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The international recovery of maintenance.

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Introduction.

As it is stated in the programme's introduction of this Seventh International Convention on Family Law, family in all of the forms we know today is the basic unit of society, and by definition, the place where life is defended.

However, when Family cases enter the justice system, despite the unanimous recognition that fundamental human rights receive under the rule of our National Laws, Constitutional Charters and International Conventions, those rights are in some way violated as they pass through the Justice system.

In many cases, the legal mechanisms and processes themselves which are designed to provide protection are insufficient to ensure the effective employment of the rights enshrined in this way.

Our topic today, the recovery of maintenance abroad, is particularly sensitive in that sense.

From my own personal experience, after more than 33 years in the judiciary in my country, of which the last 24 were spent in the Family Judiciary, I sincerely believe in the ultimate aim of our mission. For those of us who are part of the Justice System's personnel, it shall be carrying out processes, each day more moral, just, respectful, and guaranteeing the Human Rights of those involved.

This logically leads us to make a greater emphasis on the protection of vulnerable people in the different judicial relationships. In the modern interpretation and application of the constitutional principle of equality, treating unequally those who are unequal, we are practising what is called positive discrimination, positive actions that may lead to granting extra protection to those who for any reason are not under equal conditions before the process.

For those of us who are judges, it shall be through the application and interpretation of the Law; and for those who work in the Legislative and Administrative power, it shall be the search for more efficient legal instruments towards this ultimate end.

What follows is thought to be a perspective of the principal Conventions regarding international maintenance obligation, since the Bustamante Code of 1928, the United Nations New York Convention of 1956, passing through the Hague Convention of 1958 and 1973 and the Inter-American Convention of Montevideo of 1989, up to the recent Convention on International Recovery of Child Support and Other Forms of Family Maintenance and the Protocol of the Law Applicable to Maintenance Obligations of the Hague 2007; as part of an irreversible process of transformation of the old Inter-American and world Conventional Law, for the sake of protecting the person of the creditor in place of maintenance. Said objective is achieved by the International Legislator through the

creation of specific instruments to regulate the international maintenance obligation, already conceived since Quintin Alfonsín as a distinct and separate category of Family Law, that is to say, the transformation of classic conflict rules, to which material laws are added to ensure the functioning of the former. According to Operti: these are “conflict rules materially oriented to the protection of persons” as it was also seen by Santos Belandro and also construed in such way in the last Conventions mentioned, through the perfecting of the legal instruments of International, administrative and judicial Cooperation.

Professor Ruben Santos Belandro has said that in contemporary times, with the emergence of large industries, the ruin of small rural properties and crafts, the appearance of paid employment, the disappearance of small communities substituted by the anonymity of large urban areas, family has transformed profoundly. It has lost its patrimonial function together with the patriarchal structure connected to the same. The concept of role according to gender or age on the basis of rigid criteria disappears, being substituted by the concept of person. More flexible and interchangeable functions emerge among family members, be it the husband, the wife, the adult, the minor or the young person. In terms of legislation, there is a stress on the protection of women and minors.

The question of maintenance appears as a result of the disintegration of family. Those who are in need are generally the abandoned spouse and children. However, it is important to bear in mind that provision of maintenance, particularly in the case of children, may play a preventive role in the destruction of the family as a whole, avoiding child labour, providing education, and preventing greater moral neglect. This is why maintenance should be deemed as having a rescuing function regarding family organisation as well as satisfying the needs of a person, favouring a better relationship among the members of the family.

According to the author, our era shows an increase in the mobility of large contingents of persons due to wars, political or religious disturbances as well as the need to escape from adverse economic situations. These situations are the ones that have a deeper influence in Latin America because of their permanence in time. When the family as such thinks of

emigrating, the head of household is generally the first to go, and after this the standard of living goes down. With the distance, there is more laxness in terms of family ties, and unwillingness to provide maintenance on behalf of the father. Either he ceases to provide maintenance or he does this periodically. The lack of union in the family becomes an obstacle in the perception of the proper provision as well as the fact that the debtor has trespassed a frontier. What in the internal environment could have been an inconvenience, transforms in the international level into an insurmountable obstacle. The question arises as to how to make the right to maintenance between parents and children, between spouses, and between divorced persons or other relatives respected in the various legal systems.

Whether the person who is a creditor of the maintenance decides to take legal action in the state of her habitual residence, or if she chooses to take action in the debtor's state of habitual residence, there are a series of advantages and disadvantages. If it is in her residence, she will have better access to Justice but at the same time problems to obtain the exequatur in the country of the debtor's residence (it may sometimes be administrative and at other times judicial). Police standard and public policy may introduce obstacles; if she wishes to proceed to the latter, the advantage is that the exequatur will not be necessary, but the members of the "abandoned family", precisely because of the fact of abandonment, cannot afford their most basic necessities. That is why in most cases they find it impossible to take legal action abroad due to unfamiliarity with procedures, lack of lawyers with whom to maintain fluent and direct communication, difficulties to obtain poverty benefit in order to litigate and to the impossibility to appear in person.

The same imposes the unavoidable participation of States in the signing of international treaties to overcome these obstacles; in the field of the applicable law, in the corresponding jurisdiction and through international judicial cooperation leading to the drafting of uniform rules of Private International Law to avoid that geographical distance and legal systems with their own sets of regulations may lead in practice to a denial of

justice. Regulations should obey the humanitarian side of the law, making it necessary to impact both the procedural and the substantive field.

Professor Dr. Didier Opertti Badán, when expressing the motives of the inter-American convention project on conflict rules applicable to maintenance obligations for minors, quoted by Belandro, affirmed that: axiological reasons of values, justify the sacrifice of the technical matter of private international law, establishing the value dimension above the normative one.

The teacher Quintín Alfonsín considered that maintenance was a fundamental right of men: the right to survive, which must derive from any other category of family law. This position comes from long ago, from French jurisprudence, and for Santos Belardo, it is deeply rooted in the case of Mrs. De Menard, 1898, (The court of Chateau Thierry absolved her in spite of having stolen bread to eat for her and her child, here, the public ministry appeal was confirmed by the Court of Amiens) in which the existence of a right above penal norms demanded the punishment of the wrongdoer as a remedy to society and the victim. Ruben B. Santos Belandro, "Inter-American Convention on Maintenance obligations. Rules of Conflict materially oriented towards the protection of persons", Montevideo, Second Edition 1999, p. 28 onwards.

Meanwhile, Professor Eduardo Tellechea Bergmann considered that when there is a judicial relationship in which claimant and claimee are residing in different States or the claimee has assets or income perceived in another State, different from the one that constitutes the habitual residence of the claimant, it is imperative to resolve whether the payment of maintenance shall be subject to a territorialist criterion, or subject to the contrary, a system which allows for a set of solutions regarding cooperation and international solidarity. In the territorialist approach, the claimant lacking resources must confront the claim for maintenance under the laws of the country where the maintenance is due, and the debtor located in a State whose legislation does not acknowledge the obligation or it is submitted to less generous parameters, may avoid or diminish his obligation. The tendency is for this criterion to disappear. Under the internationalist thesis, although it allows for the best protection of those

under a maintenance regime, it presents difficulties due to the differences between internal legislations regarding the determination of the grounds on the basis of which the claim for maintenance must be made (mere subsistence of the beneficiary, a level according to the existing needs and debtor's ability, etc.) An important current has opted for making the international obligation of maintenance subject to the laws and courts with jurisdiction to regulate and resolve the categories included in a claim, filiations, parental rights, personal relationships between the spouses, non autonomous ranking, that is to say, the obligation of maintenance is an accessory obligation of the principal judicial relationship.

For the author, an autonomous solution is superior, capable of conceiving maintenance as a singular category, the person's right to subsistence. This position has been held since the 1950s by Quintin Alfonsín and it is recognised by modern Conventional Law in reference to the Hague Convention of October 1973 on Applicable Law to Maintenance Obligations and on the Recognition and Execution of Decisions Regarding Maintenance Obligations and the Inter-American Convention on Maintenance Obligations in Montevideo of 1989.

If maintenance integrates the individual's right to subsistence, it is then logical to make the person subject to the law of the State in which her livelihood is carried out, in other words, the place of the individual's habitual residence and subject to said States' Judges' Jurisdiction, without prejudice to other solutions which may be conceived, optional or subsidiary, with the purpose of facilitating its recovery. As far as the control problem when proceeding to acknowledge international rulings is concerned, the same requires specific normative answers to ensure the recognition of foreign judgements regarding rapid maintenance from abroad, abbreviated and non- discriminatory, allowing resolutions to be enforced fulfilling the purpose for which they were originally conceived.

Uruguay has signed two bilateral agreements between Uruguay and Spain on Conflicts of Laws regarding Maintenance for Minors and the recognition and execution of judgements and transactions regarding maintenance of 1987 and the Uruguayan-Peruvian Agreement on

International Claim and Enforcement of Judgements related to maintenance of 1984.

In turn there are several multilateral agreements: the Code of Private International Law (Bustamante Code) of 1928, the first conventional text where maintenance had a specific regulation in two articles: 67 and 68.

The Convention on the international recovery of maintenance of the United Nations of 1956 is the first Convention of a Universal nature in which a cooperation system is established among authorities (through issuing and intermediary authorities). It includes 65 State Parties, among them Uruguay and Colombia.

According to the broadest interpretation of any type of maintenance, the criterion to establish the location of the debtor and the creditor deliberately omits the word domicile or residence. According to article 11, the creditor must be in the territory of one of the State Parties. In this way, it was possible to include people displaced by war and those which were in refugee camps. Regarding the debtor, he must be under the jurisdiction of a State Party. This is the way it is interpreted in a broad sense; it is the international factor in the relationship which makes compliance possible in that State, for instance, if the debtor has assets in a State Party, in spite of not being there.

The Convention of The Hague of 1956 on the Law Applicable to Maintenance Obligations towards Children.

Convention of The Hague of 1958 concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children.

The Conventions of the Hague of 1973 on the Law Applicable to Maintenance Obligations and on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations towards Children, respectively.

The Inter-American Convention on Maintenance Obligations of 1989, in Montevideo.

All of them form part of a process tending to create a judicial category in private international law, with the purpose of taking away its regulation from the family structure and with the motive of protecting the maintenance creditor.

The criterion had not been developed yet in the Private International Law Treaties of 1889 and 1940 of Montevideo, where maintenance obligations do not constitute a specific category. They must be considered subsumed by the category of personal relationships arising from parental rights, for instance, according to the authors (Goldschmidt) or according to the filiation's category (Alfonsín).

In modern Conventional Law, what Santos Belandro describes as a new tendency has occurred; identifying the right to maintenance as a distinct and autonomous category, the adoption of rules of conflict materially oriented towards the protection of the person, in substitution for the classic rules of conflict.

Traditionally, in Private International Law, the norms of conflict are not material norms, but the ones that establish which is the applicable law to the relationship, and which should be the judge with international jurisdiction. In themselves, in Conventional Law, they have been considered neutral, that is, oriented merely to distributing among the different state laws, the jurisdiction, treating them equally. Moreover, traditionally, it has been understood that there is no place for considering interests to be satisfied or social values.

However, the rules of conflict materially oriented, or rules of conflict of a substantial nature, have been making their way through the task of searching for **closer links between the relationship and a judicial system.**

This is what has taken place in Private International Law relating to Maintenance obligations.

The Convention on the Rights of the Child, New York, 1989, in article 27 sets forth that State Parties recognise **“the right of every child”**, resorting to the principle of non-discrimination declared in a generalised fashion by the article 2 **“at a standard of living adequate for physical, mental,**

spiritual, moral and social development”, and provides that parents and other persons responsible for the minor have the primary responsibility “of providing within their best capacity and economic means, the living conditions necessary for the development of the child”. At the same time, numeral 3 of article 27 emphasises the **State Parties’ obligation to adopt, in relation to their means and conditions, the appropriate measures to help parents and other persons responsible to ensure an adequate standard of living for the minors.**

For the purposes of ensuring compliance of maintenance obligations in favour of children whose parents or other obligees to provide maintenance reside in a country different from the one of the child, numeral 4 of article 27, states (a programmatic norm) that the States **promote the adherence to existing international agreements or the conclusion of the same.**

The 4th Convention Specialised on Private International Law (Acronym in Spanish: CIDIP IV) of 1989, gave an answer as well as in the topic of international restitution, at a continental level, to the emerging obligation from the text of the United Nations, through the celebration of the Inter-American Convention on Maintenance Obligations. They are the background to this text, at a global scale: the conventions of The Hague on Applicable Law to Maintenance Obligations relating children and on the Recognition and Enforcement of Decisions relating to Maintenance Obligations with respect to Minors of 1956 and 1958, respectively. Furthermore, the subsequent and more ample ones of 1973 on the Recognition and Enforcement of Decisions relating Maintenance Obligations and on the Applicable Law to Maintenance Obligations as well as the United Nations Convention on International Recovery of Child Support of 1956 also gave an answer.

Montevideo Inter-American Convention on Maintenance Obligations of 15th July 1989.

It has been said that it is “a convention elaborated on the basis of a conflictualist methodology, in which as Opertti points out, formal rules

dominate, without prejudice to certain material norms, destined to ensure the functioning of the former”. (Fresnedo de Aguirre).

Colombia as well as Uruguay has signed this Convention, not ratified by the Colombian State and whose **scope** in the field of “ratione materiae”, established in article 1 resolves which is the **national law applicable** to an international maintenance claim, which is **the jurisdiction**, and **the way in which international cooperation shall take place**.

The claim has international status, and in consequence, it is applicable to the agreement, both when claimant and claimee have their habitual residence in different state parties or when they reside in the same country and the claimee has assets or income in other states with whom he could meet the requirements, article 1. The situation of the bilateral treaties in force between Uruguay and the Republic of Peru and between Uruguay and the Kingdom of Spain is similar.

Let us see who are the **rightholders** of this international maintenance claim. The convention protects the maintenance claim’s benefit of minors in their capacity as such, spouses, and former spouses in article 1, but allows for it to be applicable in favour of other creditors when signing, ratifying, or adhering in article 3, and otherwise the scope is that of article 1. The main difference is that the first Hague texts of 1956 and 1958 only cover maintenance for minors.

The Convention’s definition of “Minor” is autonomous with the aim of avoiding the disparity of solutions to which the application of a single rule of conflict could lead us to confront. In other words, for the sole conventional purpose, it is understood that it is the person that has not reached **the age of eighteen**. However, even having reached that age, it is possible to receive maintenance payment due when being a minor according to articles 6 and 7.

Article 4 establishes the **principle of non-discrimination**. The right to receive maintenance, in accordance with the Convention’s conditions, reaches everyone without distinctions of race, sex, religion, filiations, origin, situation, migration, etc. Article 4. **This basic principle of Public International Law is received for the first time at the Inter-American**

level in reference to a topic of Private International Law: the payment of maintenance. The same gained recognition in diverse Human Rights instruments before the Convention, namely: the 1948 Universal Declaration of Human Rights article 8, Covenant on Economic, Social and Cultural Rights article 2, International Covenant on Civil and Political Rights, article 2, etc., and especially the United Nations Convention on the Rights of the Child, as it has been discussed above.

In agreement with the texts of the Hague of 1956, of 1958 and of 1973 as well as the Uruguayan-Peruvian and Uruguayan-Spanish Agreements, the convention establishes that the **decisions adopted in the application of the treaty, do not prejudge regarding Filiations and Family relations between claimant and claimee**, in spite of the assumption that they may serve as evidentiary material. This norm **reaffirms the autonomous nature of the maintenance category in the modern PIL.** Moreover, it recognises the existence of parental links for sole maintenance purposes, article 5.

The Law Applicable. Article 6. Maintenance payment shall be regulated by **the law that the responsible authority to establish it deems to be more appropriate in the creditor's interest: whether it be the legal system of the claimant's state of domicile or habitual residence, since the debtor's domicile or habitual residence signifies the assignment of jurisdiction in terms of which is the applicable law, that is, the national law that is rational and connected enough to the case.** The term habitual residence is not defined, and it should be interpreted as "the subject's centre of life" in accordance with modern conventional law: Hague Conventions on Maintenance. Today we would refer to the abovementioned conventions and also to the Convention of 2007 and to the one on Protection of Minors (today we would refer not only to the one of 91 but of 96 as well).

It is the applicable law that establishes the payment amount, the conditions and the required time-limits for the exercise of the maintenance right, article 7. That is its field.

International Public Policy Exception. Article 22 authorises one state's court not to apply the Law of another if the court considers it manifestly

contrary to the fundamental principles of its public order. Moreover, it is a ground for the refusal to comply with foreign rulings.

Regarding the maintenance **amount**, the convention has a material norm (the principle of proportionality). Article 10 directly establishes that maintenance be proportional both to the economic conditions of the maintenance claimant and the claimee.

Jurisdiction in the international sphere. Article 8: the claimant may choose to file legal action before the authorities of her State of domicile or habitual residence, or before the domicile's State or habitual residence of the claimee, or the State where the debtor has personal patrimonial links such as assets possession, reception of income or economic benefits. This is what Tellechea defines as "limited Forum shopping". The purpose is to facilitate the beneficiary's reception, allowing her to opt for closer and more accessible courts depending on the place where the payment needs to be made. Alfonsín pointed out decades ago that **if for domicile it is understood the domicile which is habitual or principal residence of the claimant**, this allocation of jurisdiction of the judiciary is in accordance with the maintenance action's purpose and it is **the solution found by The Hague's Convention on Recognition and Enforcement of Maintenance obligations of 1958 and of 1973**. It was recommended by Professor Tellechea in view of the Convention's formulation as a **basic Connection with the purpose of selecting the applicable law and the competent courts without prejudice to admitting other rationally linked connections to the topic in the capacity of options for the choice of the claimant.**

The award criterion of the habitual residence or domicile of the debtor expresses the classic aphorism: "actor sequitur forum rei" but if it is the only basis for jurisdiction, it would deprive the indigent claimant of her right to follow a distant trial. On the other hand, it should remain an option allowing the benefit of eliminating the need to recognise the decision. The third option the State's court has is a reasonable connection of the place of possible enforcement where the claimee has patrimonial links.

Without prejudice, article 8 in essence provides a prorogation of jurisdiction post litem in favour of third States, provided that the debtor appears without objecting to said international jurisdiction.

Actions for increase, discontinuation or decrease. Article 9.

Criterion of protection of the maintenance rights holder for being the weaker party. The request for an increase may be presented before any of the international courts with jurisdiction while the decrease or discontinuation may only be presented before the court that fixed it.

International procedural cooperation. It is conceived by an ample concept, comprehensive not only of the mere formality (concept restricted and limited to the execution of letters rogatory, evidence, notifications and precautionary measures) but also including the international effectiveness of the foreign ruling, procedural condition of the foreign litigant, and the adoption of precautionary measures.

Professor Tellechea together with Dr. Angel A. Landoni, an expert litigator has sustained (RUDP N° 2/1983) **the recognition of foreign rulings as an undeniable act of international cooperation.** It is in comparative law subject to the most demanding requirements and this is due to the consequences implied by the recognition of the State that accepts said effectiveness. For this reason, it was understood as an advantage to treat them as an autonomous category in the event of decisions taken regarding maintenance.

In the Convention, the requirements are regulated by articles 11 to 13 and 22.

They generally adjust to the requirements of the Inter-American Convention on Extra Territorial Validity of Foreign Judgements and Foreign Arbitral Awards of Montevideo of 1979 (of which Colombia and Uruguay are signatories).

Formal Requirements: translation if needed and legalization (not necessary if it is obtained through the diplomatic, consular or central authority channels. Currently we must also mention the Hague Apostille Convention)

Procedural Requirements: (guaranteeing the existence of a due process). The ruling coming from a foreign jurisdiction must be made by the traditionally competent court. The claimant must have had loyal and effective opportunity for his defence and the ruling must take the form of an enforceable sentence in the country of origin.

Demand of international competence of the court that passed the ruling: international jurisdiction; the expression has a comprehensive sense of the jurisdiction or power of the judges of a State to decide on a litigation subject to their jurisdiction (direct international jurisdiction) and also the power of the court to produce an exequatur (indirect international jurisdiction). The Convention refers to the regulation of articles **8 and 9** which consequently are rules of both direct and indirect international jurisdiction.

Claimant's effective opportunity of defence article 11 (in which the claimant has been sued and exercises his right to a due defence in a way that is substantially similar to the requested State's. **Final judgement article 11, paragraph G.** Given the matter (the judgements own characteristics regarding maintenance that do not take the form of material res judicata since they are reviewable. They are formal, rebus sic stantibus) it is sufficient that the decision be stable and executed in the State of origin. It cannot have greater effects in the requested State than in the Requesting one.

Procedural requirements: Public order. The foreign ruling just as the application of the law **may be refused if the intervening authority considers it manifestly contrary to the fundamental principles of international public policy, article 22, that is to say, those fundamental non-negotiable principles of distinction and proportionality that constitute the basis of a State's legal organization.** The intervening court shall in order to know it examine the operative part of the judgement with the purpose of not undermining the essence of the legal system of the requested State. In that case, it shall cease to apply the prejudiced part so that the decision may be partially executed. Following the Spanish doctrine, Tellechea affirms that if the foreign ruling contains a pronouncement on different extremes, some being incompatible with the

international public policy of the requested State while others are compatible, for basic reasons of an elementary sense of justice, it must not signify complete denial. The same occurs with the due process. It should not be affected by the right to a defence in a trial according to the Requesting State's fundamental principles of international procedural public policy.

Ultimately, it is considered that an international public policy exception must be applied in severe cases, in which the recognition of the foreign ruling would mean the undermining of territorial essential principles of the State where the entry in force of the judgement must take place.

Foreign Judgement Control. Article 13. It is for the Court of First Instance with a hearing of the party to be bound (personal summons) and for the Public Prosecutor in an abbreviated process. This does not imply an action on the substance of the matter.

Foreign Maintenance Creditor's Procedural Standing. Recognition of procedural standing and non-discrimination, not demanding caution of any sort, article 14. Recognition of conditions of poverty, recognised by the State where the claim was presented by the State of the implementation. Thus, there is a duty to provide free legal aid.

Supervisory cooperation. Article 15. No matter what is the internationally competent jurisdiction in the current or future litigation, it must be adopted by **the jurisdiction which is closest to the assets or objects under supervision**. There is nothing prescribed as to how the measure should be communicated to the effectively competent magistrate in the international sphere nor about the powers he/she has to keep the measure or not. It is governed by the norms of the Convention of Montevideo of 1979 on the compliance of precautionary measures (or other cooperation protocols depending on the country).

Principle of protection of minors. Article 19. Professor Tellechea states that it is the *raison d'être* of the Convention and it is established in a material and pragmatic norm: it establishes the commitment of State parties to providing temporary maintenance aid within their possibilities

to abandoned children in their territory (in line with the norm of article 20.1 of CDN).

Moreover, article 20 is a **commitment on the international transfer of funds.**

Article 21. Lex Fori minimal protection. The applicable law's resulting situation may never be the cause of a decrease of the rights established by the forum itself. **The foreign law may extend those rights but it shall never undermine them.** It enshrines a sort of territorialism regarding the care of the weaker part, the claimant.

It is interesting to see how many of the solutions available to it and contemplated in this modern inter-American text were taken from the existing Hague Conventions of 1956 and 1958 on maintenance obligations and their enforcement.

Moreover, since many of them are reedited and extended, they become more functional in the text and of a greater universal vocation:

23 November 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter the 2007 Convention).

As we will see, the 2007 Convention was written to overcome deficiencies in the application of the existing instruments, to overcome the non-compliance of international norms and with a vocation of universality.

Dr. Ignacio Goicoechea, Latin-American representative of the Hague Convention on Private International Law commented on the great interest there was in Latin America and the role its representatives were performing as part of the negotiation of the 23 November 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance: "Millions of Latin-Americans have emigrated to countries with a greater economic development. Many of them do not provide maintenance for their families that continue living in the country of origin. In general, the mothers, who request maintenance for their children, are in a difficult economic situation and thus have no

possibility of confronting international litigation fees. In some cases, the situation is compounded because there is no knowledge of the whereabouts neither of the debtor nor of his economic condition. In other cases, the question of filiations appears as the first obstacle which becomes insurmountable for mothers living in poverty since they are unable to afford an international Filiations trial in order to then be able to make the maintenance claim. In general, practice indicates that the existing mechanisms do not give an effective response in the short term as the maintenance matter requires. If we had to identify the main deficiency in the mechanisms, we could affirm that it is the lack of effectiveness of administrative and legal international cooperation (including the lack of effective access to the procedures for maintenance creditors).

The explanatory report by Alegría Borrás and Jennifer Degeling highlights that the Hague Convention has recently successfully adopted several agreements of protection of children and adults and which include, in particular, modern norms on the recognition and enforcement of judicial decisions: the convention of 1980 on child abduction, the 1993 one on international adoption, the 1996 one on child protection and in 2000 on adult protection. The Agreement of 2007 is in line with all of them and with the Convention on the Rights of the Child.

The 2007 agreement writers' main concern, aim and inspiration has been to depart from the pre-existing Hague Conventions and other instruments, particularly, the United Nations Convention on the Recovery Abroad of Maintenance of 1956, in order to improve them respecting the mandate of the Convention on the Rights of the Child of 20 November 1989, articles 3 and 27 as discussed above.

The objective is achieving the effective compliance of maintenance obligations at an international level due to children and other family members; beyond the recognition of rights at the formal level that may not then be made effective due to a lack of the appropriate instruments because of legislation differences among the States. For this reason, **the norms of conflict are special**, making them more protective of the priority interest at stake; they are designed to ensure the efficiency in the payment (recognition and enforcement of decisions) through a system of

complete cooperation. Central Authorities are given a major role regarding their generic and specific qualities, and it adequately regulates the granting of **precautionary measures** previous to or during the enforcement process. It provides for **the transfer of funds through electronic means**, and accepts a wide range of **contractual sources for the maintenance obligation**, including those transmitted solely by electronic means. For all those functions, the system provides for the use of information technology.

Let us see how the Convention achieves this in its most relevant aspects.

It contains a series of autonomous definitions of the creditor, debtor, legal aid, written agreement, maintenance agreement, and vulnerable person, article 3.

Article 2 is applied to a) maintenance obligations due to people under age 21, derived from the parent-child relationship in the first place. It is possible to make reservations and apply it only to people under age 18 in a State. Reciprocity must be carried out.

Secondly, b) it is extended to the recognition and enforcement of obligations due to spouses and former spouses if there is an action included in paragraph a. And c) it is applied directly to spouses and former spouses except in chapter II and III.

Any State may declare article 63 which shall extend the application of all or part of the Convention to family relationships, filiations, matrimony or kinship, including in particular those obligations in favour of vulnerable persons. Apparently cohabitation was left out but could be understood as included in family relationships.

The clause of non-discrimination is at the end of paragraph 2.

Although nothing impedes the realization of direct requests by any interested party, the same are not the object of the agreement and it regulates them in a separate provision.

The same is centred specifically on administrative cooperation.

For this reason, it provides for the assignment of **Central Authorities (CA)**, one or more than one, if it is a Federal State for example, article 4.

The general function of the AC is **cooperating among them and promoting that their State authorities cooperate among themselves to reach the objectives established by the Convention**, article 5.

The ones that are specific of article 6 are: receiving and transmitting the requests in chapter III; initiating and facilitating the procedures regarding requests. All the necessary measures must be taken to: **promote legal aid; helping to locate the debtor or the creditor; facilitating the acquisition of information including the location of assets; promoting a friendly solution and voluntary payment; facilitating continued enforcement including any arrears; facilitating collection, gathering of evidence; aid to determine filiations when of it depends the payment of maintenance; initiating or facilitating precautionary measures tending to secure the final result of the maintenance trial; facilitating the notification of documents**. They may be exercised by public entities or entities under State control. This article and article 7 which allows the Central Authority to adopt or request its counterpart in another State to adopt specific measures foreseen in article 6. When there is no request pending and to aid a claimant or potential claimant then it must be presented. This would correspond to the preparatory process and cannot be interpreted granting the Central Authority exclusive functions of the Judicial Power according to the Law in the requested State.

Article 9 establishes that requests shall go through the State's Central Authority where the requester resides to the Central Authority of the other State (**residence excludes mere presence**).

Applicable Law: Convention and Protocol.

In article 10 of the Convention the **available requests** are enumerated **for the maintenance creditor: recognition** of a maintenance ruling; recognition and enforcement; enforcement of a ruling recognised by the requested State; **establishment of a decision** when there is no previous decision included in the determination of filiations if it is necessary; **establishment of a decision when there is a denial due to the lack of any**

requirement according to article 20; or for the motives foreseen in article 22 b) or e); the **modification** of a decision rendered in the requested State or in a State different to that of the requested one.

It also enumerates the **requests available for the maintenance debtor** when there is a judgment that has been appealed against him; the **recognition of a decision that limits or suspends previous enforcement** in the requested State; and **the modification of a judgement rendered in the requested State or a third State**.

This is a very important norm since it establishes which is the applicable law. In numeral 3, it states that “Except where this Convention expressly stipulates to the contrary, the requests foreseen in section 1c to 1f, 2b and c shall be subject to the norms”.

The same implies that the general principle in the Convention is that requests be processed in accordance with the Law of the requested state (Lex Fori).

However, this norm does not prevail when there is an attempt to obtain a conviction to serve maintenance or a modified judgement to the one already existing. In that case, the applicable law decides for the international rules of jurisdiction of internal source of the requested State, including the rules of conflict of laws. The explanatory report states that in said case, some requests could be left out, that is, not be admitted, and that the States bound by the Protocol shall apply its norms, as we shall see next. For this reason, the convenience of having States adhere is highlighted.

Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

It was drafted in parallel with the Convention and it is autonomous in relation to it. A State that is not a party to the Convention may adhere to it.

It covers uniform rules favourable to the maintenance creditor’s rights on which the necessary consensus was not achieved when drafting the

Convention, especially in common law countries in which decisions on maintenance matters are passed based on the *lex fori*. These States do not wish to modify their position since they consider it to be more effective and less expensive.

It is said that these rules are favourable to the creditor even if the State of residence has not adhered to the Convention.

It establishes a series of exceptions to **the principle of article 3 numeral 1: maintenance obligations shall be governed by the law of habitual residence of the creditor.**

The purpose is favouring maintenance reception by the creditor. This occurs on the basis of the ***lex fori as an alternative***. For example when it is not possible to obtain maintenance in virtue of the law of her habitual residence, or when she turned to the State of habitual residence of the debtor, unless it is not possible to obtain maintenance there, then the law of habitual residence shall apply (articles 3 and 4).

The application of the **law of habitual residence of the spouses** is also foreseen as an alternative to the law of residence of the creditor, article 5.

The **assignment of the applicable law for the purposes of a particular proceeding** takes place, through a previous convention of parties, ***lex fori*** of this procedure (article 7).

There is also **the assignment or election of the law applicable at all times by adults capable of defending their interests**, subject to certain conditions and restrictions (article 8). This is particularly useful when the parties conclude an agreement on maintenance.

The Convention and the requests' content.

Coming back to the convention, its article 11 regulates the request's content and the requirements and 12 the process before the Central Authority with the purpose of processing the request, demanding it is processed through **the most rapid and efficient means**.

Article 13 provides that every request, documentation or information presented through or by Central Authorities **may not be contested by the**

respondent by reason only of the medium (electronic for example) or the means of communication used between Central Authorities.

Article 14 contains a clause on the effective access to procedures, **non-discriminatory to the foreign litigant**. There is free aid when it is provided for in the Convention, more demanding conditions of access than for equivalent internal matters, and no need for a security to ensure the payment of expenses.

Moreover, article 15 stipulates **the principle of protection of children, establishing compulsory free legal aid to be provided by the requested State in the case of every request presented by the creditor who is under the age of 21 regarding any due payment derived from the parent-child relationship**. In some exceptional cases but not in any case of denegation, the declaration to allow the assessment of the means of the child is admitted. In any case, the most favourable legal aid must be provided.

Article 18 establishes **the principle in favour of the creditor in the case of children**: the modification presented by the debtor may only be presented in the place where the decision was adopted if the creditor has in it her habitual residence.

Recognition and enforcement: it refers to judicial and administrative decisions, including transactions or agreements standardised before competent authorities.

Article 20. Grounds for recognition and enforcement:

It should be noted that the process of recognition of a decision is the process through which the requested State verifies that in effect from the decision emerge rights and obligations in the State of origin while the process of Recognition and Enforcement is destined to determine if the decision is enforceable in the State of origin.

State Parties shall acknowledge the decision adopted by the State of origin **if it was the habitual residence of the debtor at the moment of initiating litigation, if debtor were expressly or tacitly subject to that jurisdiction, if the creditor had her habitual residence at the moment of initiating procedures, if the child had his/her residence in it, if the debtor had lived**

in it with the child or provided maintenance to the child, if litigation were not related to children, if the parties expressed their agreement in writing regarding jurisdiction, if the decision were taken by an authority exercising its competence during a civilian action or parental responsibility, except in the case that jurisdiction be based on the sole nationality of the parties.

Reservations by the States are permitted but they must take measures so that when the recognition of the reservation does not take place, a decision be issued in favour of the creditor.

A decision shall only be recognised if it has effects in the State of origin and it shall only be executed if it is enforceable in said State.

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Article 21 provides for **severability and partial recognition** if the entire decision may not be recognised.

Article 22 provides for an **international public policy exception** both substantial (manifestly incompatible with the public policy of the requested State) and procedural (absence of due process), for lis pendens as well as for the existence of another decision contradictory between the parties, or for a decision adopted in breach of article 18 (modification only in the creditor's forum) as grounds of refusal of recognition of foreign judgements.

It is important to note that the recent **Expert Meeting of the Hague's Conference of Private International Law and the Heidelberg Centre for Latin America, Santiago de Chile, 4-6 of December 2013 "Meeting of Santiago"** on the Hague Conventions of 1996 on International Protection of Children and of 2007 on Recovery Abroad of Maintenance, the importance of this concept was recalled for the purpose of facilitating the analysis of compatibility of the Convention before national legal systems.

In this way, international public policy operates as an exception to the application of foreign law, which is applicable to the international case in virtue of the indirect norm of the judge, with the purpose of controlling content and consequences of the material applicable law compatible with

the fundamental principles in the legal system of the Judge's State. It deals with those fundamental principles, whether they constitute positive law or not, which are in fact the essence and legal individuality of a State. Meanwhile, the internal public policy is formed by all those norms of a State's legal system that may not be modified by the will of the parties. Both notions must not be confused. International public policy is much more restricted than internal public policy.

Article 23 provides for the procedure to deal with recognition and enforcement requests, proceeding immediately to the recognition declaration or the register for its execution and also to the impugnation limitation in the case of refusal and non-suspension of the process in the case of subsequent remedies.

Article 28 establishes the **prohibition of review as to substance by the competent authority of the required State.**

Article 29 stipulates the **non-requirement of the physical presence of the child or requester in the recognition procedure.**

Article 30 includes agreements regarding maintenance. It **may be recognised and enforced provided that it be enforceable in the State of origin** (with the same requirements for the recognition and rejection of the public policy exception).

Chapter VI of the Convention: Enforcement by the required State.

Article 32 establishes that enforcement shall be carried out applying *the required state's law.*

The demand is for it to be swift. In the case of executed sentences or registered for their execution in application of chapter V, it shall take place without any other formality.

This internal law of the State of origin governs the temporary extension of the maintenance obligation. It also governs the limitation period for arrears, except if the expected time frame is more favourable for the creditor according to the law of the requested State.

Article 33. Non-discrimination. The requested State shall provide at least the same mechanisms of execution applicable to internal affairs.

Article 34 sets forth the **measures of execution: they shall be provided for in the respective internal law systems of the State parties; wage withholding, attachment of accounts and other sources, deductions from social security contributions, seizure of property or forced sale, withholding of tax refund, communications to credit institutions, withdrawal of licenses, for instance, driving license, use of mediation with the aim of achieving voluntary compliance.**

The domestic law provision of Uruguay is part of the “Profile of the Country” in the field of effectiveness of maintenance obligations.

In Uruguay, the domestic law (General Procedural Code, hereinafter GPC) under the reform of the year 2013 (Law N° 19,090) established that:

Remunerations, pension and retirement funds as well as withdrawals may be seized when the debt of maintenance is judicially decreed, affecting up to a third and in the case of alimony for minors (18 years of age) and persons with disability served by ascendants up to a half (article 381 numeral I of the GPC). If the seizure or injury is through a withholding, then the governing law is that of a third. If there are several withholdings, the attachment due to maintenance has priority over any other (Law 17,829).

Maintenance payments cannot be seized, with the sole exception of luxuries. Maintenance served for the benefit of children is untouchable by virtue of article 52 of the Childhood and Adolescence Code.

Uruguayan Law also provides **for the case of execution of final decisions, judicially approved transactions, or demand for payment on the garnishee** so that he presents a declaration of assets and rights. Once it has been breached, it allows the court of the implementation to carry out the **ascertainment of goods**, which includes information on Registers and public bodies, account balance information and deposits that the

garnishee may have in the financial intermediation entities (article 379.6 of the GPC).

It deals with solutions taken from articles 589 and 590 of the Spanish Civil Procedure Law of 2000, which have the purpose of effectively implementing the obligations emerging from titles of execution.

While Law 17,957 establishes the registration in the Registry of Personal Actions, Section Interdictions of maintenance debtors with a delay in more than three instalments and who had been previously notified. The consequence is that people registered cannot open bank accounts, request loans or credit cards, nor be contracted as State suppliers.

Article 35 of the 2007 Hague Convention establishes that the States must give priority to the transfer of international funds to be paid for maintenance obligations, through less expensive and more effective means.

Article 36: the term creditor entails public body acting on behalf of a person who is owed maintenance or to whom the refund for performance granted in the form of maintenance is owed (requirements for performance).

Article 37 deals with the direct requests regime, for instance, the one of vulnerable extra-age persons, provided that the decision be rendered before and that it provides maintenance for disability as well as age.

Article 40. It provides for the protection of personal data, that is, the confidentiality of the information by the authorities that process said data. In this sense, the non-disclosure in the case of judging there is potential risk must be taken into account by any other Central Authority, especially in the case of domestic violence to give an example.

41-42. There is no need to ask the requester for **neither legalizations** nor **power of attorneys** unless she acts as a representative before the authorities or to assign a representative.

43. Costs shall not have priority over maintenance payment.

Article 52 provides for a **maximum efficiency rule**. Without prejudice to the right to due process that the litigants have, the Convention establishes that no Convention nor instrument in force shall be disapplied between the contracting parties, the requesting one and the requested one, which provides more ample basis of recognition, swifter procedures, more favourable aid or allow the requester to present herself directly before the Central Authority of the required State.

Article 57. At the moment the contracting State ratifies, adheres or makes a declaration foreseen in the article 61 of the same Convention, it must provide information related to the laws, the procedures and services available on the web databases of said State regarding maintenance obligations and especially its execution for which it is possible to use a form of **country profile**, recommended and published by the Hague Conference.

Explanatory Report. Important Reflections.

Finally, deriving from the case on the explanatory report, which is an essential instrument of interpretation of the Convention, arises the need to transcribe two of its most important reflections which undoubtedly help in the correct understanding of the spirit of the Convention.

The field of application of Chapter V on the recognition and execution of decisions is almost the same as in the field of application of the Hague Convention of 1958 on maintenance and the Hague Convention of 1973 on Maintenance (Execution). Basing itself on these two instruments, the chapter shows great improvements derived from the advances that have taken place in the internal, regional or international systems of maintenance payment. In this way, the tendency is towards administrative systems regarding maintenance with respect to children (article 19(1)), the possibility of including agreements on maintenance (articles 3 e) and 19(4)), the “approach based on facts” (fact based approach) (article 20(3)), the restrictions to the ex officio review (article 23(4)) and the possibility of using standard forms (article 25). This chapter is prepared for using the

opportunities provided by the information technology advances which facilitate electronic communication and, at the same time, create guarantees in relation to the transmission of documents (articles 23(7) c), 25(2) y 30(5) b(ii)).” The Convention has an efficient system for the recognition and execution of decisions that allows the recognition of most of the existing decisions.

It shall eliminate the costs and delays inherent in the fact that the creditor has to make a new request because an existing decision has not been recognised. Together with Chapter IV, it shall also help to reduce the problems derived from contradictory decisions.

The fourth Recital of the Convention’s Preamble states that signatory States of this Convention intend to “take advantage of technological advances and create a flexible system capable of adapting to the changing needs and the opportunities offered by technological advances”. To this end, the Convention invites to the use of electronic transfer of funds (article 35) and is oriented to the use of electronic case management systems and communication systems, such as the iSupport that has been present on several occasions in the Special Commission during its work. This system contributed to the Convention’s effective implementation and would lead to greater consistency in the practice of the different countries. The system would significantly help to improve communication among Central Authorities besides mitigating the problems and expenses related to translation since the system would have a multilingual function. Such system could facilitate the daily functioning of Central Authorities established in virtue of the Convention and it would contribute to an improvement in record management. Moreover, this system could generate statistics for the follow-up of the Convention’s work. Together with management and control of records, the system would allow giving instructions to banks on the electronic transfer of funds and also allow sending and receiving communications and requests protected through the network in accordance with the Convention. While the Convention bridges the gap among the different internal legal systems in maintenance payment, the iSupport system bridges the gap among the existing local information technology systems.

We can only hope that all our Latin-American countries can continue in the path of advances regarding the payment of international maintenance obligations provided by the modern conventions we have just discussed and which are true judicial engineering works in the child's best interest and in the best interest of protecting family members and those most vulnerable.

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