori, so that if State A recognises a divorce granted in State B, it will assume that the courts of State B applied the law of that State. But this is not necessarily the case in civil law countries (some of which may apply the law of the nationality even if that is not the law of the forum); nor to nullity cases even in common law jurisdictions, e.g. if a marriage is declared void because the ceremony did not comply with the law of the place of celebration.

By article 14(3) a Contracting State may reserve the right not to apply the Convention in respect of divorces, separations and annulments granted by default in a State in which the respondent did not have his habitual residence. This reservation was introduced at the request of some common law delegations, and would clearly be desirable from the common law point of view; otherwise, it would become far too easy for maintenance obligations to be evaded by a spouse who was able to obtain a divorce in some inappropriate jurisdiction. (Presumably, however, article 8 would not apply if the divorce, etc., was not itself entitled to recognition in the requested State.) The effect of a reservation under article 14 is stated to be the exclusion of the operation of the Convention; the intention was, it seems, to exclude article 8, leaving the general rules in articles 4 to 6 to stand.

Special cases: persons related collaterally or by affinity. By article 7, it is a defence which may be invoked by a defendant in a claim for maintenance brought on the ground of a relationship which is collateral or by affinity that there is no such obligation under

- (i) if the parties have a common nationality, the law of that nationality; and
- (ii) in other cases, the internal law of the defendant's habitual residence.

This area, too, may be the subject of a reservation. By article 14(1)(2) a Contracting State may exclude such claims from the operative scope of the Convention, a provision paralleling one in the Enforcement Convention.

Special cases: public bodies. The question whether a public body is entitled to claim reimbursement of benefits provided for a maintenance creditor is governed by the law to which the public body is subject (article 9).

Changes in connecting factors. One of the more difficult problems in private international law arises when use is made of factors such as domicile or residence, which factors are liable to change. In respect of the basic rule adopted in the present Convention, the applicability of the habitual residence of the maintenance creditor, provision is made to deal with this eventuality. The internal law of any new habitual residence applies as from the moment the change occurs (article 4, second paragraph).

"Domestic" cases. By way of concession, the authors of the Convention were prepared to exclude the operation of the Convention's rules in certain cases where, despite the presence of a relevant foreign element the links with the forum State were so strong that that State would wish to apply its own law. Suppose that H and W are nationals of State A; H is habitually resident there, but W is habitually resident in State B. Under the basic rules of the Convention, the courts of State A would have to apply, to any claim brought in those courts by W against H, the internal law of State B, the law of the habitual residence of the maintenance creditor. By article 15, a Contracting State may make a reservation to the effect

that it will apply its own internal law if the creditor and debtor are both nationals of that State and if the debtor has his habitual residence there - as in the example given, in respect of State A.

Qualifications on the applicability of the designated law. Article 11 provides that a Contracting State may refuse to apply the law designated as applicable by the Convention if - and only if - it is manifestly incompatible with its public policy (ordre public). A more important provision in the same article declares that in all Contracting States, even if the applicable law should provide otherwise, the court or other authority determining the amount of maintenance shall take into account the needs of the creditor and the resources of the debtor.

Time-factors. It is immaterial when the maintenance obligation first arose. But the Convention does not apply in any Contracting State to maintenance claimed in respect of a period prior to the Convention's entry into force in that State (article 12). It would of course be open to any country to apply the rules contained in the Convention retrospectively, but it would not be obliged to do so by virtue of accession.

Federal States. A reference to "the law of" federal or composite States, as being the law of the common nationality, for example, is unhelpful when there are divergent legal rules. Article 16 deals with this problem: the applicable law is identified by reference to the rules laid down for this purpose by the State in question, or if there are no such rules, by deciding which is the law with which the persons concerned are most closely connected.

Miscellaneous provisions. Further provisions as to the relationship of this Convention and earlier instruments, or with other existing or future international instruments, and as to accession, denunciation, etc. are contained in articles 18 et seq. In most cases, the provisions are closely modelled upon the corresponding articles of the Enforcement Convention and are not further elaborated here.

APPENDIX: TEXT OF THE CONVENTION ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS, 1973.

The States signatory to this Convention,
Desiring to establish common provisions concerning the law applicable to maintenance obligations in respect of adults,
Desiring to coordinate these provisions and those of the Convention of the 24th of October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children,
Have resolved to conclude a Convention for this purpose and have agreed upon the following provisions:

CHAPTER I — SCOPE OF CONVENTION

Article 1

This Convention shall apply to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate.

Article 2

This Convention shall govern only conflicts of laws in respect of maintenance obligations.

Decisions rendered in application of this Convention shall be without prejudice to the existence of any of the relationships referred to in Article 1.

Article 3

The law designated by this Convention shall apply irrespective of any requirement of reciprocity and whether or not it is the law of a Contracting State.

CHAPTER II — APPLICABLE LAW

Article 4

The internal law of the habitual residence of the maintenance creditor shall govern the maintenance obligations referred to in Article 1.

In the case of a change in the habitual residence of the creditor, the internal law of the new habitual residence shall apply as from the moment when the change occurs.

Article 5

If the creditor is unable, by virtue of the law referred to in Article 4, to obtain maintenance from the debtor, the law of their common nationality shall apply.

Article 6

If the creditor is unable, by virtue of the laws referred to in Articles 4 and 5, to obtain maintenance from the debtor, the internal law of the authority seized shall apply.

Article 7

In the case of a maintenance obligation between persons related collaterally or by affinity, the debtor may contest a request from the

creditor on the ground that there is no such obligation under the law of their common nationality or, in the absence of a common nationality, under the internal law of the debtor's habitual residence.

Article 8

Notwithstanding the provisions of Articles 4 to 6, the law applied to a divorce shall, in a Contracting State in which the divorce is granted or recognised, govern the maintenance obligations between the divorced spouses and the revision of decisions relating to these obligations.

The preceding paragraph shall apply also in the case of a legal separation and in the case of a marriage which has been declared void or annulled.

Article 9

The right of a public body to obtain reimbursement of benefits provided for the maintenance creditor shall be governed by the law to which the body is subject.

Article 10

The law applicable to a maintenance obligation shall determine *inter alia* –

- (1) whether, to what extent and from whom a creditor may claim maintenance;
- (2) who is entitled to institute maintenance proceedings and the time limits for their institution;
- (3) the extent of the obligation of a maintenance debtor, where a public body seeks reimbursement of benefits provided for a creditor.

Article 11

The application of the law designated by this Convention may be refused only if it is manifestly incompatible with public policy ('ordre public').

However, even if the applicable law provides otherwise, the needs of the creditor and the resources of the debtor shall be taken into account in determining the amount of maintenance.

CHAPTER III — MISCELLANEOUS PROVISIONS

Article 12

This Convention shall not apply to maintenance claimed in a Contracting State relating to a period prior to its entry into force in that State.

Article 13

Any Contracting State may, in accordance with Article 24, reserve the right to apply this Convention only to maintenance obligations –

- (1) between spouses and former spouses;
- (2) in respect of a person who has not attained the age of twenty-one years and has not been married.

Article 14

Any Contracting State may, in accordance with Article 24, reserve the right not to apply this Convention to maintenance obligations –

- (1) between persons related collaterally;
- (2) between persons related by affinity;
- (3) between divorced or legally separated spouses or spouses whose marriage has been declared void or annulled if the decree of divorce, legal separation, nullity or annulment has been rendered by default in a State in which the defaulting party did not have his habitual residence.

Article 15

Any Contracting State may, in accordance with Article 24, make a reservation to the effect that its authorities shall apply its internal law if the creditor and the debtor are both nationals of that State and if the debtor has his habitual residence there.

Article 16

Where the law of a State, having in matters of maintenance obligations two or more systems of law of territorial or personal application, must be taken into consideration – as may be the case if a reference is made to the law of the habitual residence of the creditor or the debtor or to the law of common nationality, reference shall be made to the system designated by the rules in force in that State or, if there are no such rules, to the system with which the persons concerned are most closely connected.

Article 17

A Contracting State within which different territorial units have their own rules of law in matters of maintenance obligations is not bound to apply this Convention to conflicts of law concerned solely with its territorial units.

Article 18

This Convention shall replace, in the relations between the States who are Parties to it, the Convention on the Law Applicable to Maintenance Obligations in Respect of Children, concluded at The Hague, the 24th of October 1956.

However, the preceding paragraph shall not apply to a State which, by virtue of the reservation provided for in Article 13, has excluded the application of this Convention to maintenance obligations in respect of a person who has not attained the age of twenty-one years and has not been married.

Article 19

This Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or becomes, a Party.

CHAPTER IV — FINAL PROVISIONS

Article 20

This Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twelfth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 21

Any State which has become a Member of the Hague Conference on Private International Law after the date of its Twelfth Session, or which is a Member of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to this Convention after it has entered into force in accordance with the first paragraph of Article 25.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 22

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Article 23

A Contracting State which has two or more territorial units in which different systems of law apply in matters of maintenance obligations may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time thereafter.

These declarations shall be notified to the Ministry of Foreign Affairs of the Netherlands, and shall state expressly the territorial unit to which the Convention applies.

Article 24

Any State may, not later than the moment of its ratification, acceptance, approval or accession, make one or more of the reservations referred to in Articles 13 to 15. No other reservation shall be permitted.

Any State may also, when notifying an extension of the Convention in accordance with Article 22, make one or more of the said reservations applicable to all or some of the territories mentioned in the extension.

Any Contracting State may at any time withdraw a reservation it has made. Such a withdrawal shall be notified to the Ministry of Foreign Affairs of the Netherlands.

Such a reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 25

This Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance or approval referred to in Article 20.

- Thereafter the Convention shall enter into force
- for each State ratifying, accepting or approving it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance or approval;
 - for each acceding State, on the first day of the third calendar month after the deposit of its instrument of accession;
 - for a territory to which the Convention has been extended in conformity with Article 22, on the first day of the third calendar month after the notification referred to in that Article.

Article 26

This Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 25, even for States which have ratified, accepted, approved or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands, at least six months before the expiry of the five year period. It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 27

The Ministry of Foreign Affairs of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 21, of the following -

- (1) the signatures and ratifications, acceptances and approvals referred to in Article 20;
- (2) the date on which this Convention enters into force in accordance with Article 25;
- (3) the accessions referred to in Article 21 and the dates on which they take effect;
- (4) the extensions referred to in Article 22 and the dates on which they take effect;
- (5) the declarations referred to in Article 23, as well as modifications of them and the dates on which these declarations and their modifications take effect;
- (6) the denunciations referred to in Article 26;
- (7) the reservations referred to in Articles 13 to 15 and 24 and the withdrawals of the reservations referred to in Article 24.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 2nd day of October, 1973, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel to each of the States Members of the Hague Conference on Private International Law at the date of its Twelfth Session.

CHAPTER THREE

THE UNITED NATIONS CONVENTION

Introduction. The United Nations Convention on the Recovery Abroad of Maintenance was agreed at a special Diplomatic Conference held in New York in May and June 1956, on the basis of work done under the auspices of Unidroit (the Rome Institute for the Unification of Private Law) and of the Economic and Social Council of the U.N. It came into force on 25 May 1957. By 1980 it had the following parties:

Algeria
Argentina
Austria
Barbados
Belgium
Brazil
Central African Republic
Chile
Czechoslovakia
Denmark
Ecuador
Finland
France
German Federal Republic
Greece
Guatemala
Haiti
Holy See
Hungary
Israel
Italy
Luxembourg
Monaco
Morrocco
Netherlands
Niger
Norway
Pakistan
Phillippines
Poland
Portugal
Spain
Sri Lanka
Surinam
Sweden
Switzerland
Tunisia
Turkey
United Kingdom
Upper Volta
Yugoslavia

In addition Bolivia, Columbia, Cuba, Democratic Kampuchea, Dominican Republic, El Salvador and Mexico had signed but not ratified the Convention. The Chinese Nationalist regime had ratified the Convention. Of the Commonwealth member states, it

will be seen that Barbados, Sri Lanka and the United Kingdom are parties; Australia and Fiji have enabling legislation.

Scope of the Convention. The Convention is notably terse in its drafting. Its object is declared in article 1(1) to be the facilitation of the recovery of "maintenance to which a person, ... who is in the territory of one of the Contracting States, claims to be entitled from another person, ... who is subject to the jurisdiction of another Contracting Party". There is no definition of "maintenance", and no express limitation to cases in which periodical payments rather than lump sums would be payable. It is suggested that the phrase is wide enough to include the support of any dependant, including spouses, ex-spouses, and children (legitimate or illegitimate), but would almost certainly not cover cases of, for example, funeral expenses in relation to an illegitimate child which can be ordered to be paid under some maintenance statutes.

Equally, no definition is given of "subject to the jurisdiction" of a Contracting State. It is for each state to apply its ordinary law, including its rules of the conflict of laws, to determine the scope of the Convention, for the Convention is about the pressing of claims, the validity of which is tested in all respects by the law of the receiving State.

In the United Kingdom legislation giving effect to the Convention, "subject to the jurisdiction of" is interpreted as "resident in", which is a fair reflection of the common law approach and is also to be found in the Model Bill in Chapter Five of this paper. The United Kingdom legislation does not define "maintenance", but by specifying the local procedural forms to be followed in pressing claims under the Convention, and by limiting those claims to the magistrates' courts, it effectively excludes claims between ex-spouses, even if the divorce in question was pronounced in a United Kingdom court.

Scope: variation. Article 8 of the Convention declares that the provisions of the Convention apply to applications for the variation of maintenance orders. This clearly means that the Convention machinery is available not only to press an initial claim for maintenance but also a subsequent application to vary the order obtained on the initial application. "Variation" may be taken to include revocation. Accordingly if the original claimant applies for an increase in the level of periodical payments (or, much less probably, for a reduction, or for the revocation of the order) the Convention will apply. If the payer under the order applies for a reduction or for revocation the position is less clear; the machinery is not needed for its usual purposes (of transmitting a claim abroad to a court having jurisdiction) but some ancillary provisions, notably those of article 7 which enables evidence to be obtained from the courts of other Contracting States in relation to "an action for maintenance", would seem applicable.

Scope: limits of applicability. The Convention is based upon reciprocity. It only applies as between Contracting States, and one state party may only rely on the Convention as against another to the extent that it is itself bound by the Convention (article 18).

Machinery. It will be seen that the Convention is essentially concerned with machinery. A claimant wishes to press a claim for maintenance against a defendant who is resident abroad. This will usually entail the bringing of proceedings in the courts of the defendant's country of residence, or at least negotiations with him. These steps could be taken by solicitors or other agents in the defendant's country, but legal aid would not be available and the procedural difficulties might seem daunting to the claimant's advisers. The Convention accordingly provides official channels and agencies which will handle the matter on the claimant's behalf. The essential features are Transmitting and Receiving Agencies in each Contracting State.

Transmitting Agencies. The function of the Transmitting Agency is to receive applications from claimants in its country and to send them in due form to the Receiving Agency in the defendant's country for action to be taken on the claimant's behalf. Each Contracting State must designate "one or more judicial or administrative authorities" to act as Transmitting Agencies (article 2(1)). These terms are not further defined, but it will be noted that there can be a number of Agencies in any one State, and this could be helpful to those countries with a federal or similar structure. There is nothing in the Convention which prevents a Contracting State from specifying in its own legislation that the applicant must approach a designated local officer (e.g. court registrar) and send the application to the Transmitting Agency only through him.

Receiving Agencies. Each Contracting State is required to designate "a public or private body" to act as a Receiving Agency (article 2(2)). The terms "public" and "private" are not defined; the range of choice would appear to be very large - a judicial office, a social security agency, or even a private charitable foundation willing to devote some of its resources to this type of activity. It will be noted that only a single body may be designated; neither in article 2 nor in the federal state clause (article 11) is there provision for the appointment of a number of agencies in different geographical areas.

Information as to law and procedure. Each Contracting State has to supply to the U.N. Secretary-General information as to its law and procedure in respect of maintenance claims. What is required is detail "as to the evidence normally required under [its] law ... for the proof of maintenance claims, of the manner in which such evidence should be submitted, and of other requirements to be complied with under such law" (article 3(2)). This information is made available to all Transmitting Agencies, and the raison d'etre of those Agencies is that they are able to assist the claimant by putting the claim into a form likely to satisfy the legal requirements of the receiving country.

Transmitting the claim. Once the claimant's application is received by the Transmitting Agency, the Agency is under an obligation to transmit the documents detailing and supporting the claim "unless satisfied that the application is not made in good faith" (article 4(1)). The necessary documents and data to be supplied are detailed in article 3(3)(4), and the Transmitting Agency, before

transmitting them, must satisfy itself that they are regular in form so far as its own law is concerned (article 4(2)) and must take all reasonable steps to ensure that the law of the state whose jurisdiction is to be invoked is also satisfied (article 3(4)). The Transmitting Agency may also, but is not obliged to,

- (i) express to the Receiving Agency an opinion as to the merits of the case; and
- (ii) recommend that free legal aid and exemption from costs be given to the claimant (article 4(3)).

No criteria are given by reference to which these powers are to be exercised. Presumably a Transmitting Agency will be willing in most cases to make the recommendation in (ii) above, which will only be acted upon if the law of the receiving state so allows. The "opinion on the merits of the case" is, to the common law eye, much more difficult and surprising, as the merits have not been tested by any judicial hearing or administrative process. This need cause no difficulty, in that a common law state is under no obligation to exercise the power.

Action by the Receiving Agency. The Receiving Agency must take all appropriate steps for the recovery of maintenance, and these are detailed in article 6(1) as including "the settlement of the claim and, where necessary, the institution and prosecution of an action for maintenance and the execution of any order or other judicial act for the payment of maintenance". It will be noted that court proceedings are neither the inevitable nor the preferred mode of response. The Receiving Agency is in effect to act as a good solicitor would act, pursuing the claim in the most effective and economical manner available.

If one is needed under the law of the defendant's country, the claimant will have furnished the Receiving Agency with a Power of Attorney (see article 3(3)). Whether or not this is done, it is clear from article 6(1) that the acts of the Receiving Agency are "subject always to the authority given by the claimant", an authority which may be limited. Whatever actions or proceedings are commenced by the Receiving Agency in the courts or tribunals will be governed by the law of that country (article 6(3)).

Letters of Request. Article 7 contains provisions for obtaining evidence by Letters of Request. This enables the court or other tribunal in the state of the Receiving Agency to address requests for further evidence to the authorities of the other state involved. It is limited to cases in which Letters of Request are known to the laws of the two Contracting States involved, and is presumably not designed to exclude reliance on any other Convention or other arrangements designed to serve the same purpose.

Transfer of Judgments. Article 5 contains provisions for the transmission via the machinery of the Convention of "any order, final or provisional, and any other judicial act, obtained by the claimant for the payment of maintenance in a competent tribunal of any of the Contracting Parties". It has to be emphasised that this is not a scheme for the registration and enforcement of judgments such as is to be found under the Commonwealth scheme

and the Hague Enforcement Convention. It provides a channel for the transmission of the relevant documents but creates no new obligation upon the receiving state to register or enforce such an order as is evidenced by the documents. Article 5(3) indicates that the Receiving Authority may take exequatur or registration proceedings in accordance with the law of the receiving state, but that will be subject to the existence of such procedures in existing law. "Provisional" in this context means "interim" and does not have the sense of a "provisional order" in the Commonwealth scheme, i.e., one requiring to be confirmed in the courts of another state to have legal effect.

Security for costs. No security for costs may be required of a claimant because of his alien or non-resident status (article 9(2)). More generally, in proceedings under the Convention claimants are to receive equal treatment and the same exemptions in the payment of costs and charges as are given to nationals or residents of the forum state (article 9(1)).

Transfer of funds. No machinery is established by the Convention for the actual payment of funds due under court orders or other arrangements. Article 10 does however require Contracting States with exchange control rules to give the "highest priority" to payments in respect of maintenance and of the cost of proceedings under the Convention.

Fees. Neither Transmitting nor Receiving Agencies may charge any fees in respect of services rendered under the Convention (article 9(3)). This prohibition is in general terms and appears to apply equally to fees which might be required of the other Agency, of the claimant and of the respondent. Court fees may of course be required.

APPENDIX: TEXT OF THE UNITED NATIONS CONVENTION ON THE RECOVERY ABROAD OF MAINTENANCE

PREAMBLE

Considering the urgency of solving the humanitarian problem resulting from the situation of persons in need dependent for their maintenance on persons abroad,

Considering that the prosecution or enforcement abroad of claims for maintenance gives rise to serious legal and practical difficulties, and

Determined to provide a means to solve such problems and to overcome such difficulties,

The Contracting Parties have agreed as follows:

Article 1

SCOPE OF THE CONVENTION

1. The purpose of this Convention is to facilitate the recovery of maintenance to which a person, hereinafter referred to as claimant, who is in the territory of one of the Contracting Parties, claims to be entitled from another person, hereinafter referred to as respondent, who is subject to the jurisdiction of another Contracting Party. This purpose shall be effected through the offices of agencies which will hereinafter be referred to as Transmitting and Receiving Agencies.

2. The remedies provided for in this Convention are in addition to, and not in substitution for, any remedies available under municipal or international law.

Article 2

DESIGNATION OF AGENCIES

1. Each Contracting Party shall, at the time when the instrument of ratification or accession is deposited, designate one or more judicial or administrative authorities which shall act in its territory as Transmitting Agencies.

2. Each Contracting Party shall, at the time when the instrument of ratification or accession is deposited, designate a public or private body which shall act in its territory as Receiving Agency.

3. Each Contracting Party shall promptly communicate to the Secretary-General of the United Nations the designations made under paragraphs 1 and 2 and any changes made in respect thereof.

4. Transmitting and Receiving Agencies may communicate directly with Transmitting and Receiving Agencies of other Contracting Parties.

Article 3

APPLICATION TO TRANSMITTING AGENCY

1. Where a claimant is in the territory of one Contracting Party, hereinafter referred to as the State of the claimant, and the respondent is subject to the jurisdiction of another Contracting Party, hereinafter referred to as the State of the respondent, the claimant may make application to a Transmitting Agency in the State of the claimant for the recovery of maintenance from the respondent.

2. Each Contracting Party shall inform the Secretary-General as to the evidence normally required under the law of the State of the Receiving Agency for the proof of maintenance claims, of the manner

in which such evidence should be submitted, and of other requirements to be complied with under such law.

3. The application shall be accompanied by all relevant documents, including, where necessary, a power of attorney authorizing the Receiving Agency to act, or to appoint some other person to act, on behalf of the claimant. It shall also be accompanied by a photograph of the claimant and, where available, a photograph of the respondent.

4. The Transmitting Agency shall take all reasonable steps to ensure that the requirements of the law of the State of the Receiving Agency are complied with; and, subject to the requirements of such law, the application shall include:

(a) the full name, address, date of birth, nationality, and occupation of the claimant, and the name and address of any legal representative of the claimant;

(b) the full name of the respondent, and, so far as known to the claimant, his addresses during the preceding five years, date of birth, nationality, and occupation;

(c) particulars of the grounds upon which the claim is based and of the relief sought, and any other relevant information such as the financial and family circumstances of the claimant and the respondent.

Article 4

TRANSMISSION OF DOCUMENTS

1. The Transmitting Agency shall transmit the documents to the Receiving Agency of the State of the respondent, unless satisfied that the application is not made in good faith.

2. Before transmitting such documents, the Transmitting Agency shall satisfy itself that they are regular as to form, in accordance with the law of the State of the claimant.

3. The Transmitting Agency may express to the Receiving Agency an opinion as to the merits of the case and may recommend that free legal aid and exemption from costs be given to the claimant.

Article 5

TRANSMISSION OF JUDGEMENTS AND OTHER JUDICIAL ACTS

1. The Transmitting Agency shall, at the request of the claimant, transmit, under the provisions of article 4, any order, final or provisional, and any other judicial act, obtained by the claimant for the payment of maintenance in a competent tribunal of any of the Contracting Parties, and, where necessary and possible, the record of the proceedings in which such order was made.

2. The orders and judicial acts referred to in the preceding paragraph may be transmitted in substitution for or in addition to the documents mentioned in article 3.

3. Proceedings under article 6 may include, in accordance with the law of the State of the respondent, exequatur or registration proceedings or an action based upon the act transmitted under paragraph 1.

Article 6

FUNCTIONS OF THE RECEIVING AGENCY

1. The Receiving Agency shall, subject always to the authority given by the claimant, take, on behalf of the claimant, all appropriate steps for the recovery of maintenance, including the settlement of the claim and, where necessary, the institution and prosecution of an action for maintenance and the execution of any order or other judicial act for the payment of maintenance.

2. The Receiving Agency shall keep the Transmitting Agency currently informed. If it is unable to act, it shall inform the Transmitting Agency of its reasons and return the documents.

3. Notwithstanding anything in this Convention, the law applicable in the determination of all questions arising in any such action or proceedings shall be the law of the State of the respondent, including its private international law.

Article 7

LETTERS OF REQUEST

If provision is made for letters of request in the laws of the two Contracting Parties concerned, the following rules shall apply:

(a) A tribunal hearing an action for maintenance may address letters of request for further evidence, documentary or otherwise, either to the competent tribunal of the other Contracting Party or to any other authority or institution designated by the other Contracting Party in whose territory the request is to be executed.

(b) In order that the parties may attend or be represented, the requested authority shall give notice of the date on which and the place at which the proceedings requested are to take place to the Receiving Agency and the Transmitting Agency concerned, and to the respondent.

(c) Letters of request shall be executed with all convenient speed; in the event of such letters of request not being executed within four months from the receipt of the letters by the requested authority, the reasons for such non-execution or for such delay shall be communicated to the requesting authority.

(d) The execution of letters of request shall not give rise to reimbursement of fees or costs of any kind whatsoever.

(e) Execution of letters of request may only be refused:

- (1) If the authenticity of the letters is not established;
- (2) If the Contracting Party in whose territory the letters are to be executed deems that its sovereignty or safety would be compromised thereby.

Article 8

VARIATION OF ORDERS

The provisions of this Convention apply also to applications for the variation of maintenance orders.

Article 9

EXEMPTIONS AND FACILITIES

1. In proceedings under this Convention, claimants shall be accorded equal treatment and the same exemptions in the payment of costs and charges as are

given to residents or nationals of the State where the proceedings are pending.

2. Claimants shall not be required, because of their status as aliens or non-residents, to furnish any bond or make any payment or deposit as security for costs or otherwise.

3. Transmitting and Receiving Agencies shall not charge any fees in respect of services rendered under this Convention.

Article 10

TRANSFER OF FUNDS

A Contracting Party, under whose law the transfer of funds abroad is restricted, shall accord the highest priority to the transfer of funds payable as maintenance or to cover expenses in respect of proceedings under this Convention.

Article 11

FEDERAL STATE CLAUSE

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting Party transmitted through the Secretary-General, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article 12

TERRITORIAL APPLICATION

The provisions of this Convention shall extend or be applicable equally to all non-self-governing, trust or other territories for the international relations of which a Contracting Party is responsible, unless the latter, on ratifying or acceding to this Convention, has given notice that the Convention shall not apply to any one or more of such territories. Any Contracting Party making such a declaration may, at any time thereafter, by notification to the Secretary-General, extend the application of the Convention to any or all of such territories.

Article 13

SIGNATURE, RATIFICATION AND ACCESSION

1. This Convention shall be open for signature until 31 December 1956 on behalf of any Member of the United Nations, any non-member State which is a Party to the Statute of the International Court of Justice, or member of a specialized agency, and any other non-member State which has been invited by

the Economic and Social Council to become a Party to the Convention.

2. This Convention shall be ratified. The instruments of ratification shall be deposited with the Secretary-General.

3. This Convention may be acceded to at any time on behalf of any of the States referred to in paragraph 1 of this article. The instruments of accession shall be deposited with the Secretary-General.

Article 14

ENTRY INTO FORCE

1. This Convention shall come into force on the thirtieth day following the date of deposit of the third instrument of ratification or accession in accordance with article 13.

2. For each State ratifying or acceding to the Convention after the deposit of the third instrument of ratification or accession, the Convention shall enter into force on the thirtieth day following the date of the deposit by such State of its instrument of ratification or accession.

Article 15

DENUNCIATION

1. Any Contracting Party may denounce this Convention by notification to the Secretary-General. Such denunciation may also apply to some or all of the territories mentioned in Article 12.

2. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General, except that it shall not prejudice cases pending at the time it becomes effective.

Article 16

SETTLEMENT OF DISPUTES

If a dispute should arise between Contracting Parties relating to the interpretation or application of this Convention, and if such dispute has not been settled by other means, it shall be referred to the International Court of Justice. The dispute shall be brought before the Court either by the notification of a special agreement or by a unilateral application of one of the parties to the dispute.

Article 17

RESERVATIONS

1. In the event that any State submits a reservation to any of the articles of this Convention at the time of ratification or accession, the Secretary-General shall communicate the text of the reservation to all States which are Parties to this Convention, and to the other States referred to in article 13. Any Contracting Party which objects to the reservation may, within a period of ninety days from the date of the communication, notify the Secretary-General that it does not accept it, and the Convention shall not then enter into force as between the objecting State and the State making the reservation. Any State thereafter acceding may make such notification at the time of its accession.

2. A Contracting Party may at any time withdraw a reservation previously made and shall notify the Secretary-General of such withdrawal.

Article 18

RECIPROCITY

A Contracting Party shall not be entitled to avail itself of this Convention against other Contracting Parties except to the extent that it is itself bound by the Convention.

Article 19

NOTIFICATIONS BY THE SECRETARY-GENERAL

1. The Secretary-General shall inform all Members of the United Nations and the non-member States referred to in article 13:

(a) of communications under paragraph 3 of article 2;

(b) of information received under paragraph 2 of article 3;

(c) of declarations and notifications made under article 12;

(d) of signatures, ratifications and accessions under article 13;

(e) of the date on which the Convention has entered into force under paragraph 1 of article 14;

(f) of denunciations made under paragraph 1 of article 15;

(g) of reservations and notifications made under article 17.

2. The Secretary-General shall also inform all Contracting Parties of requests for revision and replies thereto received under article 20.

Article 20

REVISION

1. Any Contracting Party may request revision of this Convention at any time by a notification addressed to the Secretary-General.

2. The Secretary-General shall transmit the notification to each Contracting Party with a request that such Contracting Party reply within four months whether it desires the convening of a Conference to consider the proposed revision. If a majority of the Contracting Parties favour the convening of a Conference it shall be convened by the Secretary-General.

Article 21

LANGUAGES AND DEPOSIT OF CONVENTION

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General, who shall transmit certified true copies thereof to all States referred to in article 13.

CHAPTER FOUR

ACCESSION TO THE CONVENTIONS

A. The Hague Enforcement Convention

This Convention is now open for accession by any State which is not a Member of the Hague Conference, but which is

- (a) a member of the United Nations; or
- (b) a member of a specialised agency of the United Nations; or
- (c) a Party to the Statute of the International Court of Justice.

States which were Members of the Hague Conference at the time of the Twelfth Session may sign the Convention; those which became Members at a later date must accede.

Instruments of accession or ratification are deposited with the Ministry of Foreign Affairs of the Netherlands. When a State deposits an instrument of accession, Contracting States have twelve months in which to raise objection to the accession; the Convention does not affect the relations between the acceding State and any Contracting State objecting within that time limit. The Convention enters into force in respect of the acceding State on the first day of the third calendar month thereafter.

Various decisions have to be taken before accession, and are the subject of possible declarations or reservations.

(a) Under article 25, it is possible to make a declaration extending the Convention to cover actes authentiques. Common law jurisdictions are unlikely to wish to take this course.

(b) Under article 26, a State may reserve the right not to recognise or enforce

(1) a decision or settlement insofar as it relates to a period of time after a maintenance creditor attains the age of 21 years or marries, except when the creditor is or was the spouse of the maintenance debtor;

(2) a decision or settlement in respect of maintenance obligations

- a) between persons related collaterally;
- b) between persons related by affinity;

(3) a decision or settlement unless it provides for the periodical payment of maintenance.

The effect of the first possible Reservation is unclear; even the official Rapporteur describes it as "mysterious". Commonwealth jurisdictions may well wish to take advantage of the second and third Reservations, the latter of which was inserted at the express wish of the United Kingdom. The actual text of the U.K. Reservation was as follows. It will be seen that it is in a qualified form:

"The United Kingdom ...

a) reserves the right provided for in article 26(2) not to recognise or enforce a decision or settlement in respect of maintenance obligations between persons related collaterally

and between persons related by affinity unless that decision or settlement requires the maintenance debtor to make payments to a person who is a child of the family (for the purposes of the law of England and Wales and Northern Ireland) or who is a child of the maintenance creditor who has been accepted as a child of the family by the maintenance debtor (for the purposes of the law of Scotland) b) reserves the right provided for in article 26(3) not to recognise or enforce a decision or settlement unless it provides for the periodical payment of maintenance."

(c) Under article 28 which allows a State to declare that it will not apply certain rules of interpretation contained in that article. The rules concern the interpretation of certain references to a State when that State contains two or more territorial units in which different systems of law apply in relation to the recognition and enforcement of maintenance decisions. As the rules appear essential to the clear working of the Convention, it is suggested that no declaration be made.

(d) Under article 32, a State may extend the Convention to territories for the international relations of which it is responsible.

(e) Under article 33, a State with two or more territorial units in which different systems of law apply in relation to the recognition and enforcement of maintenance decisions may, in effect, accede in respect of some or all the units, and may modify its declaration at a later date (e.g. to add units which could not be included in the initial list, perhaps because of a failure of one unit to pass draft uniform legislation).

The Model Bill in Chapter 5 contains the necessary provisions to give effect to the Convention in the law of a country contemplating accession.

Although this Convention does not use the device of designated Central Authorities, it is helpful if the Permanent Bureau of the Hague Conference is notified of the appropriate office in the acceding State which will receive requests for enforcement and recognition so that formalities can be kept as simple as possible.

B. The United Nations Convention

This Convention is now open for accession by

- (a) any Member of the United Nations;
- (b) any non-member State which is a Party to the Statute of the International Court of Justice or a member of a specialized agency of the United Nations; or
- (c) any other non-member State which has been invited by the Economic and Social Council to become a Party to the Convention.

Instruments of accession are to be deposited with the U.N. Secretary-General, and the Convention enters into force for an acceding State on the thirtieth day following deposit of the instrument of accession.

Although there are no provisions in the Convention specifying possible Reservations, article 17 contains a general Reservations clause enabling an acceding State to submit a Reservation to any of the articles of the Convention. In such a case, however, the Convention will not bind other Contracting States which object to the Reservation within ninety days of being notified of it by the Secretary-General. There are in fact no specific matters which appear to call for a Reservation.

At the time of depositing an instrument of accession, a State must

(a) designate one or more judicial or administrative authorities (e.g. the Ministry for Foreign Affairs or the Registrar of the Supreme Court) as Transmitting Agencies;

(b) designate a public or private body as a Receiving Agency;

(c) inform the Secretary-General as to the evidence normally required under its law for proof of maintenance claims, of the manner in which such evidence should be submitted, and of other requirements to be complied with under that law.

Accession extends the Convention to all territories for the international relations of which a Contracting State is responsible, unless notice is given to the U.N. Secretary-General at the time of accession that the Convention is not to apply to any one or more such territories. Amending declarations, extending the application of the Convention, can be made subsequently.

The Model Bill in Chapter 5 contains the necessary provisions to give effect to this Convention in the laws of a country contemplating accession.

CHAPTER FIVE

MODEL LEGISLATION

This Chapter includes two pieces of model legislation. The first is a draft Maintenance Orders (Facilities for Enforcement) Bill. The Bill has three main objects. Two concern international conventions examined in this paper; the Bill contains provisions enabling effect to be given in the law of the enacting country to the United Nations Convention and the Hague Enforcement Convention. For reasons already given, the Bill does not make provision in respect of the Hague Applicable Law Convention. The other principal object of the Bill is to make improved provision for the registration and enforcement of maintenance orders as between Commonwealth jurisdictions.

The background to the existing Commonwealth legislation on maintenance orders is fully examined in Chapter 3 of The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth - A Further Report considered by the Commonwealth Law Ministers in 1977. After the matter had been examined at Regional Meetings in Basseterre (St. Kitts), Apia (Western Samoa) and Nairobi (Kenya), the position was summarised as follows in a memorandum submitted to the 1980 Law Ministers' Meeting (LMM(80)17):

"17. Almost all Commonwealth countries have legislation based upon a scheme devised in 1920. That Scheme caters for both situations encountered in this area:

(i) that in which the payer under a maintenance order leaves the jurisdiction in which the order was made, so that the payee needs to be enabled to enforce the order in the country to which the payer has gone; and

(ii) that in which a claim for maintenance is made against a defendant who has already taken up residence abroad, e.g. a claim by a wife against a husband who has travelled abroad and has now ceased to remit payments for her support.

18. This Scheme, like that on Grants of Administration is defective in a number of respects:

(i) coverage of the scheme: the legislation implementing the scheme is to be found in virtually common form in almost all countries of the Commonwealth. However, it does not apply automatically in relation to other Commonwealth countries but only those specifically designated as reciprocating states. This formality has been recognised as no longer necessary and is not required in relation to other Commonwealth countries in legislation already in force in New Zealand and Western Samoa.

(ii) refinement of procedure: the basic scheme has been found to contain lacunae and procedural difficulties. In countries in which the scheme has been heavily used, notably Australia and Canada, there have been a number of revisions incorporating improvements; many of these improvements were in the United Kingdom's Maintenance Orders (Reciprocal Enforcement) Act 1972 referred to at the 1973 Law Ministers'

Meeting. They have not been taken into account in the legislation of many Commonwealth member countries.

(iii) inapplicability to non-Commonwealth countries: the features of the Commonwealth scheme which have proved most beneficial in practice, notably the "shuttlecock" procedure designed to meet the second of the two situations outlined in para. 17 are, unfortunately, not found in the legislation of countries outside the Commonwealth. It is therefore impossible to designate such countries as reciprocating countries, and some different approach is needed.

19. After detailed discussions at the Regional Meetings there was general agreement to the following strategy:

(i) the refurbishment of the Commonwealth scheme to take account of the various improvements adopted in recent revisions, to include a wide definition of maintenance orders (including, in particular, affiliation orders, a matter once controversial but upon which there was very wide agreement at the Regional Meetings), and to dispense with the requirement for the designation of reciprocating countries so far as other Commonwealth countries are concerned;

(ii) to encourage more Commonwealth countries to accede to the United Nations Convention on the Recovery Abroad of Maintenance which provides a mechanism for dealing with claims against absent defendants (i.e. the second situation identified in para. 17) which is less satisfactory than that in the Commonwealth scheme but provides a useful basis for governing relations with non-Commonwealth countries; and

(iii) similarly to encourage more Commonwealth countries to accede to The Hague Convention on the Enforcement of Decisions Relating to Maintenance Obligations which deals with the enforcement of existing orders (and so with the first situation identified in para. 17) and is, again, suitable for governing relationships with civil law and other non-Commonwealth countries.

20. A Model Bill was prepared and discussed in various versions at the Regional Meetings. It is so constructed that individual jurisdictions could adopt it so as to refurbish the Commonwealth Scheme in its local application without necessarily acceding to either of the Conventions. Ministers may think it appropriate for the Draft Bill, with full explanatory material, to be circulated to each Commonwealth jurisdiction for detailed examination and possible enactment. The Secretariat would be able to give detailed advice as required and would take account of comments and criticisms received as a result of the examination of the Bill by the relevant officers of Commonwealth governments."

Accordingly, the Bill (which has undergone some small adjustments, most notably the addition of Clause 31(2), since it was presented to the Law Ministers) is set out in this paper, and is followed by some notes on each Clause.

The second piece of model legislation is much more tentative in nature. It is a set of draft Rules to be made under the draft Bill. The Bill itself will require adaptation to suit local

circumstances, as the notes make clear, but this is almost certainly more true of the draft Rules. Although presented to the Regional Meeting in Nairobi, they did not receive detailed attention, and can best be regarded as indicating the type of matters which need to be prescribed. The Schedule of Forms is however of considerable importance; it is desirable that these Forms should be in a standard recognisable pattern. As the Forms are referred to in the text of the Bill, they are an essential feature of the whole package.

DRAFT MODEL BILL

entitled

MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 198—

An Act to make new provision to facilitate the enforcement of maintenance orders; to make provision with a view to the accession by [] to the United Nations Convention on the Recovery Abroad of Maintenance done at New York on 20th June 1956 and to the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations done at The Hague on 2nd October 1973; and for connected purposes.

Short title 1. This Act may be cited as the Maintenance Orders (Facilities for Enforcement) Act 198—.

Interpretation 2.(1) In this Act—

“affiliation order” means an order (however described) adjudging, finding or declaring a person to be the father of a child, whether or not it also provides for the maintenance of the child;

“certificate of arrears”, in relation to a maintenance order, means a certificate certifying that the sum specified in the certificate is to the best of the information or belief of the officer giving the certificate the amount of the arrears due under the order at the date of the certificate or, as the case may be, that to the best of his information or belief there are no arrears due thereunder at that date;

“certified copy”, in relation to an order of a court, means a copy of the order certified by the registrar or other proper officer of the court to be a true copy;

“Commonwealth country” means any country outside [] which is an independent sovereign member of the Commonwealth or any territory for whose international relations any such country is responsible;

“competent court in a Hague Convention country” means any court in a Hague Convention country which has jurisdiction on one of the grounds specified in section 34(4);

“convention country” means a country designated by [Order] made under section 23;

“court” includes any tribunal or person having power to make, confirm, enforce, vary or revoke a maintenance order;

“court in a Hague Convention country” means any judicial or administrative authority in a Hague Convention country;

“Hague Convention” means the Convention referred to in section 31, and “Hague Convention country” means a country designated by [Order] under that section.

“maintenance order” means an order (however described), including a settlement made by or before a competent court in a Hague Convention country, of any of the following descriptions, and in the case of an order which is not limited to the following descriptions, the part of the order which is so limited, that is to say:—

(a) an order (including an affiliation order or order consequent upon an affiliation order) which provides for the periodical payment of sums of money towards the maintenance of any person, being a person whom the person liable to make payments under the order is, according to the law applied in the place where the order was made, liable to maintain;

(b) an affiliation order or order consequent upon an affiliation order, being an order which provides for the payment by a person adjudged, found or declared to be a child’s father of expenses incidental to the child’s birth, or, where the child has died, of his funeral expenses, or, where the mother of the child has died, of her funeral expenses; and

(c) an order within the foregoing provisions of this definition made against a payer on the application of a public body which claims reimbursement of sums of money payable under the order with respect to the payee if reimbursement can be obtained by the public body under the law to which it is subject,

and, in the case of a maintenance order which has been varied (including a maintenance order which has been varied either by a court in [] or by a competent court in a

Hague Convention country whether or not the original order was made by such a court) means that order as varied;

Provided that the expression "maintenance order" shall not include an order made in a Hague Convention country of a description which that country or [] has reserved the right under article 26 of The Hague Convention not to recognise or enforce

"payee" in relation to a maintenance order, means the person entitled to payments for which the order provides;

"payer", in relation to a maintenance order, means the person liable to make payments under the order;

"prescribed" means prescribed by rules of court;

"provisional order" means (according to the context)—

(a) an order made by a court in [] which is provisional only and has no effect unless and until confirmed, with or without alteration, by a competent court in a Commonwealth country; or

(b) an order made by a court in a Commonwealth country which is provisional only and has no effect unless and until confirmed, with or without alteration, by a court in [] having power under Part I of this Act to confirm it;

"registered order" means an order which is for the time being registered in a court in [] under Part III;

"registering court", in relation to a registered order, means the court in which that order is for the time being registered;

"related documents" means—

(a) the application on which the order was made;

(b) a certificate of arrears signed by the registrar of the registering court;

(c) a statement giving such information as he possesses as to the whereabouts of the payer; and

(d) any relevant documents in his possession relating to the case.

"the responsible authority", in relation to a Commonwealth country, means any person who in that country has functions similar to those of the [Minister for Foreign Affairs] under Part I, and in relation to a Hague Convention country means the appropriate authority in that country.

(2) Any reference in this Act to the payment of money for the maintenance of a child shall be construed as including a reference to the payment of money for the child's education.

PART I

ENFORCEMENT OF MAINTENANCE ORDERS MADE IN [] AND IN COMMONWEALTH COUNTRIES

ORDERS MADE BY COURTS IN []

Transmission of a maintenance order made in [] for registration in a Commonwealth country

3.(1) This section applies to any maintenance order, not being a provisional order or an order made by virtue of a provision of Part III made, whether before or after the commencement of this Part, by a court in [].

(2) Where it appears that the payer under a maintenance order to which this section applies is residing in or is proceeding to a Commonwealth country, the registrar of the court by which the order was made [or in which it is registered] may, of his own motion or on the application of a payee under the order, send to the [Minister for Foreign Affairs] a Request for Registration in the prescribed form.

(3) The [Minister for Foreign Affairs] shall transmit the Request for Registration to the responsible authority in the Commonwealth country if he is satisfied that the statement relating to the whereabouts of the payer gives sufficient information to justify that being done.

(4) Nothing in this section shall be taken as affecting any jurisdiction of a court in [] with respect to a maintenance order to which this section applies, and subject to section 7 any such order may be enforced, varied or revoked accordingly.

Provisional orders for confirmation in a Commonwealth country	<p>4.(1) Where an application is made to a court in [] for a maintenance order against any person who is proved to be residing in or to be proceeding to a Commonwealth country, and the application is one on which the court would have jurisdiction to make a maintenance order if that person were resident in [] and a summons to appear before the court to answer the application had been duly served upon him, the court shall have jurisdiction to hear the application and may make a provisional order.</p> <p>(2) Where a court makes a provisional order by virtue of this section, the registrar of the court shall send to the [Minister for Foreign Affairs] a Request for Confirmation in the prescribed form.</p>
Effect of confirmation	<p>5. A provisional order made by virtue of section 4 which has been confirmed by a competent court in a Commonwealth country shall be treated for all purposes as if the court in [] which made the order had made it in the form in which it was confirmed and as if the order had never been a provisional order, and subject to section 7 any such order may be enforced, varied or revoked accordingly.</p>
Further proceedings in respect of a provisional order	<p>6.(1) Where before a provisional order made by virtue of section 4 is confirmed, either—</p> <p style="padding-left: 40px;">(i) a document, duly authenticated, setting out or summarising evidence taken in a Commonwealth country for the purpose of proceedings relating to the confirmation of the order is received by the court in [] which made the order; or</p> <p style="padding-left: 40px;">(ii) that court, in compliance with a request made to it by a court in a Commonwealth country, takes the evidence of a person residing in [] for the purpose of such proceedings,</p> <p>the court in [] which made the order shall consider that evidence.</p> <p>(2) If it appears to the court, having considered such evidence that the provisional order ought not to have been made, or ought not to have been made in the form in which it was made—</p> <p style="padding-left: 40px;">(a) it shall, in such manner as may be prescribed, give to the person on whose application the order was made an opportunity to consider that evidence, to make representations with respect to it, and to adduce further evidence; and</p> <p style="padding-left: 40px;">(b) after considering all the evidence and any representations made by that person, it may revoke the provisional order, and may make a fresh provisional order.</p> <p>(3) Where a court makes a fresh provisional order by virtue of the preceding sub-section, the registrar of the court shall send in the prescribed manner to the court in the Commonwealth country a Request for Confirmation in the prescribed form.</p>
Variation and revocation in [] of orders	<p>7.(1) This section applies to a maintenance order which has been transmitted to a Commonwealth country in pursuance of section 3 and to a provisional order made by virtue of section 4 which has been confirmed by a competent court in a Commonwealth country.</p> <p>(2) A court in [] which, having considered an application for the variation of an order to which this section applies, proposes to vary the order—</p> <p style="padding-left: 40px;">(a) may do so by a provisional order; and</p> <p style="padding-left: 40px;">(b) shall do so by a provisional order where it proposes to increase the rate of payments under the order unless either—</p> <p style="padding-left: 80px;">(i) both the payer and the payee under the order appear in the proceedings; or</p> <p style="padding-left: 80px;">(ii) the applicant appears and the appropriate process has been duly served on the other party.</p> <p>(3) Where a court in [] makes a provisional order by virtue of this section, the registrar of the court shall send in the prescribed manner to the court in a Commonwealth country having power to confirm the provisional order a Request for Confirmation in the prescribed form.</p>
Confirmation of provisional orders affecting orders made in []	<p>8.(1) This section applies to a maintenance order which has been transmitted to a Commonwealth country in pursuance of section 3 and to a provisional order made by virtue of section 4 which has been confirmed by a competent court in a Commonwealth country.</p> <p>(2) Where a certified copy of a provisional order made by a court in a Commonwealth country, being an order varying or revoking an order to which this section applies, together</p>

with a document duly authenticated, setting out or summarising the evidence given in the proceedings in which the provisional order was made, is received by the court in [] which made the order, that court may confirm or refuse to confirm the provisional order and if that order is an order varying the order, confirm it either without alteration or with such alterations as it thinks reasonable.

(3) For the purpose of determining whether a provisional order should be confirmed under this section, the court shall proceed as if an application for the variation or revocation, as the case may be, of the order in question had been made to it.

ORDERS MADE IN COMMONWEALTH COUNTRIES

Registration in [] court of maintenance order made in a Commonwealth country

9.(1) This section applies to a maintenance order made before or after the commencement of this Part against any person by a court in a Commonwealth country, including a provisional order made by such a court which has been confirmed by a court in another Commonwealth country.

(2) Subject to the following provisions of this section, the registrar of a court in [] who receives from the [Minister for Foreign Affairs] a certified copy of an order to which this section applies shall register the order in the prescribed manner in the court.

(3) Before registering an order under this section, the registrar shall take such steps as he thinks fit for the purpose of ascertaining whether the payer is residing within the jurisdiction of the court, and if after taking those steps he is satisfied that the payer is not so residing he shall return the certified copy of the order to the [Minister for Foreign Affairs] with a statement giving such information as he possesses as to the whereabouts of the payer.

Setting aside registration

10. The registration of an order under section 9 shall be set aside if the court in which the order has been registered is satisfied on an application by the payer that the order is not an order to which that section applies.

Confirmation and registration in [] of a provisional order made in a Commonwealth country

11.(1) This section applies to a provisional order made before or after the commencement of this Part against any person by a court in a Commonwealth country.

(2) Where the registrar of a court in [] receives from the [Minister for Foreign Affairs] a certified copy of an order to which this section applies together with—

- (a) a document, duly authenticated, setting out or summarising the evidence given in the proceedings in which the order was made; and
- (b) a statement of the grounds on which the making of the order might have been opposed by the payer under the order,

the registrar shall cause proceedings to be commenced in the court for the confirmation of the order.

(3) If a summons to appear in the proceedings for the confirmation of the order cannot be duly served on the payer, the registrar shall return the certified copy of the order and documents which accompanied it to the [Minister for Foreign Affairs] with a statement giving such information as he possesses as to the whereabouts of the payer.

(4) Subject to the provisions of section 19 of this Act, proceedings for the confirmation of the order shall be conducted as if an application for a maintenance order against the payer had been made to the court.

(5) At the hearing it shall be open for the payer to raise any defence which he might have raised in the original proceedings had he been present, but no other defence, and the statement received from the court which made the order of the grounds on which the making of the order might have been opposed shall be conclusive evidence that the payer might have raised a defence on any of those grounds.

(6) If the payer establishes any such defence as he might have raised in the original proceedings, the court shall refuse to confirm the order, and the registrar shall return the certified copy of the order and the documents which accompanied it to the [Minister for Foreign Affairs].

(7) In any other case, the court shall confirm the order either without alteration or with such alteration as it thinks reasonable, and the registrar shall register the order in the prescribed manner.

Enforcement in [] of orders registered under Part I	<p>12.(1) An order registered in a court in [] by virtue of section 9(2) or 11(7) may be enforced in [] as if it had been made by the court in which it is registered and as if that court had had jurisdiction to make it; and proceedings for or with respect to the enforcement of any such order may be taken accordingly.</p> <p>(2) The registrar of the court by which an order is enforceable by virtue of this section shall take all such steps for enforcing the order as may be prescribed.</p> <p>(3) In any proceedings for or with respect to the enforcement of an order which is for the time being registered in any court under this Part a certificate of arrears sent to the court or to the registrar thereof shall be evidence of the facts stated therein.</p> <p>(4) Subject to subsection (5), sums of money payable under an order registered under this Part shall be payable in accordance with the order as from the date on which the order was made.</p> <p>(5) A court confirming an order under section 11(7) may direct that the sums of money payable under it shall be deemed to have been payable in accordance with the order as from such date, being a date later than the date on which the order was made, as it may specify; and subject to any such direction an order so confirmed shall be treated as if it had been made in the form in which it was confirmed and as if it had never been a provisional order.</p>
Variation and revocation of orders registered under Part I	<p>13.(1) This section applies to orders registered in [] by virtue of section 9(2) or 11(7).</p> <p>(2) The court in which an order to which this section applies is registered shall have the like power, on an application made by the payer or the payee, to vary or revoke the order as if the court had made the order and had had jurisdiction to make it.</p> <p>(3) Where the court in which an order to which this section applies is registered varies the order it may do so by means of a provisional order and shall do so unless—</p> <p style="padding-left: 40px;">(a) both the payer and the payee are for the time being residing in []; or</p> <p style="padding-left: 40px;">(b) the application is made by the payee; or</p> <p style="padding-left: 40px;">(c) the variation consists of a reduction in the rate of payments under the order and is made solely on the ground that there has been a change in the financial circumstances of the payer since the order was made or, in the case of an order registered by virtue of section 11(7), since the order was confirmed, and the courts in the Commonwealth country in which the order was made do not have power, according to the law in force in that country, to confirm provisional orders varying maintenance orders.</p> <p>(4) When the court in which an order to which this section applies is registered revokes the order it may do so by means of a provisional order and shall do so unless both the payer and the payee are for the time being resident in [].</p> <p>(5) On an application for the revocation of an order to which this section applies, the court shall, if both the payer and the payee are for the time being residing in [], apply the law of [], but shall in any other case apply the law of the Commonwealth country in which the order was made; but where the court is required by virtue of this subsection to apply the law of a Commonwealth country it may make a provisional order if it has reason to believe that the ground on which the application is made is a ground on which the order could be revoked according to that law, notwithstanding that it has not been established that it is such a ground.</p> <p>(6) Where a court makes a provisional order under this section, the registrar shall send in the prescribed manner to the court in the Commonwealth country which made the order a Request for Confirmation in the prescribed form.</p>
Confirmation of provisional orders affecting orders registered under Part I	<p>14.(1) This section applies to orders registered in [] by virtue of section 9(2) or 11(7).</p> <p>(2) Where a certified copy of a provisional order made by a court in a Commonwealth country, being an order varying or revoking an order to which this section applies, together with a document duly authenticated, setting out or summarising the evidence given in the proceedings in which the provisional order was made, is received by a court in [] in which an order to which this section applies is registered, that court may confirm or refuse to confirm the provisional order and if that order is an order varying the order, confirm it either without alteration or with such alterations as it makes reasonable.</p>

(3) For the purpose of determining whether a provisional order should be confirmed under this section, the court shall proceed as if an application for the variation or revocation, as the case may be, of the order in question had been made to it.

(4) The registrar of the court in which any order to which this section applies is registered shall register in the prescribed manner any order varying such an order.

Cancellation of registration and transfer of order

15.(1) This section applies to orders registered in [] by virtue of section 9(2) or 11(7).

(2) Where an order to which this section applies is revoked

(a) by an order made by the court in which it is registered; or

(b) by a provisional order made by that court which has been confirmed by a court in a Commonwealth country and notice of the confirmation is received by the court in []; or

(c) by an order made by a court in a Commonwealth country and notice of the revocation is received by the court in [].

the registrar of that court shall cancel the registration; but any arrears due under the order at the date when its registration is cancelled shall continue to be recoverable as if the registration had not been cancelled.

(3) Where the registrar of a court in which an order to which this section applies is registered is of opinion that the payer has ceased to reside within the jurisdiction of that court, he shall cancel the registration of the order and subject to sub-section (4) shall send the certified copy of the order to the [Minister for Foreign Affairs].

(4) Where the registrar of a court in which an order to which this section applies is registered is of opinion that the payer is residing within the jurisdiction of another court in [], he shall transfer the order to that court by sending the certified copy of the order to the registrar of that other court, and that registrar shall, subject to subsection (6) register the order in the prescribed manner in that court.

(5) Where the certified copy of an order is received by the [Minister for Foreign Affairs] under this section and it appears to him that the payer is still residing in [], he shall send the certified copy of the order to the registrar of the court within the jurisdiction of which it appears that the payer is residing, and the registrar of that court shall, subject to sub-section (6), register the order in the prescribed manner in that court.

(6) Before registering an order under sub-section (4) or (5), the registrar shall take such steps as he thinks fit for the purpose of ascertaining whether the payer is residing within the jurisdiction of the court, and if after taking those steps he is satisfied that the payer is not so residing he shall return the certified copy of the order to the [Minister for Foreign Affairs] with a statement giving such information as he possesses as to the whereabouts of the payer.

(7) A registrar required by the provisions of this section to send to the [Minister for Foreign Affairs] or to the registrar of another court the certified copy of an order shall send with that copy—

(a) a certificate of arrears signed by him;

(b) a statement giving such information as he possesses as to the whereabouts of the payer; and

(c) any relevant documents in his possession relating to the case.

Transmission of certain orders by [Minister for Foreign Affairs]

16.(1) This section applies to maintenance orders received by the [Minister for Foreign Affairs] from the responsible authority in a Commonwealth country and to orders which have been registered in a court in [] by virtue of section 9(2) or 11(7).

(2) If it appears to the [Minister for Foreign Affairs] that the payer under an order to which this section applies is not residing or has ceased to reside in [], he shall send to the responsible authority of the Commonwealth country which in all the circumstances is appropriate—

(a) the certified copy of the order in question and a certified copy of any order varying that order;

(b) if the order has at any time been registered in a court in [], a certificate of arrears signed by the registrar of the court in which it was last registered;

(c) a statement giving such information as the [Minister for Foreign Affairs] possesses as to the whereabouts of the payer; and

(d) any other relevant documents in his possession relating to the case.

(3) Where the documents mentioned in sub-section (2) are sent to the responsible authority in a Commonwealth country other than that in which the order in question was made, the [Minister for Foreign Affairs] shall inform the responsible authority in the Commonwealth country in which the order was made of what he has done.

SUPPLEMENTAL

Appeals

17.(1) No appeal shall lie from a provisional order made under any provision of this Part of this Act by a court in [] .

(2) Where any court in [] refuses to make a provisional order in pursuance of section 4 or revokes a provisional order in pursuance of section 6, the applicant shall have the like right of appeal (if any) from the refusal to make, or the revocation of, the provisional order as he would have if that order were not a provisional order.

(3) Where in pursuance of any provision of this Part, any court in [] confirms or refuses to confirm a provisional order made by a court in a Commonwealth country (including a provisional order varying or revoking a maintenance order), the payer or payee under the order shall have the like right of appeal (if any) from the confirmation of, or refusal to confirm, the provisional order as he would have if that order were not a provisional order and the court which confirmed or refused to confirm it had made or, as the case may be, refused to make it.

(4) Where in pursuance of any provision in this Part, any court in [] makes, or refuses to make, an order varying or revoking a maintenance order made by a court in a Commonwealth country, then, subject to sub-section (1), the payer or payee shall have the like right of appeal (if any) from that order or from the refusal to make it as he would have if the maintenance order had been made by the court in [] .

(5) Nothing in this section (except sub-section (1)) shall be construed as affecting any right of appeal conferred by any other enactment.

Obtaining of evidence for the purposes of proceedings in a Commonwealth country

18.(1) Where for the purpose of any proceedings in a court in a Commonwealth country relating to a maintenance order to which this Part applies a request is made by or on behalf of that court for the taking in [] of the evidence of a person residing therein relating to matters specified in the request, a court in [] shall have power to take that evidence and, after giving notice of the time and place at which the evidence is to be taken to such persons and in such manner as it thinks fit, shall take the evidence in such manner as may be prescribed.

(2) Evidence taken by virtue of this section shall be sent in the prescribed manner by the registrar of the court to the court in the Commonwealth country by or on behalf of which the request was made.

Remission of case to a court in a Commonwealth country; interim orders

19.(1) A court in [] may for the purpose of any proceedings in that court under this Part relating to an order to which this Part applies request a court in a Commonwealth country to take or provide evidence relating to such matters as may be specified in the request and may remit the case to that court for that purpose.

(2) A court in [] considering the confirmation of an order under section 11 and remitting the case in accordance with this section may make such interim order for periodical payments by the payer as it thinks fit.

Conversion of currency

20.(1) Where the sums of money required to be paid under an order registered in a court in [] under this Part or specified in any statement of arrears due under a maintenance order made by a court in a Commonwealth country are expressed in a currency other than the currency of [] , then, as from the relevant date, the sums shall be treated as such sums in the currency of [] as are equivalent thereto on the basis of the rate of exchange prevailing at that date.

(2) For the purposes of this section a written certificate purporting to be signed by an officer of any bank in [] certifying that a specified rate of exchange prevailed between currencies at a specified date and that at such rate a specified sum in the currency of

[] is equivalent to a specified sum in another specified currency shall be evidence of the rate of exchange so prevailing on that date and of the equivalent sums in terms of the respective currencies.

(3) In this section “the relevant date” means—

(a) in relation to an order which is registered in a court in [] or to a statement of arrears due under a maintenance order made by a court in a Commonwealth country, the date on which the order is first registered under this Act;

(b) in relation to an order which has been varied, the date on which the last order varying that order is registered under this Act.

Orders in foreign language

21. Where a maintenance order sought to be registered or confirmed in [] under this Part is in a language other than English, the certified copy of the order shall have attached thereto, for all purposes of this Part, a translation in the English language approved by the registrar of the court, and upon such approval being given the order shall be deemed to be in the English language.

PART II

EXTENSION OF PART I TO NON-COMMONWEALTH COUNTRIES

Extension of Part I to non-Commonwealth countries

22. The [Head of State] may by [Order] declare that the provisions of Part I, with such exceptions, adaptations and modifications as may be specified in the [Order] shall apply as if any country designated in the [Order] were a Commonwealth country.

PART III

RECIPROCAL ENFORCEMENT OF CLAIMS FOR THE RECOVERY OF MAINTENANCE

CONVENTION COUNTRIES

Convention countries

23. The [Head of State] may by [Order] declare that any country or territory specified in the [Order], being a country or territory outside [] and not being a Commonwealth country or a country designated in an [Order] under section 22, to which the United Nations Convention on the Recovery Abroad of Maintenance done at New York on 20th June 1956 extends, is a convention country for the purposes of this Act.

APPLICATION BY PERSON IN [] FOR RECOVERY ETC. OF MAINTENANCE IN A CONVENTION COUNTRY

Application by person in []

24.(1) Where a person in [] (“the applicant”) claims to be entitled to recover in a convention country maintenance from another person, and that other person is for the time being subject to the jurisdiction of that country, the applicant may apply to the [Minister for Foreign Affairs], in accordance with the provisions of this section, to have his claim for the recovery of maintenance from that other person transmitted to that country.

(2) Where the applicant seeks to vary any provision made in a convention country for the payment by any other person of maintenance to the applicant, and that other person is for the time being subject to the jurisdiction of that country, the applicant may apply to the [Minister for Foreign Affairs], in accordance with the provisions of this section, to have his application for the variation of that provision transmitted to that country.

(3) An application to the [Minister for Foreign Affairs] under this section shall be made through the registrar of the prescribed court who shall assist the applicant in completing an application which will comply with the requirements of the law of the convention country and shall send the application to the [Minister for Foreign Affairs], together with such other documents, if any, as are required by that law.

(4) On receiving an application from the registrar, the [Minister for Foreign Affairs] shall transmit it, together with any accompanying documents, to the appropriate authority in the convention country, unless he is satisfied that the application is not in good faith or that it does not comply with the requirements of the law of that country.

(5) The [Minister for Foreign Affairs] may request the registrar to obtain from the court of which he is registrar such information relating to the application as may be specified in the request, and it shall be the duty of the court to furnish the [Minister for Foreign Affairs] with the information he requires.

APPLICATION BY PERSON IN CONVENTION COUNTRY FOR RECOVERY OF MAINTENANCE IN []

Application
by person in
convention
country

25.(1) Where the [Minister for Foreign Affairs] receives from the appropriate authority in a convention country an application by a person in that country for the recovery of maintenance from another person ("the defendant") who is for the time being residing in [], he shall send the application, together with any accompanying documents, to the registrar of the prescribed court.

(2) On receiving the application in accordance with sub-section (1), the registrar shall cause proceedings to be commenced in the court for the consideration of the application.

(3) If a summons to appear in the proceedings cannot be duly served on the defendant, the registrar shall subject to sub-section (4) return the application, together with any accompanying documents, to the [Minister for Foreign Affairs] with a statement giving such information as he possesses as to the whereabouts of the defendant.

(4) If a registrar who receives an application in accordance with sub-section (1) is satisfied that the defendant is residing within the jurisdiction of another court in [], he shall send the application, together with any accompanying documents, to the registrar of that other court and shall inform the [Minister for Foreign Affairs] that he has done so.

(5) A registrar receiving an application under sub-section (4) shall proceed as if he had received it under sub-section (1).

(6) In any case not falling under sub-section (3) or (4), the court shall proceed as if the applicant were before the court.

(7) If the court makes an order on the application the registrar shall register the order in the prescribed manner in the court.

FURTHER PROVISIONS AS TO REGISTERED ORDERS

Transfer or
return of orders

26.(1) Where the registrar of the registering court is of opinion that the payer under a registered order has ceased to reside within the jurisdiction of the court he shall cancel the registration and, subject to sub-section (2), send a certified copy of the order and the related documents to the [Minister for Foreign Affairs].

(2) Where the registrar of the registering court is of opinion that the payer under a registered order is residing within the jurisdiction of another court in [], he shall transfer the order to that other court by sending a certified copy of the order and the related documents to the registrar of that court and, subject to sub-section (4), that registrar shall register the order in the prescribed manner in that court.

(3) Where a certified copy of an order is received by the [Minister for Foreign Affairs] under sub-section (1) and it appears to him that the payer under the order is still residing in [] he shall transfer the order to the court within the jurisdiction of which the payer is residing by sending the copy of the order and the related documents to the registrar of that court and, subject to sub-section (4), that registrar shall register the order in the prescribed manner in that court.

(4) Before registering an order in pursuance of sub-section (2) or (3), a registrar of a court shall take such steps as he thinks fit for the purpose of ascertaining whether the payer under the order is residing within the jurisdiction of the court, and if after taking those steps he is satisfied that the payer is not so residing he shall return the certified copy of the order and

the related documents to the registrar or the [Minister for Foreign Affairs], as the case may be, from whom he received them, together with a statement giving such information as he possesses as to the whereabouts of the payer.

Enforcement of orders

27.(1) The registrar of the court in which an order is registered under this Part shall take all such steps for enforcing the order as may be prescribed.

(2) A registered order which is registered in a court other than the court by which the order was made may be enforced as if it had been made by the registering court and as if that court had had jurisdiction to make it.

(3) In any proceedings for or with respect to the enforcement of a registered order, a certificate of arrears sent under section 26 to the registrar of the court shall be evidence of the facts stated therein.

Variation and revocation of orders

28.(1) The registering court shall have jurisdiction to hear any application by the payer or the payee for the variation or revocation of a registered order where the defendant to the application is residing in [] or in a convention country.

(2) Where the [Minister for Foreign Affairs] receives from the appropriate authority in a convention country an application by a person in that country for the variation or revocation of a registered order, he shall send the application, together with any accompanying documents, to the registrar of the registering court.

(3) On receiving the application in accordance with sub-section (1), the registrar shall cause proceedings to be commenced in the court for the consideration of the application.

(4) The court shall not proceed to the hearing of an application for the variation or revocation of a registered order unless

(a) in the case of a defendant to the application residing in [], a summons to appear in the proceedings has been duly served on him; and

(b) in the case of a defendant residing in a convention country, such notice of the proceedings as may be prescribed has been given to the defendant in the prescribed manner.

Obtaining of evidence for purpose of proceedings in []

29.(1) A court in [] may for the purpose of any proceedings in that court under this Part arising out of an application received by the [Minister for Foreign Affairs] from a convention country request the [Minister for Foreign Affairs] to make to the appropriate authority or court in the convention country a request for the taking in that country of the evidence of a person residing therein relating to matters connected with the application.

(2) A request made by a court under this section shall—

(a) give details of the application in question;

(b) state the name and address of the person whose evidence is to be taken; and

(c) specify the matters relating to which the evidence of that person is required.

(3) If the [Minister for Foreign Affairs] is satisfied that a request made to him under this section contains sufficient information to enable the evidence of the person named in the request relating to the matters specified therein to be taken by a court or person in the convention country, he shall transmit the request to the appropriate authority or court in that country.

Taking of evidence at request of court in a convention country

30.(1) Where a request is made to the [Minister for Foreign Affairs] by or on behalf of a court in a convention country to obtain the evidence of a person residing in [] relating to matters connected with an application to which section 24 applies, the [Minister for Foreign Affairs] shall request such court, or such registrar or other officer of a court, as he may determine to take the evidence of that person relating to such matters connected with that application as may be specified in the request.

(2) The court by which or registrar or other officer by whom a request under sub-section (1) is received from the [Minister for Foreign Affairs] shall have power to take the evidence and, after giving notice of the time and place at which the evidence is to be taken to such persons and in such manner as it or he thinks fit, shall take the evidence of the person named in the request relating to the matters specified therein in such manner as may be prescribed; and the evidence so taken shall be sent in the prescribed manner by the registrar to the court in the convention country by or on behalf of which the request referred to in sub-section (1) was made.

PART IV

ENFORCEMENT UNDER THE HAGUE CONVENTION

HAGUE CONVENTION COUNTRIES

Hague Con-
vention
countries

31.(1) The [Head of State] may by [Order] declare that any country or territory specified in the [Order], being a country or territory outside [] and not being a Commonwealth country or a country designated in an [Order] under section 22, in which the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations concluded at The Hague on 2nd October 1973 is in force, is a Hague Convention country for the purposes of this Part.

(2) In relation to a Hague Convention comprising territories in which different systems of law are in force in relation to the recognition and enforcement of maintenance orders, any reference to

- (a) the law or procedure of a Hague Convention country; or
- (b) a court in a Hague Convention country; or
- (c) habitual residence in a Hague Convention country

shall have effect as if each territory were a separate Hague Convention country.

ORDERS MADE BY COURTS IN []

Transmission of
a maintenance
order made in
[]
for registration
in a Hague Con-
vention country

32.(1) This section applies to any maintenance order, not being a provisional order or an order made by virtue of a provision of Part III, made, whether before or after the commencement of this Part, by a court in [] if—

- (a) either the payer or the payee had his habitual residence in [] at the time when the application for the maintenance order was made; or
- (b) the payer and the payee were citizens of [] at that time; or
- (c) the payer appeared in the proceedings in which the maintenance order was made and defended on the merits without objecting to the jurisdiction of the court.

(2) Where it appears that the payer under a maintenance order to which this section applies is residing in or is proceeding to a Hague Convention country, the registrar of the court by which the order was made [or in which it is registered] may, of his own motion or on the application of a payee under the order, send to the [Minister for Foreign Affairs] a Request for Enforcement in the prescribed form.

(3) The [Minister for Foreign Affairs] shall transmit the Request for Enforcement to the responsible authority in the Hague Convention country if he is satisfied that the statement relating to the whereabouts of the payer gives sufficient information to justify that being done.

(4) Nothing in this section shall be taken as affecting any jurisdiction of a court in [] with respect to a maintenance order to which this section applies, and, subject to section 33, any such order may be enforced, varied or revoked accordingly.

Variation and
revocation in
[]
of orders

33.(1) This section applies to a maintenance order which has been transmitted to a Hague Convention country by virtue of section 32

(2) Where an application is made to a court in [] by the payee for the variation or revocation of an order to which this section applies, and the payer is residing in a Hague Convention country, the registrar of the court shall send to the [Minister for Foreign Affairs] a notice of the application in the prescribed form, and the court may not vary or revoke the maintenance order unless—

(a) it is satisfied that the notice of the application has been served on the payer in accordance with the law of the Hague Convention country in which he is residing not less than six weeks before the date of the hearing of the application; and

(b) it has taken into account any representations made and any evidence adduced by or on behalf of the payer.

(3) Where a court in [] varies or revokes an order to which this section applies, the registrar of the court shall send to the [Minister for Foreign Affairs] a Notice of Variation or Revocation in the prescribed form.

ORDERS MADE BY COURTS IN HAGUE CONVENTION COUNTRIES

Registration
in []
of maintenance
order made in
Hague Conven-
tion country

34.(1) This section applies to a maintenance order made before or after the commencement of this Part against any person by a court in a Hague Convention country.

(2) Subject to the following provisions of this section, the registrar of a court in [] who receives from the [Minister for Foreign Affairs] a certified copy of an order to which this section applies shall register the order in the prescribed manner in the court.

(3) Before registering an order under this section, the registrar shall take such steps as he thinks fit for the purpose of ascertaining whether the payer is residing within the jurisdiction of the court, and if after taking those steps he is satisfied that the payer is not so residing he shall return the certified copy of the order to the [Minister for Foreign Affairs] with a statement giving such information as he possesses as to the whereabouts of the payer.

(4) (a) The registrar may refuse to register the order if the court in the Hague Convention country by or before which the order was made did not have jurisdiction to make the order; and for these purposes a court in a Hague Convention country shall be considered to have jurisdiction if—

(i) either the payer or the payee had his habitual residence in the Hague Convention country at the time when the proceedings in which the maintenance order was made were instituted; or

(ii) the payer and the payee were nationals of that country at that time; or

(iii) the defendant in those proceedings had submitted to the jurisdiction of the court, either expressly or by defending on the merits of the case without objecting to the jurisdiction; or

(iv) in the case of a maintenance order made by reason of a divorce or a legal separation or a declaration that a marriage is void or annulled, the court is recognised by the law of [] as having jurisdiction in that matter.

(b) In deciding whether a court in a Hague Convention country had jurisdiction to make a maintenance order the registrar shall be bound by any finding of fact on which the court based its jurisdiction.

(5) The registrar may refuse to register the order

(a) if such registration is manifestly contrary to public policy;

(b) if the order was obtained by fraud in connection with a matter of procedure;

(c) if proceedings between the same parties and having the same purpose are pending before a court in [] and those proceedings were the first to be instituted; or

(d) if the order is incompatible with an order made in proceedings between the same parties and having the same purpose, either in [] or in another country provided that in the latter case the order fulfils the conditions necessary for its recognition and enforcement in [] under this Act.

(6) Without prejudice to sub-section (5), if the payer did not appear in the proceedings in the Hague Convention country in which the order was made, the registrar shall refuse to register the order unless

(a) notice of the institution of the proceedings, including notice of the substance of the claim, was served on the payer in accordance with the law of that Hague Convention country; and

(b) having regard to the circumstances, the payer had sufficient time to enable him to defend the proceedings.

Setting aside registration

35.(1) The payer may apply to the court in which an order is registered under section 34 for the registration to be set aside.

(2) The court shall set aside the registration if it is satisfied that the order is not an order to which section 34 applies or that the registrar should have refused to register the order under subsection (6) of that section.

(3) The court may set aside the registration on any ground upon which the registrar might have refused to register the order under section 34.

Appeals against refusal to register

36. The payee may appeal to the court against any refusal by the registrar to register an order to which section 34 applies.

Enforcement in [] of orders registered under section 34

37.(1) An order registered in a court in [] by virtue of section 34 may be enforced in [] as if it had been made by the court in which it is registered and as if that court had jurisdiction to make it, and proceedings for or with respect to the enforcement of any such order may be taken accordingly.

(2) The registrar of the court by which an order is enforceable by virtue of this section shall take all such steps for enforcing the order as may be prescribed.

(3) In any proceedings for or with respect to the enforcement of an order which is for the time being registered in any court under section 42, a certificate of arrears sent to the court or the registrar thereof shall be evidence of the facts stated therein.

(4) Subject to subsection (5), sums of money payable under an order registered under section 42 shall be payable in accordance with the order as from the date on which the order was made.

(5) Where an order was made by a court in a Hague Convention country prior to the date of the entry into force of the Hague Convention between [] and that country, no sums of money falling due before that date shall be payable in accordance with the order.

Cancellation transfer and transmission of orders registered under section 34

38.(1) This section applies to a maintenance order registered in a court in [] by virtue of section 34.

(2) Subject to the following subsections, section 15 and 16 shall apply in relation to orders to which this section applies as if the Hague Convention country in which the maintenance order was made was a Commonwealth country.

(3) In its application to the orders to which this section applies, section 15 shall be amended by the omission of subsection (2)(b).

(4) In its application to the orders to which this section applies, section 16 shall be amended by the omission in subsection (2) of the words "which in all the circumstances is appropriate" and of subsection (3).

SUPPLEMENTAL

- Obtaining of evidence for purpose of proceedings in []
39. A court in [] may for the purpose of any proceedings in that court under this Part relating to a maintenance order to which this Part applies request the [Minister for Foreign Affairs] to make to the responsible authority in a Hague Convention country a request for the taking or provision of evidence relating to such matters as may be specified in the request.
- Obtaining of evidence for the purpose of proceedings in a Hague Convention country
- 40.(1) Where for the purpose of any proceedings in a court in a Hague Convention country relating to a maintenance order to which this Part applies a request is made by or on behalf of that court for the taking in [] of the evidence of a person residing therein relating to matters specified in the request, a court in [] shall have power to take that evidence and, after giving notice of the time and place at which the evidence is to be taken to such persons and in such manner as it thinks fit, shall take the evidence in such manner as may be prescribed.
- (2) Evidence taken by virtue of this section shall be sent by the registrar of the court to the [Minister for Foreign Affairs] for transmission to the responsible authority in the Hague Convention country.
- Conversion of currency
41. Section 20 shall apply in relation to orders made by a court in a Hague Convention country as if that country were a Commonwealth country.

PART V

SUPPLEMENTAL

- Provisional order to cease to have effect on remarriage
- 42.(1) Where a court has, by virtue of Section 4, made a provisional order consisting of or including a provision for periodical payments by a husband or wife and the order has been confirmed by a competent court in a Commonwealth country, then, if after the making of that order the marriage of the parties to the proceedings in which the order was made is dissolved or annulled but the order continues in force, that order or, as the case may be, that provision thereof shall cease to have effect on the remarriage of the payee except in relation to any arrears due under it on the date of such remarriage and shall not be capable of being revived.
- (2) For the avoidance of doubt it is hereby declared that reference in this section to remarriage include references to a marriage which is by law void or voidable.
- Admissibility of evidence given abroad
- 43.(1) A statement contained in—
- (a) a document, duly authenticated, which purports to set out or summarise evidence given in proceedings in a court in a Commonwealth country, a convention country, a Hague Convention country or a country designated in an [Order] under section 22; or
 - (b) a document, duly authenticated, which purports to set out or summarise evidence taken in such a country for the purpose of proceedings in a court in [] under this Act, whether in response to a request made on behalf of such a court or otherwise; or
 - (c) a document, duly authenticated, which purports to have been received in evidence in proceedings in a court in such a country, or to be a copy of a document so received,
- shall in any proceedings in a court in [] under this Act (including any proceedings on appeal from any such proceedings be admissible as evidence of any fact stated therein to the same extent as oral evidence of that fact is admissible in these proceedings.
- (2) A document purporting to set out or summarise evidence given as mentioned in sub-section (1)(a), or taken as mentioned in sub-section (1)(b), shall be deemed to be duly authenticated for the purposes of that sub-section if the document purports to be certified by the judge, magistrate, or other person before whom the evidence was given or, as the case may be, by whom it was taken, to be the original document containing or recording or, as the case may be, summarising, that evidence or a true copy of that document.

(3) A document purporting to have been received in evidence as mentioned in sub-section (1)(c), or to be a copy of a document so received, shall be deemed to be duly authenticated for the purposes of that sub-section if the document purports to be certified by a judge, magistrate or officer of the court in question to have been, or to be a true copy of a document which has been, so received.

(4) It shall not be necessary in any such proceedings to prove the signature or official position of the person appearing to have given such a certificate.

(5) Nothing in this section shall prejudice the admission in evidence of any document which is admissible in evidence apart from this section.

Order, etc.,
made abroad
need not be
proved

44. For the purposes of this Act, unless the contrary is shown—

(a) any order made by a court in a Commonwealth country, a Hague Convention country or a country designated in an [Order] under section 22 purporting to bear the seal of that court or to be signed by any person in his capacity as a judge, magistrate or officer of the court, shall be deemed without further proof to have been duly sealed or, as the case may be, to have been signed by that person;

(b) the person by whom the order was signed shall be deemed without further proof to have been a judge, magistrate or officer, as the case may be, of that court when he signed it and, in the case of an officer, to have been authorised to sign it; and

(c) a document purporting to be a certified copy of an order made by a court in such a country shall be deemed without further proof to be such a copy.

Rules of court

45. Without prejudice to the generality of the powers conferred under [the relevant legislation] [the appropriate authority] may make rules of court prescribing the practice and procedure under this Act.

Repeals

46. The [Maintenance Orders (Facilities for Enforcement) Act 192–] is hereby repealed.

Transitional
provisions

47.(1) Where immediately before the commencement of Part I, a country was one to which the [Act repealed by s.46] extended, the provisions of that Part shall apply to any order made under that Act by a court in [] against a person residing in that country and to any order made by a court in that country against a person residing in [] and transmitted to [] for the purpose of proceedings under that Act.

(2) Any proceedings brought under or by virtue of any provision of the [Act repealed by s.46] in a court in [] which are pending immediately before the commencement of Part I shall be continued as if they had been brought under or by virtue of the corresponding provision of this Act.

Commencement

48. This Act shall come into force on such day as the [Head of State] may by [Order] appoint and different days may be so appointed for different provisions or for different purposes.

Clause 1. In the absence of any requirement of reciprocity insofar as the principal provisions are concerned, this seems to be the most appropriate Short Title. It is also the Short Title retained in many jurisdictions which have legislation on this matter dating from the 1920s.

Clause 2. Clause 2(1) contains definitions of terms. Most are based upon definitions contained in the Maintenance Orders (Reciprocal Enforcement) Act 1972 (U.K.), but there are significant differences. In the U.K. Act, definitions are given in a variety of places within the Act (principally in sections 21(1), 32(8) and 39) but have been brought together in this Draft Bill. The U.K. definitions make no provision for certain terms used in connection with the Hague Convention (i.e. Part IV of the present Draft Bill) (but see U.K. S.I. 1979 No.1317 which remedies this deficiency), and use terms such as "reciprocating country" which are inappropriate in the changed situation in which this Draft Bill was prepared.

The definition of "Commonwealth country" is based on that in section 66(1) of the Domestic Proceedings Act 1968 of New Zealand. It includes dependent and other territories for the foreign relations of which a Commonwealth member State is responsible, territories which may well not be included in the definition of "Commonwealth" provided in general Interpretation Acts.

The definition of "court", corresponding to that in section 21(1) of the U.K. Act, is a wide one. It includes agencies not generally regarded as in any sense judicial such as the New Zealand Department of Social Security to which the task of enforcing orders has been transferred.

The definition of "maintenance order" is crucial to the whole Draft Bill. Affiliation orders are included, reversing the policy in the 1920 legislation and reflecting action already taken in Australia, Canada and New Zealand. The distinction between an affiliation order and an "order consequent upon an affiliation order" reflects the separability of paternity and maintenance proceedings in New Zealand and some other jurisdictions. Lump sum payments are not included, except for certain payments as to expenses in affiliation cases. Although the definition is based on the U.K. model, the inclusion of funeral expenses of a mother (i.e. after death in child birth) reflects the Family Law Act 1975, s.109, of Australia. The possibility of including other lump sums was discussed at the Nairobi meeting but it became clear that there were difficulties in limiting the scope of any such extension in a way which would be found generally acceptable. Paragraph (c) of this definition applies to recovery by public bodies, and the drafting takes account of the rules in the Hague Convention (arts. 18-20). Article 26 of that Convention, referred to in the proviso to this definition permits reservations excluding whole categories of orders (e.g. those between persons related collaterally or by affinity). Legislation in some Commonwealth jurisdictions contains express provisions for severing those parts of an order which do not relate to maintenance; the opening lines of the present definition have this effect, and no separate provision is required.

PART 1

This part contains a modern version of the Commonwealth scheme as first introduced in 1920, some version of which is to be found in the legislation of almost every Commonwealth jurisdiction.

Clauses 3 to 8 inclusive deal with orders made in the country enacting the legislation.

Clause 3 (transmission of a maintenance order for registration in a Commonwealth country) deals with final (i.e. not provisional) maintenance orders made by any court in the enacting country. Orders made under Part III (e.g. under clause 25) are excluded to restrict the scope of the present clause to the familiar standard cases. Clause 3(2) is based in part upon the Australian Family Law Regulations 1975, reg. 145(1). The special features of that provision, not found in other models, are (i) the power given to the registrar to act on his own motion, so simplifying procedures as much as possible; and (ii) provision for cases in which the payer is "proceeding to" but cannot yet be proved to be "residing in" a Commonwealth country, so eliminating a possible source of delay. Following the suggestion of the St. Kitts meeting, a form of Request for Registration is to be prescribed in Rules; this enables provision to be made for the supply of full information to the authorities in the receiving country yet simplifies the drafting of the Clause. Clause 3(4) preserves the jurisdiction of the court which originally made the order to enforce, vary or revoke it. This is however subject to clause 7, which requires certain variations to be by provisional orders. The Clause applies to orders by inferior as well as superior courts, and to orders of any date. "The responsible authority" is defined in clause 2(1).

Clause 4 (provisional orders for confirmation in a Commonwealth country). This Clause enables courts in the enacting country to deal with cases where the potential payer has left the jurisdiction before a maintenance order could be made against him, by making a "provisional order". This is defined in clause 2(1) as an order which is provisional only and has no effect unless and until confirmed, with or without alteration, by a competent court in a Commonwealth country. As drafted, the Clause extends to any court in the enacting jurisdiction; it is for local decision whether this should be qualified (e.g. by limiting it to inferior courts, as in the U.K., or to designated courts). Clause 4(1) follows the Australian Family Law Regulations 1975, reg. 147(1) in making reference to persons "proceeding to" a Commonwealth country. Clause 4(2) and the prescribed form of Request for Confirmation is an innovation, based on the suggestion of the St. Kitts meeting. In some jurisdictions it may be necessary to include provisions corresponding to section 3(3) of the U.K. Act (circumventing a rule preventing a court from making certain orders unless it also deals with the legal custody of a child) and to section 3(4) of that Act (which excludes the reference of a case from an inferior court - which in the U.K. is the only court with jurisdiction to make a provisional order - to a superior court).

Clause 5 (effect of confirmation) states the legal position in the enacting jurisdiction once the provisional order has been confirmed by a competent court in another Commonwealth country. The order is then to be treated as having been made, in the form in which it was confirmed, by the courts in the enacting jurisdiction. This means that it can be enforced there should the payer ever return, and that jurisdiction exists to vary or revoke it - subject to clause 7, requiring certain variations to be by provisional orders. Clause 5 refers to a court in "a" Commonwealth country; this need not be the country to which the order was originally sent for confirmation, as some payers move more rapidly than the processes of justice.

Clause 6 (further proceedings in respect of a provisional order) deals with the situation in which a provisional order has been sent to a Commonwealth country but the courts there do not immediately confirm it. Earlier legislation based on the U.K. Act of 1920 commonly provides for the case in which a request is made by the overseas court for further evidence; the court which made the provisional order takes this evidence and may rescind its order in the light of that evidence. This Clause follows section 5(9) of the U.K. Act of 1972 in also dealing with cases in which further evidence is taken by the court overseas in proceedings for confirmation of the order and that evidence is made available to the court which made the provisional order, and in providing expressly that the original applicant should be given the opportunity to make representations and adduce further evidence. The Clause also makes it clear, following in this respect the Family Law Regulations (Australia), reg. 147(5), that where the original provisional order is rescinded, a fresh provisional order can be made, and indicates the procedure to be followed thereafter.

Clause 7 (variation and revocation in the enacting country of orders). Clauses 3(4) and 5 provide that the court which originally made a maintenance order or a provisional order may vary or revoke that order notwithstanding its transmission for registration or confirmation overseas. This Clause governs the exercise of this power. If both parties appear or are within the jurisdiction there is no need to build in any special safeguards for the payer, and a variation or revocation can be made in the usual way. But if, as will frequently be the case, the application is by the payee and is for an increase in the sums payable by the payer who is resident abroad, the payer's interests are at risk. Clause 7(2) accordingly provides that in such cases a provisional order must be made, requiring confirmation in the country in which the payer is resident. Although the Clause appears more elaborate than the corresponding provision in legislation dating from the 1920s it will in some cases simplify matters. Under the 1920-model legislation all variations of orders originally made as provisional orders have themselves to be by provisional order: see section 3(5), Proviso, of the U.K. Act of 1920.

Clause 8 (confirmation of provisional orders affecting orders made in the enacting country). This Clause deals with cases in which variation or revocation is initiated not in the country in which the order was first made but in the Commonwealth country to which

the order was sent for registration or confirmation. It will typically be an application by the payer for a reduction in the payments due, on account of a change in his financial circumstances. The Clause enables the court which originally made the order to consider a provisional order made overseas to this end, and to decide whether or not to confirm it. Clause 8(2) effectively safeguards the interests of the payee who will be a defendant.

Clauses 9 to 16 deal with orders originating in other Commonwealth countries.

Clause 9 (registration in the enacting country of maintenance order made in a Commonwealth country) deals with the registration of final (i.e. not provisional) maintenance orders made in another Commonwealth country. It does, however, apply to orders which began as provisional orders but have matured into final orders as a result of confirmation in a third Commonwealth country. The order will be sent by the responsible authorities of the overseas country concerned to the Minister. If the Minister is satisfied that the payer is not in fact resident in the receiving country, he will act under clause 16; but in every other case he will send the order for registration under this Clause. There is no requirement under this Draft Bill, as there is in legislation based on the U.K. Act of 1920 (see s.1(1) of that Act), that the order should be sent by the responsible authorities of the particular Commonwealth country in which it was made; it can be forwarded by the responsible authorities in which it has been registered, or to which it was sent in the belief that the payer was resident there. The draft Clause may need adaptation to spell out the duty of the Minister to send the order for registration in a particular court (for example, a Family Court, or a local court at the place of residence of the payer).

Clause 10 (setting aside registration) is based upon section 63 of the Domestic Proceedings Act 1968 of New Zealand. Most legislative models make no express provision for cases of registration which turn out to have been mistaken, the order not falling within the scope of the local legislation. Such cases will be few, and there will almost certainly be procedures available to correct the mistake, under some general legislation. It was, however, thought desirable to make the point explicit. It is not provided that the registration shall be deemed to have been valid until it is set aside; it is treated as a nullity.

Clause 11 (confirmation and registration in the enacting country of a provisional order made in a Commonwealth country) deals with the procedure on the receipt of a provisional order made in another Commonwealth country. As under clause 9, the Minister will have to decide initially whether he is satisfied that the payer is resident in the enacting country; if he is not so satisfied, he will act under clause 16. In the more usual case, he will act by sending the order to the registrar of the appropriate court, and the draft Clause may here again need local adaptation to identify the court concerned. The provisions of the draft Clause are based on those of section 7 of the U.K. Act of 1972, but re-ordered to follow the usual course of events; the drafting is

influenced at some points by section 64 of the Domestic Proceedings Act 1968 of New Zealand. There are no changes of substance from the procedure under legislation on the 1920 model. Clause 19 referred to in clause 11(4) enables a case to be remitted to the overseas court for further evidence to be taken.

Clause 12 (enforcement in the enacting country of orders registered under Part I). Legislation based on the 1920 model commonly provides that a registered order, whether a final order transmitted for registration or a provisional order transmitted for confirmation and duly confirmed, may be enforced as if made in the enacting country, and imposes a duty on court officers to take active steps on behalf of the absent payee. In some countries fairly elaborate provision is made; for example, to apply to these orders the law applicable to maintenance orders on such points as the accrual and remission of arrears and the duty of the payer to notify his address. Other countries rely upon general references to the statute law as to procedure in maintenance order cases generally. The present draft Clause may well need local adaptation in these respects. The provisions included in the draft are designed to identify the sums payable; enforcement procedures are to be prescribed by rules of court. Under the 1920 model legislation, in the case of provisional orders received and confirmed, payments are due with effect from the date of confirmation, the payee suffering as a result of any delays in the process; clause 12(5) in effect enables the court to back-date the payments to some earlier date, but not earlier than the date upon which the provisional order was first made.

Clause 13 (variation and revocation of orders registered under Part I) is based upon a re-ordered version of section 9 of the U.K. Act of 1972. It gives considerably more power to the registering court than was given under the 1920 model, especially in enabling that court to vary or revoke final orders registered under clause 9(2). Under the earlier legislation this could not be done, even if both parties were now resident in the registering country. Under the new provisions, the court has wide powers but will often have to make a provisional order requiring confirmation in the country in which the order was first made. If both parties are now resident in the enacting country, the court can make any variation or revoke the order without resort to the provisional order procedure; a variation on the application of the payee can also be so made, the payee having in effect submitted to the jurisdiction. The only other case in which there is no need to use a provisional order is that set out in clause 13(3)(c); such cases are ones in which the power to order variation is desirable on grounds of justice and in which the provisional order procedure would not normally be available (for those countries still operating under the 1920-model legislation would not have power to confirm such a provisional order). In such a case the court, if it wished to obtain evidence as to the payee's financial circumstances, could make use of clause 19(1) to request the relevant evidence from the court in the payee's country of residence. In general the law of the country in which an order originated governs; clause 13(5) makes an exception in the case where both parties are resident in the enacting country and the application is for revocation; in such a case there seems no reason not to apply the law of that country.

Clause 14 (confirmation of provisional orders affecting orders registered under Part I) deals with the corresponding case in which the registered order is varied or revoked by a provisional order made in the country of origin or possibly in a third Commonwealth country. So far as variation is concerned, this Clause is based upon section 9(6)(7) of the U.K. Act of 1972. Those provisions do not deal with the possibility of provisional revocation orders; the U.K. draftsman seems to have considered such a possibility as remote, but they are provided for under the Family Law Regulations 1975 (Australia), reg. 154(1)(a)(ii), and to omit the power to confirm such an order could cause hardship and delay.

Clause 15 (cancellation of registration and transfer of order) makes provision for the cancellation of the registration of orders which are or have been revoked, but for the continued liability of the payer in respect of accrued arrears. It also provides for action to be taken when the payer leaves the jurisdiction (clause 15(3)(7)). Clause 15(4)(5)(6), the cross-reference in clause 15(4) "and subject to sub-section (4)", and the words in clause 15(7) "or to the registrar of another court" all apply only in those countries divided geographically for internal jurisdictional purposes. If orders are all registered in a single Family Court, for example, those provisions should be deleted.

Clause 16 (transmission of certain orders by the Minister) has already been referred to, and deals with the procedure in a number of cases in which the payer is not residing in the country enacting the legislation.

Clauses 17 to 21 make supplemental provisions affecting proceedings under Part I.

Clause 17 (appeals) regulates appeals within the enacting country. No appeal is given from any provisional order, because that order in itself has no effect. Nor is any appeal given against the registration of a final order under clause 9; but clause 10 enables such registration to be set aside when it was outwith the powers conferred by clause 9. There are however appeals against the refusal of, or revocation of, a provisional order (the draft Clause following in this respect section 73(9) of the Domestic Proceedings Act 1968 of New Zealand); against the confirmation or the refusal to confirm a provisional order made in another Commonwealth country; and against the making (otherwise than by a provisional order) or refusal to make a variation or revocation of an order originally made in another Commonwealth country. Such rights of appeal are without prejudice to those conferred under the general legislation of the enacting country.

Clause 18 (obtaining of evidence for the purposes of proceedings in a Commonwealth country) enables courts in the enacting country to respond to requests made by courts in other Commonwealth countries for evidence needed in relation to proceedings of the type dealt with in this Bill. The corresponding provision in legislation on the 1920 model is much more limited; it would not extend to requests made, for example, in relation to possible variation of an order.

The draft Clause contains no provisions concerning the issue of process to compel the attendance of witnesses, authorising the payment of expenses to witnesses who are not parties, or for such matters as the appointment of examiners. Any such matters which it is desirable to cover can be the subject of local adaptation, perhaps applying more general legislation to this particular case.

Clause 19 (remission of a case to a court in a Commonwealth country; interim orders) enables a court of the enacting country to obtain evidence from the courts of other Commonwealth countries to assist it in considering an application under Part I of the Bill. Clause 19(2), based on the Family Law Regulations 1975 (Australia), reg.146(8) enables a court which exercises the power under clause 19(1) to assist it in deciding whether or not to confirm a provisional order, so leading to some delay, to make an interim order for periodical payments. This might be useful in cases where the receiving court is minded to confirm the order but remains uncertain as to the precise quantum; an interim order fixing payments at the lower end of the likely range would assist the payee.

Clause 20 (conversion of currency) is a simplified version of section 16 of the U.K. Act of 1972. No provision as to the conversion of currency was made in the 1920-model legislation and courts have had to improvise. Although practical problems do not appear to have been great, it is desirable to make the position clear. In some jurisdictions it may be desired to modify clause 20(2) to require the certificate to be issued by an officer of a designated bank.

Clause 21 (orders in Foreign language) is also designed to regulate procedure in an area not covered by express provisions in most legislation on the 1920 model. It is in the form recommended before 1979 by the Canadian Commissioners on Uniform Laws.

PART II

Clause 22 (extension of Part I to non-Commonwealth countries). There are a number of countries outside the Commonwealth and so outside the scope of Part I, principally former Commonwealth members, which have legislation compatible with Part I of this Bill, generally based on the 1920 model, or on the United States Uniform Act on the subject. This Clause, based upon section 71 of the Domestic Proceedings Act 1968 (New Zealand), enables Part I to be applied in respect of such countries. No express requirement of reciprocity is included, but it will no doubt be insisted upon in practice.

PART III

Clauses 23 to 30 which comprise Part III contain provisions giving effect to the United Nations Convention of the Recovery Abroad of Maintenance, 1956.

Clause 23 (convention countries) provides for the designation of states parties to the Convention as convention countries for the purposes of Part III of the Bill.

Clause 24 (application by person in the enacting country for recovery etc. of maintenance in a convention country) sets out the procedure for sending applications for maintenance to other countries and gives effect to article 1 (Scope of the Convention), article 3 (Application to Transmitting Agency) and article 4 (Transmission of Documents) of the U.N. Convention. The applicant is required to be "in" the enacting country, but there is no requirement of "residence" there, for none is contained in the Convention. Clause 24(1) provides for initial applications, and clause 24(2) for requests for variation of maintenance, so giving effect to article 8 of the Convention which extends its provisions to variation. Clause 24(5) deals with the transmission of "information relating to the application", obtained from a court in the enacting country. This is a reflection of article 4(3) of the Convention, which authorises the "Transmitting Agency" to express to the "Receiving Agency" an opinion as to the merits of the case. As there have been no court proceedings in respect of the application, this is an unusual power, but it accords with the practice in some civil-law countries and it seems desirable that the Bill should leave the possibility open.

Clause 25 (application by person in convention country for recovery of maintenance in the enacting country) deals with the procedure to be followed on the receipt of an application initiated by an applicant in a convention country and gives effect to article 6 of the Convention. Clause 25(4)(5) and the words "or (4)" in clause 25(6) will be omitted in any enacting country not divided into geographical areas for internal jurisdiction purposes. This Clause may require considerable adaptation or supplementation in some enacting countries. It may be necessary to provide for the application to cases falling within this Clause of the general law of the enacting country as to maintenance and affiliation cases. Conversely, it may be necessary to exclude applications falling within this Clause from some rules of that general law. For example in the U.K. Act of 1972 provisions can be found applying the general statute law in these areas, but dispensing with certain rules: that in affiliation cases the mother must apply within twelve months of the birth of the child and give evidence on oath and in person (see section 30(3) of the U.K. Act of 1972). Clause 25(1) follows section 27(1) of that Act in requiring the defendant to be "for the time being residing in" the enacting country; the Convention (art. 1(1)) speaks of his being "subject to the jurisdiction of" that country, and it is desirable to give a clear meaning to this phrase.

Clause 26 (transfer or return of orders) deals with the procedure to be followed when the payer under an order changes his residence. In enacting countries which are not divided into geographical areas for the purposes of internal jurisdiction rules, only clause 26(1) is required and the name of the enacting country should then be substituted for the words "the jurisdiction of the court".

Clause 27 (enforcement of orders). This Clause enables rules of court to be made regulating the enforcement of orders made under Part III. An alternative approach adopted in Fiji is to apply to such orders the generally-applicable enforcement provisions. In the case of enacting countries not divided into geographical areas for the purposes of internal jurisdiction rules, only clause 27(1) is required.

Clause 28 (variation and revocation of orders). This Clause enables a court in the enacting country to vary or revoke an order made under Part III, either on an application made directly to the court or on one received from a party in a convention country by way of the Transmitting and Receiving Agencies (i.e. under clause 28(2)). Article 8 of the Convention deals with "variation" but does not make clear what is believed to be implicit, that this includes revocation. The U.K. Act adopts the same practice, but following discussion in Apia it was decided to deal expressly with revocation. Clause 28(4) does not provide for cases where the defendant resides in some overseas but non-convention country; this could only be dealt with if the enacting country had facilities for service of process in such countries.

Clauses 29 and 30 contain provisions similar in object to those in clauses 19 and 18 respectively, the drafting according with the terms of article 7 of the Convention. The note to clause 18 as to compelling attendance, expenses, etc., applies equally to clause 30.

PART IV

Clauses 31 to 38 which comprise Part IV contain provisions giving effect to the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, 1973.

Clause 31 (Hague Convention countries) provides for the designation of states parties to the Hague Convention as Hague Convention countries for the purposes of Part IV of the Bill. Clause 31(2) gives effect to article 28 of the Convention.

Clause 32 (transmission of a maintenance order made in the enacting country for registration in a Hague Convention country) deals with the transmission of certain maintenance orders (not being provisional maintenance orders or orders made under Part III) for enforcement as against a payer residing in or proceeding to a Hague Convention country. The drafting is influenced by section 2 of the U.K. Act of 1972 as modified by the Reciprocal Enforcement of Maintenance Orders (Hague Convention Countries) Order 1979, S.I. 1979 No. 1317. Unlike that provision, however, it incorporates, in clause 32(1) the conditions set out in article 7 of the Hague Convention as to the cases in which the State of origin shall be regarded as having jurisdiction. It seems desirable that the registrar should be required to satisfy himself that the order falls within the scope of the Convention in this respect before he initiates the procedure thereunder.

Clause 33 (variation and revocation in the enacting country of orders). Article 2, second paragraph, of the Hague Convention applies the Convention to orders "modifying" earlier orders. Clause 33(2), based upon section 5 of the U.K. Act of 1972 as modified by S.I. 1979 No. 1317, gives some protection to the payer by requiring service of process and by enabling him to make representations and adduce evidence. Where the payer himself makes an application, so submitting himself to the jurisdiction, the usual rules requiring notice to the other party will apply by virtue of the saving in clause 32(4).

Clause 34 (registration in the enacting country of maintenance order made in Hague Convention country). This Clause provides for the registration of orders transmitted by the authorities of a Hague Convention country. Clause 34(4) gives effect to articles 7, 8 and 9 of the Convention which set out the cases in which the State of origin is to be regarded as having jurisdiction. Clause 34(5) gives effect to article 5, and clause 34(6) to article 6 of the convention. The drafting of clause 34, while based upon section 6 of the U.K. Act of 1972 as modified by S.I. 1979 No. 1317, departs in some respects from that model. In particular, clause 34(4)(a)(iv) ends "in that matter", following the English text of article 8 in preference to the U.K. provision (s.6(5)(a)(iv)) which ends "to make the order". Clause 34(5)(d) ends "under this Act", a wider provision than the U.K. "under this Part of this Act" (s.6(6)(d)) and one thought to accord with the intention of article 5(4) of the Convention. Under this Clause, the registrar takes the initial decision. However Clause 35 provides for applications to set aside registration if it is thought to have been done inappropriately, and Clause 36 gives a right of appeal against a refusal to register.

Clause 37 (enforcement in the enacting country of orders registered under section 34) corresponds to clause 12 which governs orders registered under Part I. The provisions as to arrears in clause 37(4)(5) accord with articles 11 and 24 of the Convention.

Clause 38 (cancellation transfer and transmission of orders registered under section 34) applies clauses 15 and 16 mutatis mutandis to orders registered under this Part.

Clauses 39 to 41 make supplemental procedural provision as to evidence and exchange rates, based on clauses 18 to 20 but adapted to suit cases falling under this Part.

PART V

Clauses 42 to 48 which comprise Part V contain supplemental and general provisions.

Clause 42 (provisional order to cease to have effect on remarriage) relates only to provisional orders made under clause 4; it is not included in Part I as it does not strictly relate to enforcement.

In many Commonwealth jurisdictions a maintenance order made between husband and wife ceases to have effect if the party in whose favour the order was made remarries. In such countries it seems desirable that the same effect should follow in the case of a provisional order made in the enacting country and confirmed in another Commonwealth country. The Clause so provides. If there exists a provisional order which has not been confirmed, it has no effect and no provision is needed.

Clause 43 (admissibility of evidence given abroad) is a provision essential to the working of the Bill, making the various certificates and statements received from the authorities of other countries admissible in evidence. In some enacting countries there may be sufficiently broad provisions in an Evidence Act, in which case this Clause will not be required.

Clause 44 (order, etc., made abroad need not be proved) dispenses with the need to prove strictly copies of court orders and the signatures and seals they bear. The last sentence in the note to clause 43 applies here also.

Clause 45 (rules of court) is in general terms. In this respect the precedent of Canada and Singapore is preferred to that favoured in the U.K., Fiji and Hong Kong, where detailed enabling powers are listed.

Clauses 46 and 47 (repeals and transitional provisions) will need modification to meet the requirements of particular enacting countries.

Clause 48 (commencement). The provision for the appointment of different days for different purposes is particularly important because of the different nature of the provisions in Parts I, III and IV, the latter involving accession to international conventions.

VARIANT FORMS OF THE DRAFT MODEL BILL

VARIANT A.

In any enacting country not willing or unable to accede to either of the international Conventions to which the Bill gives effect, but desiring to implement the proposals in the Bill to improve its legislation on the 1920 model, the Bill should be modified as follows:

- (i) In the Long Title, omit from "to make provision" to "1973".
- (ii) In Clause 2(1), omit the entries relating to
"competent court in a Hague Convention country",
"convention country",
"Hague Convention" and "Hague Convention country",
"registered order",
"registering court",
"related documents",
and in the entry relating to "the responsible authority",
all words after "Part I".

- (iii) In Clause 2(1), for the entry relating to "maintenance order" substitute the following:

"maintenance order" means an order (however described) of any of the following descriptions, that is to say -

- (a) an order (including an affiliation order or order consequent upon an affiliation order) which provides for the periodical payment of sums of money towards the maintenance of any person, being a person whom the person liable to make payments under the order is, according to the law applied in the place where the order was made, liable to maintain; and
- (b) an affiliation order or order consequent upon an affiliation order, being an order which provides for the payment by a person adjudged, found or declared to be a child's father of expenses incidental to the child's birth, or, where the child has died, of his funeral expenses, or, where the mother of the child has died, her funeral expenses, and, in the case of a maintenance order which has been varied, means that order as varied;

- (iv) Insert a new Clause 2(2) (renumbering existing Clause 2(2) as 2(3):

(2) For the purposes of Part I an order shall be taken to be a maintenance order so far (but only so far) as it relates to the payment of such periodical payments or the payment of such expenses as are mentioned in the definition of "maintenance order" in subsection (1).

- (v) In Clause 3(1), omit the words "or an order made by a provision of Part III".

- (vi) Omit Parts III and IV.

(vii) In Clause 43(1)(a), omit the words "a convention country, a Hague Convention country".

(viii) In Clause 44(a), omit the words "a Hague Convention country".

VARIANT B.

In any enacting country acceding to the Hague Convention but not the U.N. Convention, the Bill could be enacted with the following modifications:

(i) In the Long Title, omit the words from "the United Nations" to "and to".

(ii) In Clause 2(1), omit the entries relating to "convention country", "registered order", "registering court", and "related documents".

(iii) In Clause 3(1), omit the words "or an order made by virtue of a provision of Part III".

(iv) Omit Part III.

(v) In Clause 43(1)(a), omit the words "a convention country".

VARIANT C.

In any enacting country acceding to the U.N. Convention but not the Hague Convention, the Bill could be enacted with the following modifications:

(i) In the Long Title, omit the words from "and to the" to "1973".

(ii) In Clause 2(1), omit the entries relating to "competent court in a Hague Convention country", "Hague Convention" and "Hague Convention country", and in the entry relating to "the responsible authority", all words after "Part I".

(iii) In Clause 2(1) substitute the definition of "maintenance order" set out in paragraph (iii) under Variant A, above.

(iv) Insert Clause 2(2) as set out in paragraph (iv) under Variant A, above.

(v) Omit Part IV

(vi) In Clause 43(1)(a), omit the words "a Hague Convention country".

(vii) In Clause 44(a), omit the words "a Hague Convention country".

MAINTENANCE ORDERS (FACILITIES FOR
ENFORCEMENT) RULES 198-

1. In these Rules, "the Act" means the Maintenance Orders (Facilities for Enforcement) Act 198- and other terms have the same meaning as in the Act.

2.(1) Where a registrar is required by any provision of the Act to register any order he shall cause the order to be registered in his court by means of a minute or memorandum entered and signed by him in the register of the court.

(2) Every minute or memorandum entered in pursuance of this Rule shall specify the section of the Act under which the order in question is registered.

Proceedings under Part I of the Act

3. A document setting out or summarising any evidence required by any provision of the Act or these Rules to be authenticated shall be authenticated by a certificate, signed by [the judge] [the magistrate] [one of the justices] before whom that evidence was given, that the document is the original document containing or recording or, as the case may be, summarising that evidence or a true copy of that document.

4. Any documents required by any provision of the Act or these Rules to be sent to a court in a Commonwealth country shall be sent to the registrar of that court by post.

5.(1) An application by a payee under section 3 of the Act (transmission of a maintenance order made in [] for registration in a Commonwealth country) shall be made in writing to the registrar.

(2) An application made in pursuance of paragraph (1) above shall -

- (a) specify the date on which the order was made;
- (b) contain such particulars as are known to the applicant of the whereabouts of the payer;
- (c) specify any matters likely to assist in the identification of the payer;
- (d) where possible, be accompanied by a recent photograph of the payer.

6. A Request for Registration under section 3(2) of the Act shall be in Form 1 in the Schedule to these Rules.

7.(1) A Request for Confirmation under section 4(2) of the Act shall be in Form 2 in the Schedule to these Rules.

(2) A Request for Confirmation under section 6(3), 7(3) or 13(6) of the Act shall be in Form 3 in the Schedule to these Rules.

8.(1) For the purposes of compliance with section 6(2) of the Act (Further proceedings in respect of a provisional order) there shall be served on the person on whose application the order was made a notice which shall -

(a) set out the evidence received or taken, as the case may be, in pursuance of section 6(1) of the Act;

(b) inform that person that it appears to the court that the order ought not to have been made or, as the case may be, ought not to have been made in the form in which it was made; and

(c) inform that person that if he wishes to make representations with respect to the evidence set out in the notice he may do so orally or in writing and that if he wishes to adduce further evidence he should notify the registrar.

(2) Where a registrar receives notification that the person on whose application the order was made wishes to adduce further evidence, he shall fix a date for the hearing of such evidence and shall send that person written notice of the date fixed.

9.(1) Where the evidence of any person is to be taken in pursuance of section 18(1) of the Act, subject to paragraph (2) below,

(a) the evidence shall be taken in the same manner as if that person were a witness in proceedings on an application for maintenance;

(b) any oral evidence so taken shall be put into writing and read to the person who gave it, who shall be required to sign the document; and

(c) the [judge] [magistrates] [justices] by whom the evidence of any person is so taken shall certify at the foot of any document setting out the evidence of, or produced in evidence by, that person that such evidence was taken, or document received in evidence, as the case may be, by them.

(2) Where such a request as is mentioned in section 18(1) of the Act includes a request that the evidence be taken in a particular manner, the court by which the evidence is taken shall, so far as circumstances permit, comply with that request.

10. Any request under section 19 of the Act for the taking or provision of evidence by a court in a Commonwealth country shall be sent to the court in question by post.

11.(1) Where under section 7 of the Act (variation and revocation in [] of orders) a court makes an order (not being a provisional order) varying or revoking an order to which that section applies, the registrar of the court shall send to any court in a Commonwealth country in which to his knowledge the original order is registered or by which it was confirmed, written notice of the variation or revocation.

(2) Where under section 10 of the Act (setting aside registration) a court sets aside the registration of an order, the registrar shall send written notice of that action to the [Minister for Foreign Affairs].

(3) Where under section 11(7) of the Act (confirmation and registration in [] of a provisional order made in a Commonwealth country) a court confirms a provisional order, the registrar shall send written notice of the confirmation and of any alteration made in the provisional order to the court which made the provisional order.

(4) Where under section 13 of the Act (variation and revocation of registered orders) a court makes an order (not being a provisional order) varying or revoking an order to which that section applies, the registrar shall send written notice of the variation or revocation to the court which made the order.

(5) Where under section 14(2) of the Act (confirmation of provisional orders affecting registered orders) a court confirms a provisional order, the registrar shall send written notice of the confirmation and of any alteration made in the provisional order to the court which made the provisional order.

12. Where a registrar registers an order under section 9(2), 11(7), 15(4) or 15(5) of the Act, he shall send written notice to the [Minister for Foreign Affairs] that the order has been duly registered.

13. Where a registrar registers an order under section 9(2), 11(7), 14(4), 15(4), or 15(5) of the Act, he shall send written notice to the payer that the order has been duly registered and of the person to whom and the hours and place at which payments under the order should be made.

14. Where it appears to the registrar of the court in which an order is registered under Part I of the Act that any sums payable under the order are in arrear he may, and if such sums are in arrear to an amount equal to four times the sum payable weekly under the order, he shall proceed in his own name for the recovery of those sums, unless it appears to him that it is unreasonable in the circumstances to do so.

15. Where the registration of an order is cancelled under section 15(2) of the Act, the registrar shall send written notice of that action to the [Minister for Foreign Affairs].

Proceedings under Part III of the Act

16. An application under section 24 of the Act shall be made through the registrar of the [type of] court [within the jurisdiction of which the applicant is residing].

17. An application received by the [Minister for Foreign Affairs] under section 25 of the Act shall be sent to the registrar of the [type of] court [within the jurisdiction of which the defendant is residing].

18. Where a court dismisses an application under section 25 of the Act for a maintenance order or an application received under section 28(2) of the Act for the variation of a registered order, the registrar shall send written notice of the decision and a statement of the court's reasons to the [Minister for Foreign Affairs].

19. Where a registrar registers an order under section 25(7), 26(2) or 26(3) of the Act, he shall send written notice to the [Minister for Foreign Affairs] that the order has been duly registered.

20. Where it appears to the registrar of the court in which an order is registered under Part III of the Act that any sums payable under the order are in arrear he may, and if such sums are in arrear to

an amount equal to four times the sum payable weekly under the order, he shall proceed in his own name for the recovery of those sums, unless it appears to him that it is unreasonable in the circumstances to do so.

21. Notice under section 28(4)(b) of the Act of an application for the variation or revocation of a registered order shall be in Form 4 in the Schedule to these Rules and shall be sent by post not less than six weeks before the date of the hearing of the application to the [Minister for Foreign Affairs] for transmission to the appropriate authority in the convention country in which the defendant to the application is residing.

22.(1) Where the evidence of any person is to be taken in pursuance of section 29(1) of the Act, subject to paragraph (2) below,

(a) the evidence shall be taken in the same manner as if that person were a witness in proceedings on an application for maintenance;

(b) any oral evidence so taken shall be put into writing and read to the person who gave it, who shall be required to sign the document; and

(c) the [judge] [magistrates] [justices] by whom the evidence of any person is so taken shall certify at the foot of any document setting out the evidence of, or produced in evidence by, that person that such evidence was taken, or document received in evidence, as the case may be, by them.

(2) Where such a request as is mentioned in section 29(1) of the Act includes a request that the evidence be taken in a particular manner, the court by which the evidence is taken shall, so far as circumstances permit, comply with that request.

(3) Any such document as is referred to in paragraph (1)(c) above shall be sent to the [Minister for Foreign Affairs] for transmission to the appropriate authority in the convention country in which the request originated.

Proceedings under Part IV of the Act

23. A Request for Enforcement under section 32(2) of the Act shall be in Form 5 in the Schedule to these Rules.

24.(1) A Notice of Application for the variation or revocation of a maintenance order under section 33(2) of the Act shall be in Form 6 in the Schedule to these Rules.

(2) The registrar shall give the payer notice in writing of the date fixed for the hearing by sending notice by post addressed to his last known or usual place of abode.

25. A Notice of Variation or Revocation under section 33(3) of the Act shall be in Form 7 in the Schedule of these Rules.

26. Where a registrar registers an order under section 34(2) of the Act, he shall send written notice to the [Minister for Foreign Affairs] that the order has been duly registered.

27. Where a registrar registers an order under section 34(2) of the Act, he shall send written notice to the payer by post addressed to his last known or usual place of abode that the order has been duly registered and of the person to whom and the hours and place at which payments under the order should be made.

28. If a registrar refuses to register an order under section 34 of the Act he shall give written notice of his refusal and of the grounds to the [Minister for Foreign Affairs].

29. If the payer applies under section 35 for the registration of a maintenance order to be set aside, the registrar shall give written notice of the application to the [Minister for Foreign Affairs], and if the registration is set aside shall give written notice thereof to the [Minister].

30. If the payee appeals under section 36 against any refusal to register, the registrar shall give written notice of the appeal and of the date of the hearing of the appeal to the payer by post addressed to his last known or usual place of abode.

31. Where it appears to the registrar of the court in which an order is registered under Part IV of the Act that any sums payable under the order are in arrear he may, and if such sums are in arrear to an amount equal to four times the sum payable weekly under the order, he shall proceed in his own name for the recovery of those sums, unless it appears to him that it is unreasonable in the circumstances to do so.

32.(1) Where the evidence of any person is to be taken in pursuance of section 40(1) of the Act, subject to paragraph (2) below,

(a) the evidence shall be taken in the same manner as if that person were a witness in proceedings on an application for maintenance;

(b) any oral evidence so taken shall be put into writing and read to the person who gave it, who shall be required to sign the document; and

(c) the [judge] [magistrates] [justices] by whom the evidence of any person is so taken shall certify at the foot of any document setting out the evidence of, or produced in evidence by, that person that such evidence was taken or document received in evidence, as the case may be, by them.

(2) Where such a request as is mentioned in section 49(1) of the Act includes a request that the evidence be taken in a particular manner, the court by which the evidence is taken shall, so far as circumstances permit, comply with that request.

3. Request for Confirmation of Provisional Order under Section 6, 7 or 13 of the Act

Maintenance Orders (Facilities for Enforcement) Act
198-, s.6, s.7 or s.13

REQUEST FOR CONFIRMATION OF A PROVISIONAL ORDER

[name of court] The Registrar,
[address of court]
.....
.....
.....

1. I enclose a certified copy of a provisional order made by this court and request that proceedings be instituted in your court for the confirmation of the order.
2. The order is provisional only and has no effect unless and until it is confirmed, with or without alteration, by a competent court.
3. I enclose a document, duly authenticated, setting out or summarising the evidence given in the proceedings in this court.

Orders made under s.6 only: [delete if inapplicable]

4. The order is a fresh provisional order in place of the order dated _____ and previously sent for confirmation in your court, which has been revoked.

[Signature of Registrar]

[Date of signature]19..

[Note: This form is to be sent to the Registrar of the court in which confirmation is sought.]

5. Request for Enforcement under Section 32

Maintenance Orders (Facilities for Enforcement) Act 198-, s.32
Hague Convention on the Recognition and Enforcement of
Maintenance Obligations

REQUEST FOR ENFORCEMENT OF A MAINTENANCE ORDER

The Registrar

[name of court]
[address of court]
.....

1. I enclose a certified copy of a maintenance order now registered in this court for transmission to the responsible authority in [name of country], requesting the enforcement of the order under the terms of the Hague Convention on the Recognition of Maintenance Obligations.
2. I certify that the order is no longer subject to the ordinary forms of review and that it is legally enforceable in [].
3. (Either) I certify that the payer appeared in the proceedings
(Or) I certify that notice of the institution of the proceedings, including notice of the substance of the claim, was served on the payer, and enclose a copy of a document establishing that fact.
4. I certify that legal aid was granted as follows: [give details, or delete if inapplicable]
5. (Either) I certify that to the best of my information and belief the arrears due under the order at the date hereof are [amount, in words in [] currency]
.....
(Or) I certify that to the best of my information and belief no arrears are due under the order at the date thereof.
6. The following is the information I have as to the whereabouts of the payer:
7. The following information may facilitate the identification of the payer:
8. I enclose a photograph of the payer [delete if no photograph is available].

[signature of registrar]
[Date of signature]19..

[Note: This form is to be sent to the [Minister for Foreign Affairs] for onward transmission to the responsible authority in the relevant Hague Convention country.]

6. Notice of application under Section 33

Maintenance Orders (Facilities for Enforcement) Act 198-
Hague Convention on the Recognition and Enforcement of
Maintenance Obligations

NOTICE OF APPLICATION

[name of court] The Registrar
[address of court]

To: [name of payer]
of [address of payer]

1. An application has been made by [name of payee]
..... that an order made by this court on [date]
..... and by which you were ordered as follows:
[details of order]

[Either] should be revoked
[Or] should be varied by an order requiring: [give details]

2. The substance of the application is as follows: [give details
of grounds, etc.]

3. The hearing may take place at any time after the expiry of six
weeks from the service on you of this notice. If you wish to
make written representations to the Court, or to adduce evidence
in person or through a representative you may do so.

[Signature of registrar]

[Date of signature]19..

[Note: This form is to be sent to the [Minister for Foreign Affairs]
for onward transmission to the relevant authority in the
Hague Convention country.]

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