

COMMONWEALTH ACTION IN THE FIELD OF PRIVATE INTERNATIONAL LAW

Paper by the Commonwealth Secretariat

INTRODUCTION

1. The Hague Conference is the recognised international agency dealing with this specialist area of law. Commonwealth Law Ministers decided in 1977 that, rather than develop their own competence in intra-Commonwealth private international law, they would work with the Hague Conference. Several Commonwealth countries are Members of the Conference in their own right and the Commonwealth Secretariat is represented by an Observer delegation at the principal meetings in The Hague. The present paper draws the attention of Law Ministers to aspects of the work of the Conference that have important implications for intra-Commonwealth practice.

CHILD SUPPORT AND FAMILY MAINTENANCE IN INTERNATIONAL CASES

2. Commonwealth governments are well aware of the increasing mobility of people across national boundaries and of the increasing incidence in many countries of family breakdown. Especially when the child or other person in need of maintenance lives in one country and the person who should provide support is in another, the result can be that children and other family members face severe financial hardship and become a claim on the welfare provision of the state. An adequate system for the enforcement of support obligations across national boundaries is very much in the interests of governments, which will wish to provide help to those in need, so vindicating the rights of the child to which much international attention has been paid in recent years, and to place the burden on those who should properly bear it.

Commonwealth arrangements

3. This is an area in which there is a distinct Commonwealth interest, not least because of the patterns of movement from one Commonwealth country to another. Most Commonwealth countries have on their statute books legislation reflecting intra-Commonwealth arrangements dating from the 1920s and sometimes referred to as the Reciprocal Enforcement of Maintenance Orders (REMO) arrangements. Some 70 Commonwealth jurisdictions (including states and provinces within federal or composite countries) are party to these arrangements, but some, such as Canada, are moving away from the system.

4. Under the REMO system, where the maintenance claim is against someone now living in another designated country, a provisional order is made in the claimant's country of residence but needs to be confirmed after a separate hearing in that of the respondent. The complexity of the legislation, the infrequency with which any particular court will encounter it, and the likelihood that the court will be low in the judicial hierarchy, all mean that the practical operation of the REMO system can prove difficult. Two courts are involved and each hears directly from only one party. That is not an ideal arrangement but those who devised the system, in days when international communication was much more difficult than it is today, saw no alternative given the relatively small sums of money involved.

5. These intra-Commonwealth arrangements are no longer adequate. There are a number of reasons for this.

- (i) The legislation was drafted with the case of deserted wives in mind; the great majority of cases are now child support cases, and the need for government assistance in handling claims by children is more pressing than in claims between adults. Despite the great scientific advances in ascertaining paternity, many of the older statutes exclude 'affiliation orders', which seems inappropriate in modern conditions. So far as spousal maintenance is concerned, almost all the legislation is limited to orders for the periodical payment of sums of money; lump sum orders, property adjustment orders and other types of financial provision are excluded; those types of orders may have become more frequent as divorcing spouses seek a 'clean break'.
- (ii) The legislation requires the recognition and enforcement of an order even if the requested country would not recognise the relationship between the parties as giving rise to a support obligation; given the sharp divergence of opinion as to the status of partnerships outside marriage (and especially of same-sex partnerships) some ability to refuse enforcement on public policy grounds may be thought desirable.
- (iii) Perhaps most significantly, several Commonwealth countries have taken child support cases out of the normal courts and entrusted them to an administrative agency which applies a statutory formula to determine the level of support; in some countries these agencies handle only domestic cases, but others handle cases with an international dimension. The effect is that in Australia, for example, the REMO system cannot operate as originally envisaged.

A new Hague Convention

6. The Hague Conference on Private International Law is drawing up a new Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. It is likely that the Convention will be completed and opened for signature by the end of 2006. The latest draft, dated April 2005, sets out the objects of the Convention as being:

- 1. to establish a comprehensive system of co-operation between the authorities of the Contracting States for the international recovery of child support and other forms of family maintenance;
- 2. to provide for the recognition and enforcement of maintenance decisions.

7. The core functions of the designated Central Authority under the Convention would be to transit and receive applications for the recognition and enforcement of orders, and to initiate, or facilitate the initiation of, proceedings in respect of such applications or proceedings for the making of an order. The present draft specifies in Article 6(2) other functions, some still the subject of debate:

- 2. In relation to such applications they shall take all appropriate measures -
 - a) where the circumstances require, to provide, or facilitate the provision of legal assistance;
 - b) to help locate the debtor;
 - c) to help to obtain relevant information concerning the income and other financial circumstances of the debtor or creditor, including the location of assets;
 - d) to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by the use of mediation, conciliation or similar processes;
 - e) to facilitate the ongoing enforcement of maintenance decisions;
 - f) to facilitate the [collection and] expeditious transfer of maintenance payments;
 - g) to facilitate the obtaining of documentary or other evidence;
 - h) to provide assistance in establishing parentage where necessary for the purpose of recovery of maintenance;

- [i) to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending or anticipated maintenance application;]
- [j) to facilitate service of process.]¹

8. It is recognised that in some countries the assistance that could be given would be limited, given that financial and human resources vary enormously from one country to another. The agencies in the United States, for example, handle some two million support orders (and their federal agencies will handle only cases involving child support and not 'spouse-only' cases); other countries would only be able to devote quite limited time and money to the work as one part of the budget of a Law (or other) Ministry. The strongly-held view at The Hague is that the clarity which the Convention would produce, coupled with the use of standard forms and some support through the continuing work of the Hague Conference, would ease enforcement of support obligations, and actually reduce the potential cost to states in terms of welfare benefits and associated costs.

9. Under the Convention, an applicant resident in one country seeking maintenance from a person resident in another country would be able to use the administrative co-operation procedures of the Convention to gain assistance in obtaining enforcement of an existing order or the grant of a new order from the authorities (the courts or the appropriate government agency) of the latter country. Where a new order was sought, there would be only one proceeding, not two as in the REMO system, and the use of standard forms would eliminate the complex documentation generated under the REMO system.

10. The Convention will contain rules specifying which countries' orders will be entitled to recognition and enforcement. The proposed rules have a certain complexity, mainly because of the inability of the United States to accept the residence of the creditor as a basis for recognition. The current draft of the relevant Article 15 is in the following terms:

1. A maintenance decision made in one Contracting State (the State of origin) shall be recognised and enforced in other Contracting States if –
 - a) the respondent was [habitually] resident in the State of origin at the time proceedings were instituted;
 - b) the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;
 - c) the creditor was [habitually] resident in the State of origin at the time proceedings were instituted;
 - [d) there has been agreement to the jurisdiction by the parties in writing or evidenced in writing;
 - e) the decision was made by an authority having jurisdiction on a matter of personal status, unless that jurisdiction was based solely on the nationality of one of the parties.] ; or
2. A Contracting State may make a reservation in respect of paragraph 1 c)[, d), or e)].
3. A Contracting State making a reservation under paragraph 2 shall recognise and enforce a decision if its law would in similar [factual] circumstances confer or would have conferred jurisdiction on its authorities to take such a decision;
4. A Contracting State shall, if recognition is not possible as a result of a reservation under paragraph 2, and if the debtor is [habitually] resident in that State, take all appropriate

¹ Please note that the inclusion of brackets replicates the original and indicates material which is still under discussion.

measures to establish a decision. This paragraph does not apply to direct applications under Article 26.

5. A decision shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

11. Commonwealth governments have shown a considerable interest in the development of the Convention. Ms Jennifer Degeling, formerly of the Attorney-General's Department in Canberra, is one of the two co-Rapporteurs and Judge Jan Doogue of the Family Court of New Zealand is chair of the Drafting Committee. Australia, Canada, India, Malaysia, New Zealand, Pakistan, South Africa, Sri Lanka, Uganda, the United Kingdom and Zimbabwe have been represented in the negotiations as has the Commonwealth Secretariat.

12. By the time of the next Meeting of Law Ministers, the text of the Convention will be available, together with its Explanatory Report. Law Ministers may wish to have on the agenda of that Meeting a consideration of the Convention and its impact on the REMO system.

REMO Orders and the new Convention

13. One particular issue requires more urgent consideration. Some Commonwealth countries will become parties to the new Convention in due course, but will no doubt retain the REMO system for the foreseeable future for dealings with Commonwealth countries that have not become parties. It is very desirable that orders made under the REMO system should be capable of recognition under the Convention. The Convention's recognition rules (see paragraph 10 above) require an order to originate from a Contracting State. The REMO system involves an order made, in effect, by the combined efforts of two courts, that which made the provisional order (in Country A) and that which confirmed it (in Country B). Courts and commentators have sometimes described the result as 'really' an order from one of those countries; but are not in agreement as to which country that is.

14. The issue was raised at the April 2005 meeting of the Special Commission drafting the Convention by the Observer for the Commonwealth Secretariat. There seems to be a measure of support within the Commission for a solution, requiring careful drafting, under which each of Country A and Country B would be regarded as a State of origin for the purposes of the recognition rules. It would be helpful in the negotiations if Law Ministers felt able to endorse this approach.

THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

The Hague Judgments Project

15. A major project of the Hague Conference over the last decade was an attempt to agree a potentially world-wide Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This was an extraordinarily ambitious project, requiring agreement on the rules governing the jurisdiction of the courts of Contracting States as well as the rules as to the recognition and enforcement of foreign judgments. Agreement could not be reached on such a broad canvas but one aspect of the work led to the successful negotiation of the Convention on Choice of Court Agreements earlier this year.

16. The Member States of the European Union now have common rules as to jurisdiction in civil and commercial matters, and are able, in reliance on those common rules, to accord virtually automatic recognition to the judgments of the courts of other Member States. The experience gained in the course of work at The Hague points to the difficulty of reaching a similar level of agreement between countries which do not have the geographical contiguity, developed internal market and strong legal and political institutions of the EU. Law Ministers may feel that it would be unwise to

devote resources to a search for agreed bases of jurisdiction to be adopted by Commonwealth countries.

Commonwealth Practice as to Foreign Judgments

17. Law Ministers have, however, long recognised the importance to their financial institutions, commercial enterprises and private citizens of effective systems for the enforcement of foreign judgments. The statute books of most Commonwealth countries contain Acts derived directly or indirectly from either or both of two United Kingdom statutes, the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. The latter is a slightly revised version of the former, and is applicable to judgments given in non-Commonwealth countries. It is also possible in most Commonwealth countries to enforce a foreign judgment by an action at common law on the judgment-debt. The rules applying in such cases are similar to those under the legislation but not identical, and not wholly clear: a case (*Adams v Cape Industries plc*, 1989) requiring the clarification of aspects of these common law rules occupied 34 days of argument in the English High Court and a further 21 days in the Court of Appeal.

18. The principal features of the Commonwealth position were reviewed in a full report for Law Ministers in the mid-1970s. It was in fact consideration of that report which led to the decision to work closely with the Hague Conference. No full survey has been made of reforms undertaken subsequently in individual Commonwealth countries, but overall the position is thought to have changed relatively little. It was found:

- (a) that the effect of the legislation in each country generally depended on the designation of 'reciprocating States', supplemented in the practice of some countries by bilateral agreements;
- (b) that the legislation provided for the registration of judgments where the country of origin was regarded as having a proper claim to jurisdiction on criteria set out in the Act; these were almost always narrower than the bases upon which the country requested to enforce the judgment would itself claim jurisdiction: in particular, a judgment granted after service of process outside the country of origin would not be recognised, even though almost all Commonwealth countries would assert jurisdiction on that basis.

19. The criteria for recognition in the case of a judgment given in an action in personam, as set out in legislation on the 1933 model, are:

- (i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings . . . ; or
- (ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court; or
- (iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court; or
- (iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
- (v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.

20. In addition, the judgment has to be final and conclusive as between the judgment debtor and the judgment creditor (or require the former to make an interim payment to the latter); and has to provide for the payment of a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty.

Improving Commonwealth practice

21. Law Ministers may wish to consider whether use could be made of the enormous effort by governments and experts at The Hague in order to improve intra-Commonwealth practice. The 'Interim Text' of a possible Hague Convention drawn up in 2001 identified, albeit with many unresolved issues, a number of bases of jurisdiction the use of which would entitle the resulting judgment to recognition. In the context of the work at The Hague, which attempted to prescribe rules as to jurisdiction and to meet the needs of the civil law and common law traditions and to reconcile the contrasting approaches of the United States and the EU on many issues, the draft text had to be extremely detailed. That text could, however, be drawn upon in the context of a much more limited exercise.

22. This would make no attempt to prescribe jurisdictional rules: it is for each Commonwealth country, subject to treaty and other international obligations, to determine the rules governing the jurisdiction of its courts. It would identify possible clarifications and improvements to the rules governing the recognition of foreign judgments, and suggest ways in which those clarifications and improvements could be taken into Commonwealth practice without requiring a major re-negotiation of existing arrangements. Examples are given in the paragraphs which follow.

Clarifications

23. In the Hague text the primary basis of jurisdiction was the residence of the defendant. In Commonwealth practice, this remains the principal basis upon which courts recognise foreign judgments (see paragraph 19(iv) above, which also uses the concept of the principal place of business). The Hague text contains useful clarifications of the meaning of 'residence' in this context. It provides that a natural person is to be considered to be resident (a) if that person is resident in only one State, in that State; and (b) if that person is resident in more than one State, in the State in which that person has his or her principal residence; or if that person does not have a principal residence in any one State, in each State in which that person is resident. An entity or person other than a natural person is to be considered to be resident in the State (a) where it has its statutory seat; or (b) under whose law it was incorporated or formed; or (c) where it has its central administration; or (d) where it has its principal place of business.

24. Similarly the Hague text corresponding to the basis noted at paragraph 19(v) above refers to actions in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, provided that the dispute relates directly to the activity of that branch, agency or other establishment, and includes a possible clarification that a legal entity shall not be considered a 'branch, agency or other establishment' by the mere fact that the legal entity is a subsidiary of the defendant.

Bases not found in current Commonwealth practice

25. The Hague text also suggests a number of bases for taking jurisdiction, which are found in international instruments, such as the regulation governing jurisdiction within the European Union, and in national legislation. In Commonwealth practice, these are grounds on which many courts would give leave for the service of process outside the jurisdiction; but although this would give jurisdiction to the court concerned, statutes based on the UK models (and the similar common law rules) would not enable the resulting judgment to be recognised and enforced elsewhere.

26. Cases falling into this category include the following:

- (i) proceedings concerning immovable property in the country in which the property is situated;
- (ii) proceedings relating to disputes among the trustee, settlor and beneficiaries of a trust concerning the validity, construction, effects, administration or variation of a trust in the courts of a country designated in the trust instrument for this purpose;
- (iii) actions in contract in the courts of a country in which (a) in matters relating to the supply of goods, the goods were supplied in whole or in part; (b) in matters relating to the provision of services, the services were provided in whole or in part; (c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part;
- (iv) actions brought by consumers (natural persons acting primarily for personal, family or household purposes) in the country in which the consumer is habitually resident against another party acting for the purposes of its trade or profession in respect of a consumer contract;
- (v) actions brought by employees in the State in which the employee is habitually resident arising out of individual contracts of employment; and
- (vi) actions in tort in the courts of the State (a) in which the act or omission that caused injury occurred, or (b) in which the injury arose.

27. Almost all Commonwealth countries will take jurisdiction in most if not all of these cases, either under specific legislation or as a result of the exercise of judicial discretion. It is not suggested that any country should change its practice in this regard. The important question is this: is there any policy reason why a judgment given in one Commonwealth country, the courts of which have taken jurisdiction under the law of that country on one of these bases, should not be entitled, subject to some public policy defences, to be recognised and enforced in another Commonwealth country?

28. If Law Ministers' views on that question favour the recognition and enforcement of such judgments, changes in Commonwealth practice will be required. They might wish to invite the Commonwealth Secretariat to examine the issues in greater depth and to report to Senior Officials on possible courses of action.

OTHER HAGUE CONVENTIONS

29. Attention is drawn to the annexed chart showing, in respect of each Hague Convention, the current signatures, ratifications and accessions in Commonwealth countries. Conventions which have attracted considerable Commonwealth interest are those dealing with the Form of Wills, with aspects of civil procedure (Legalisation, Service of Process and Taking of Evidence), and with issues affecting children (Child Abduction, Adoption co-operation, and the recent Protection of Children Convention). The Commonwealth Secretariat has issued 'accession kits', explanatory documentation designed specifically for Commonwealth governments on a number of these conventions, and plans to issue revised and additional papers in the near future.

THE HAGUE CONVENTIONS: SIGNATURES, RATIFICATIONS AND ACCESSIONS status on: 25 July 2005

NON-MEMBER STATES	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII	XIII	XIV	XV	XVI	XVII	XVIII	XIX	XX	XXI	XXII	XXIII	XXIV	XXV	XXVI	XXVII	XXVIII	XXIX	XXX	XXXI	XXXII	XXXIII	XXXIV	XXXV	XXXVI	XXXVII			
Civil procedure																																							
Sales of goods																																							
Transfer of title *																																							
Sales - choice of court *																																							
National law vs law of domicile *																																							
Recognition of companies *																																							
Maintenance children - appl. law																																							
Maintenance children - enforcement																																							
Protection of minors																																							
Form of wills																																							
Legalisation (Apostille)																																							
Adoption																																							
Service abroad																																							
Choice of court *																																							
Enforcement of judgments																																							
Protocol on jurisdiction																																							
Divorce - recognition																																							
Traffic accidents																																							
Taking of evidence																																							
Administration of estates																																							
Products liability																																							
Maintenance - enforcement																																							
Maintenance - applicable law																																							
Matrimonial property																																							
Marriage																																							
Agency																																							
Child abduction																																							
Access to justice																																							
Trusts																																							
Sales contracts *																																							
Sales - applicable law *																																							
Successions - applicable law *																																							
Adoption - co-operation																																							
Protection of children																																							
Protection of adults *																																							
Securities held with intermediaries *																																							
Choice of court agreements *																																							

* These Conventions have not yet entered into force

A = accession (Convention in force) R = ratification (Convention not in force) A = accession (Convention not in force) R = ratification (Convention not in force) S = signature (Convention not in force)

N.B. The date of entry into force of a Convention following a ratification or an accession may be later than the date of this chart.

For more detailed information, please consult the Hague Conference website, at <http://www.hcch.net>.