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Ratification of the Convention on the recognition and enforcement of orders on maintenance allowances for children

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Séan FLANAGAN, Ireland

1. 1959 - 11th Session - First part

A. Draft Recommendation

The Assembly,

Having regard to its Recommendation 179 on the ratification of the Convention on Maintenance Allowances for children;

Whereas The Hague Conference on International Private Law, at its Eighth Session, also drew up a Convention on the recognition and enforcement of orders on maintenance allowances for children;

Whereas this Convention would allow the practical implementation of the Convention referred to in Recommendation 179 and thus constitutes its essential complement;

Whereas this Convention has, since 15th April 1958, remained open to signature by the States represented at this Eighth Session, including all Member States of the Council of Europe with the exception of Iceland and Ireland,

Recommends that the Committee of Ministers :

1. Should invite the Governments of Member States of the Council of Europe which were represented at the Eighth Session of the Hague Conference to sign and ratify the Convention on the Recognition and Enforcement of Orders on Maintenance Allowances for Children ;
2. Should invite Governments of Member States which were not represented at the Eighth Session of the Conference to adhere thereto;
3. Should inform the Assembly in due course of the action taken on this Recommendation.

B. Explanatory Memorandum

1. Introduction

1. On 21st January 1959, I and several other members of the Assembly tabled a Motion for a Recommendation relating to the Ratification of the Hague Convention on the recognition and enforcement of orders on maintenance allowances for children (Doc. 953), which the Assembly referred to the Legal Committee on 22nd January 1959. The Committee has duly studied it at its meeting of 9th March 1959. It was assisted in its discussion by the Secretary-General of the Hague Conference on Private International Law.

2.

Substance of the Hague Convention

2. This Motion was a sequel to Recommendation 179 of 26th October 1958, on the ratification of the Convention on Maintenance Allowances for Children (hereinafter referred to as " Convention on conflicts of law "). The connection between these two texts is obvious. The Convention mentioned in Recommendation 179 puts forward rules for resolving conflicts of law on children's maintenance allowances. Although standardisation of the rules' of conflict guaranteeing that the same law shall be applied in every country to each specific case of maintenance allowance has already gone far towards solving this humanitarian problem, it is clear that there can be no real protection of minors without recognition of court orders for maintenance allowances. For instance, proceedings are often instituted in the child's country of habitual residence, in which case, if the order of the court is not recognised in the country where the debtor is living, the child must institute fresh proceedings in that country—which involves him in almost insuperable difficulties, since he is usually destitute and living elsewhere.

3. When drafting the Convention on the recognition and enforcement of orders on maintenance allowances at its Eighth Session, the Hague Conference did not overlook the fact that several of its Member States had already signed, or were intending to sign, the New York Convention of 20th June 1956 on the Recovery Abroad of Maintenance. According to information given to this Legal Committee, the Hague Conference took the view, however, that, over and above the Hague Convention on conflicts of law, it was necessary to enable a person claiming a maintenance allowance to obtain simplified enforcement of an order in his favour. The New York Convention does not settle this problem; it does no more than provide, under Article 5, that a transmitting agency shall transmit to an intermediary body any order or other judicial act obtained by the claimant in a competent court of one of the Contracting Parties; this body must then institute either " exequatur or registration proceedings or a new action ". However, the procedure of exequatur or leave to issue execution is in many countries fraught with difficulties. Only a simplification of this procedure would enable a person claiming maintenance allowances to secure speedy enforcement of the initial order. It was these considerations that prompted the Hague Conference to draft the Convention which is the subject of the Motion in Document 953. This Convention was drawn up partly on the basis of preparatory work carried out by the International Institute for the Unification of Private Law in Rome.

4. I do not wish to go into the details of the 1958 Hague Convention, the text of which in appended herewith; I will simply draw attention to a few of its basic principles. It should first be pointed out that by virtue of Article 1 the Convention aims at the recognition and enforcement of any order by a judicial or administrative authority. The authors of the Convention believed its scope should extend to administrative orders, since in many States— particularly the Scandinavian countries and Austria—the administrative authorities may deal with maintenance claims. Secondly, the Convention covers not only orders issued in pursuance of the rules of the Convention on conflicts of law, but also those issued solely in accordance with the municipal law of the country of the court because there was no international element in the dispute. Furthermore, the Convention deals only with the substantive text of the maintenance order to be enforced and excludes, for example, arrangements for the custody of the children. Finally, the Convention on recognition and enforcement, like the Convention on conflicts of law, does not apply to relations concerning maintenance between collaterals.

Accession to the Convention

5. Article 17 of the Convention is a somewhat strict embodiment of the " closed convention " principle, for it makes the accession of countries not represented at the Eighth Session of the Hague Conference dependent upon the positive consent of the Contracting Parties. In this connection, your Committee would recall that the general question of the accession of Member States of the Council of Europe to Conventions drafted by the Hague Conference was considered by the Legal Committee during the preparation of

Recommendation 179 concerning the Convention on conflicts of law. It will be remembered that this Convention, too, makes the accession of a State not represented at the Eighth Session dependent upon the positive consent of the Contracting Parties. At that time the Legal Committee felt it was inconceivable, in view of the 1955 Agreement for co-operation between the Council of Europe and the Hague Conference, that a non-Member State of the Council which was a Member of the Hague Conference (i.e. Finland, Japan, Portugal, Spain, Switzerland or the United States) should have the right to veto the accession of a Member Government not represented at the Eighth Session of the Conference (Iceland and Ireland). While believing that this was merely a question of form, the Committee, as a matter of principle, included in the draft which became Recommendation 179 of the Assembly a paragraph proposing that the Committee of Ministers " invite the Hague Conference on Private fnternational Law, having regard to the Agreement concluded between the Confer- ! ence and the Council of Europe, to arrange that any conventions which it may prepare in the future should provide for the possibility of accession by any Member State of the Council of Europe which may so desire by the simple deposit of an instrument of accession and without further formality ". The Committee consider that for the time being, and for the purposes of the recommendation, there is no need to revert to this matter, as the Committee of Ministers has been assured by the Secretary-General of the Hague Conference that Recommendation 179 will be submitted to the Conference when it considers the drafting of the formal clauses of future conventions.

Appendix

Convention on the recognition and enforcement of orders for the maintenance of children 1[2]

The States signatory to the present. Convention;

Desiring to establish common provisions governing the recognition and enforcement of orders for the maintenance of children,

Have resolved to conclude a Convention for this purpose and have agreed to the following provisions :

Article 1

The purpose of this Convention is to ensure the reciprocal recognition and enforcement by the contracting States of orders pursuant to claims for maintenance of an international or domestic character, by legitimate, non-legitimate or adopted children, not married and being under 21 years of age.

If an order contains any clause relating to a matter other than maintenance, the effect of. this Convention shall be limited to the latter.

This Convention does not apply to orders for maintenance as between collaterals.

Article 2

An order for maintenance made in one of the contracting States shall be recognised and declared enforceable, without reconsideration of the merits, in the other contracting States, if :

1. the deciding authority had jurisdiction under this Convention;

2. the defendant was duly summoned or represented in accordance with the law of the State to which the deciding authority pertains; nevertheless, in case of j udgment by default, recognition and enforcement may be refused if, on consideration of the circumstances of the case, the enforcing authority concludes that the defaulting party was unaware of the proceedings, or was unable to defend himself, through no fault of his own;

3. the order has acquired force of res judicata in the State where it was made; nevertheless, orders for provisional enforcement and interlocutory measures shall, even though an appeal lies from them, be declared enforceable by the enforcing authority if like orders may be made and enforced in the State to which such authority pertains;

4. the order is not incompatible with an order made in the same matter and as between the same parties in the State.where it is invoked; recognition and enforcement may be refused if, before the order is made, an action was pending in the State in which it is invoked;

5. the order is not manifestly incompatible with the " ordre-public" of the State in which it is invoked.

Article 3

For the purposes of this Convention, the following authorities shall have jurisdiction to make orders as to maintenance :

6. the authorities of the State in whose territory the person liable for maintenance was ordinarily resident when the proceedings were instituted;

7. the authorities of the State in whose territory the person entitled to maintenance was ordinarily resident when the proceedings were instituted;

8. an authority to whose jurisdiction the person liable for maintenance has submitted either expressly or by arguing the merits without reservation in respect of jurisdiction

Article 4

The party which relies on an order or seeks its enforcement must produce :

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2. Drawn up by the Hague Conference on Private International Law and open for signature since 15th April 1958.

9. a copy of the order, complying with the conditions for authenticity;

10. sufficient documentary evidence to show that the order is enforceable;

11. in case of judgment by default, an authentic copy of the writ instituting the proceedings and sufficient documentary evidence to show that such writ was duly served.

Article 5

The enforcing authority's examination shall be confined to the conditions laid down in Article 2 and to the documents listed in Article 4.

Article 6

Except as otherwise provided in this Convention, enforcement proceedings shall be governed by the law of the State to which the enforcing authority pertains.

Any order declared enforceable shall have the same force and the same effect as if it had been made by a competent authority of the State in which enforcement is sought

Article 7

If the order which it is sought to enforce provided for the payment of a maintenance allowance at regular intervals, leave to enforce shall be granted in respect both of payments already due and of future payments.

Article 8

The conditions laid down in the preceding Articles for the recognition and enforcement of the orders referred to in this Convention apply equally to any order made by one of the authorities referred to in Article 3 and modifying a previous order for maintenance.

Article 9

A party who has been granted free legal aid in the State in which the order was made shall also be granted such aid in the proceedings for the enforcement of the order.

Security for costs shall not be required in proceedings under this Convention

Documents produced in proceedings governed by this Convention need not be endorsed or authenticated.

Article 10

The contracting States undertake to facilitate the transfer of sums allocated to fulfil maintenance obligations towards infants.

Article 11

Nothing in this Convention shall interfere with the right of a person entitled to maintenance to rely on any other provision applicable to the enforcement of orders for maintenance whether under the domestic law of the country in which the enforcing authority is located or under another Convention in force between the contracting States.

Article 12

This Convention does not apply to orders made before its entry into force.

Article 13

Each contracting State shall notify the Netherlands Government of the authorities which are competent to make orders for maintenance and to declare foreign orders enforceable.

The Netherlands Government shall give notice of such communications to the other contracting States.

Article 14

This Convention applies ipso jure to the metropolitan territories of the contracting States

If a contracting State desires the extension of this Convention to all its other territories, or to those of its other territories for whose international relations it is responsible, it shall so notify its intention by a document which shall be deposited with the Ministry of Foreign Affairs of the Netherlands. The latter shall transmit by diplomatic channels a duly certified copy thereof to.each of the contracting States.

Such declaration shall take effect as regards non-metropolitan territories only in respect of relations between the State which has made it and such States as shall have declared their acceptance of it. Such declarations of acceptance shall be deposited with the Ministry of Foreign Affairs of the Netherlands, which shall transmit by diplomatic channels duly certified copies thereof to each of the contracting States.

Article 15

This Convention shall be open for the signature of the States1 represented at the Eighth Session of the Hague Conference on Private International Law. [3].

It shall be ratified and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

A proces-verbal shall be made of every deposit of instruments of ratification and a duly certified copy of such proces-verbal shall be transmitted by diplomatic channels to each of the signatory States.

Article 16

This Convention shall come into force on the sixtieth day after the deposit of the fourth instrument of ratification as mentioned in Article 15.

As regards any signatory State ratifying the Convention subsequently, it shall come into force on the sixtieth day after the date of the deposit of its instrument of ratification.

In the case referred to in Article 14, second paragraph, the Convention shall become applicable on the sixtieth day after the date of the deposit of the declaration of acceptance.

Article 17

Any State not represented at the Eighth Session of the Hague Conference on Private International Law may accede to this Convention. A State desiring to accede shall notify its intention by a document which shall be deposited with the Ministry of Foreign Affairs of the Netherlands. The latter shall transmit by diplomatic channels a duly certified copy thereof to each of the contracting States.

The Convention shall come into force, as between the acceding State and a State which has declared its acceptance of such accession, on the sixtieth day after the date of the deposit of the document of acceptance.

Such accession shall take effect only in respect of the relations between the acceding State and such States as shall have declared their acceptance of such accession. Such declarations shall be deposited with the Ministry of Foreign Affairs of the Netherlands, which shall transmit by diplomatic channels duly certified copies thereof to each of the contracting States.

It is understood that the deposit of the document of accession may take place only after the entry into force of this Convention pursuant to Article 16.

Article 18

Each contracting State, on signing, ratifying or acceding to this Convention, may make a reservation in respect of the recognition and enforcement of orders made by an authority of another contracting State which would otherwise be competent by virtue of the residence of the person entitled to maintenance.

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3. Austria, Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Italy, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom.

A State which has availed itself of such a reservation cannot claim application of the Convention to orders made by its authorities when the latter would have jurisdiction by virtue of the residence of the person entitled to maintenance.

Article 19

This Convention shall remain in force for a period of five years from the date indicated in Article 16, first paragraph. This period shall begin to run from that date, even in respect of States which ratify or accede to it subsequently.

The Convention shall, unless renounced, be renewed tacitly at the end of each period of five years.

Denunciation shall be notified, at least six months before the expiry of that period, to the Ministry of Foreign Affairs of the Netherlands, which shall give notice thereof to all the other contracting States.

Denunciation may be limited to the territories, or to certain of the territories, indicated in a notification made pursuant to Article 14, second paragraph.

Denunciation shall take effect only in respect of a State which has given notice thereof. The Convention shall remain in force for the other contracting States.

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

Done at The Hague, on the 15th of April 1958, in a single copy, which shall remain deposited in the archives of the Netherlands Government, and of which a certified true copy shall be transmitted by diplomatic channels to each of the States represented at the Eighth Session of the Hague Conference on Private International Law and to any State acceding subsequently.