

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
- Morocco
- 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.