European Association of Private International Law (EAPIL)

POSITION PAPER

in response to the Hague Conference on Private International Law's invitation
to participate as an Observer in the
First Meeting of the Special Commission on the practical operation of the

2007 Child Support Convention and its Protocol on Maintenance obligations

May 2022

The European Association of Private International Law (EAPIL) is an independent and non-partisan organisation established in 2019 as a non-profit association under the law of Luxembourg with the aim of promoting the study and development of private international law. It does so by fostering the cooperation of academics and practitioners in European countries and the exchange of information on the sources of the discipline, its scholarship and practice. EAPIL has more than 360 members, mostly academics and practitioners, based in more than 60 countries.

By this position paper, EAPIL intends to take part in the discussion launched by the Hague Conference on Private International Law (HCCH) on cross-border recovery of maintenance obligations under the application of the international instruments concluded in 2007 on its own initiative.

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A The Private International Law (PIL) perspective

1. Through the present paper, the *European Association of Private International Law* (EAPIL) is delighted to take part in the discussions of the *Special Commission* on Child Support/Maintenance, by expressing its position on some issues considered as paramount from a private international law (hereinafter: PIL) point of view. The EAPIL's Working Group (hereinafter: WG) has specifically taken into account the items listed on the SC agenda, although additional reference has been made to issues that are considered urgent even though not expressly mentioned on the agenda (e.g. point D below). At the same time, administrative issues concerning the cooperation between Central Authorities, as well as some practical questions such as the transmission of documents or money and iSupport, have not been considered due to more practical rather than academic nature of these issues.

B Concepts

2. The first theme we wish to address is the interpretation of certain **concepts** used by the 2007 Convention [hereinafter: *the Convention*] and/or Protocol [hereinafter: *the Protocol*] on Child Support and Maintenance. As it is well-known – and according to an unchallenged principle included in the 1969 Vienna Convention on the Law of the Treaties – it is of a paramount importance that an international convention receives a uniform interpretation by the Parties. The same principle is certainly presupposed by the Convention in Art. 53[1], and by the Protocol in Art. 20.

3. On this basis, it would, therefore, seem appropriate that the following concepts deserve specific attention during the SC.

B.1. «Spouse» (and relationships not provided by the law of the requested State)

4. The first concept to be analysed can be found in Art. 2(1)(b) and 2(1)(c) of the Convention, and it is directly linked to the substantive scope of application. This is the notion of **spouse**[2]**,** directly linked to the underlying concept of *marriage*. More precisely, the reference is made by this Article to «spousal support» as the content of a decision to be recognised and/or enforced on the basis of the Convention. Similarly, Art. 5 of the Protocol is devoted to establish a «Special rule with respect to *spouses and ex-spouses*».

5. It is clear that the Convention on child support allows the Parties to 'minimise'

[1] Convention, Art. 53 (Uniform interpretation). *In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application*.
[2] «*Époux et ex-époux*» according to the French version.

its application to such family relationships[3]. It can be said that a clarification on the exact (minimum) scope of the notions of *marriage* and *spouse* is pivotal for a uniform interpretation and application of the convention at stake. This is important considering the differences that exist in domestic family laws, which are apparent from the responses given by the Contracting States to the questionnaires on the practical operation of the Convention and the Protocol (prel. docs. 4 and 5).

6. It is important to stress that this particular situation – regarding the precise content and extension of the notion of *marriage* – is different from the one regarding other family relationships possibly falling within the scope of the Convention[4]. The reason is not to be found in the fact that other family forms can be removed from the Convention's scope, lacking a declaration of *ex* Art. 63 (providing for a specific extension in that direction) by the single Contracting State. Instead, it is because spousal support is – at least in a part[5] – included *de jure* by the Convention. There are two main interpretative paths that could be followed. On the one hand, it could be considered that the concept of marriage has to be defined according to the national choices at stake – so that a further alternative between the domestic laws of the State where the decision was rendered (State *a quo*) and the State requested for the recognition/enforcement (State *ad quem*) arises. Alternatively, an *autonomous definition* of 'marriage' could be provided for the 2007 Hague Convention.

7. The first option creates the risk that a significant difference between domestic family laws could affect the (uniform) application of the Convention and, ultimately, undermine creditors' rights and legitimate expectations. This could happen, in particular, where marital status is based on a **same-sex marriage** which is not recognised by the requested State. In such cases, it could happen that a same-sex marriage *is not qualified as a marriage at all* by a Country whose family law only recognises the marital union between a man and a woman. In these situations, the Convention cannot apply, for the simple reason that any decision to order the payment of maintenance would be considered as based upon a family relationship other than a marriage, and so not (automatically) covered by the Convention.

8. Unfortunately the second option may also be problematic for two reasons (*i*) the content of such an autonomous notion proper to the Convention; (*ii*) the impact that such a notion could have on national systems (and legislative discretion).

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[3] Lacking a specific declaration of extension to be made according to Arts. 2(3) and 63 by the single Contracting State, the Convention is entirely applicable only to spousal support when the application is made with a claim arising from a parent-child relationship.

[4] Hereinafter, a generic reference made for easiness to the Convention only, has to be considered as made to the Protocol as well.

[5] See Convention's Arts. 2(1)b and 2(1)c.

9. Regarding point (*i*), it is increasingly difficult to argue that an autonomous notion of marriage should not be irrespective of identity or difference of sex between parties: many Countries in (Western) Europe have now introduced the so-called 'egalitarian marriage', and it is quite evident that these States are going to apply the Convention and the Protocol to all types of marriage. At the same time, it is also difficult to affirm that the autonomous notion is surely equivalent to that one of egalitarian marriage, because (*ii*) this would determine a strong preference towards certain legal systems above those that strongly wish to maintain a traditional institution of marriage and to avoid the approval of registered partnerships aimed at granting to the couple a comparable status and (at least mostly) the same legal effects. Moreover, the explicit favour for the elaboration of 'autonomous notions' is actually peculiar to the EU system and the case law of the CJEU, which is not transferable *de plano* at an international level.

10. The main question could be the following: is it possible to argue that the CJEU's *Coman* case-law could be transposed to the Convention legal framework[6]? Even if one might say '*not at all*' as the first response, that could anyway happen among EU Member States.

11. In short, this issue needs to be addressed, because the Convention's wording should not prevent the enforceability of 'spousal support' applications, just because some States believe that particular relationship should be covered by a declaration under Art 2(3) and not Art 2(1).

12. Notwithstanding that, it is true that the radical distinction between the family status, on one side, and the maintenance position, on the other side, although clearly provided for by the Convention under Art. 19(2), cannot prevent Countries from using the public policy exception to deny recognition to maintenance claims based on legal relationships stemming from same-sex relationships, or non-traditional parentage relationships. Although the two aspects – family relationship and maintenance obligation – should be completely separated by the Parties[7], and the partial recognition as provided by Art. 21 of the Convention could remedy the issue of recognition of non-existent relationships, and although the public policy clause (Art. 22(a)) as a ground for non-recognition of foreign decisions should in principle not be used to just because the relationship it concerns does not exist in the law of the requested State, from a practical perspective the problem of the **relationships not provided by the law of the**

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[6] CJEU 5 June 2018, *Coman*, C-673/16, ECLI:EU:C:2018:385. On that occasion the Court of Justice ruled that a EU Member State (Romania in the case at hand) is *required to recognise the marital status* of an individual *for the purposes* of applying the EU uniform law (in that case, the discipline on family reunification under the Directive 2004/38 read in conjunction with Art. 21(1) TFEU) *although* the same-sex marriage is not provided by – nor recognised at any effects – by the domestic law of the requested State. The marriage was legitimately contracted under Belgian law, so that the couple had acquired the marital status in a EU Member State.

[7] According to the abovementioned Art. 19(2) of the Convention.

State of recognition seems to be going to last for a long time.

13. A related issue could also arise with regard to those countries that increasingly equate **co-habitants** who have children with married couples, which is the case in the Nordic States. Although spousal maintenance is the exception there, does the concept of 'spouse' apply exclusively to formal marriage arrangements, or should/could it also include **relationships that are equated to marriage** in national law? There has been considerable legal development in this regard, and therefore, it seems that the discussion on same-sex relationships is also relevant for co-habitants.

14. Undoubtedly the key-point is not asking all Countries to accept same-sex marriage (or any other kind of family relationship not provided for by the State where the maintenance order is requested for recognition), but to **accept that a valid maintenance order was created** on the basis of this relationship (qualified as familial by the legal order *a quo*), therefore that maintenance order should be enforceable under the Convention, because it is a spousal maintenance order.

B.2. «Creditor»

15. The Convention includes – under Art. 3 – an explicit provision aimed at clarifying the notion of «creditor», especially underlining that this status does not only regard the person to whom the maintenance has been awarded, but also the person who *seeks* a maintenance decision *for the first time*. However, based on the national responses, there is an unresolved issue remaining[8]. In the case of a maintenance obligation towards a child, should this 'creditor' be the **child or the parent acting for the recovery of maintenance in the interest of the child**? According to *Borrás-Degeling* Explanatory Report, «The term "creditor" includes, without any doubt, the child for whom maintenance was ordered or sought». Nevertheless, such a notion seems to have received different interpretations at a national level.

16. Domestic experiences, demonstrate that two opposing models can be found concerning the formal ownership of the legal action. On the one hand, those systems where it is the child him/herself that qualifies as 'creditor' acting for the protection of his/her own interests, even if procedurally through an adult (parent) acting on his/her behalf[9]. On the other hand, in other States a dependent child cannot formally be the creditor, so the action for the maintenance recovery is brought by the parent on his/her *own* behalf[10]. This difference is of importance when applying Article 4(4) of the Protocol when one needs to determine the common nationality of the creditor and the debtor (for example).

[8] Prel. doc. no 4 p. 31-32.

[9] That is the case of Germany, for example.

[10] That is the case of the United States of America, for example.

17. This problem could be resolved by better communication between Central Authorities – especially given that the name of custodial parent should be always indicated within applications, even in case of actions brought on behalf of the minor – as suggested by the United States of America. However, it seems that a preference should be (uniformly) given to always granting a **direct indication of the real creditor**, even in case of a child. Once again, a uniform approach to the interpretation of the Convention is the preferable option compared to leaving it to the single Contracting State.

B.3. «Residence» and «habitual residence»

18. The Convention uses the concepts of «**habitual residence**» – under Arts. 18(1), 20(1) and (4), and 46(1) – and «**residence**» – under Arts. 9, 23(6), and 46(1). As it can be clearly argued by the same wording of Art. 46(1)(e), it is a precise choice, so that the two concepts should receive a single and different interpretation.

19. The Convention *does not* contain a definition of ***habitual residence***. There was a prolonged discussion during the proceedings as to whether it was necessary to include a definition of the term within Article 3, but ultimately it was decided that this was not necessary[11].

20. The Explanatory Report emphasises that the complex case law on habitual residence in the context of child abduction should not be imported into this area, because the context of child support is significantly different[12]. A *relatively low threshold* for habitual residence in the context of maintenance would be helpful to enable maintenance creditors to easily establish decisions where necessary.

21. The German Central Authority (CA) has identified *three circumstances where it can be difficult to determine* habitual residence. These are: (i) child abduction,
(ii) where the creditor is studying or working abroad for a limited period of time and
(iii) where the creditor has two equal residences[13].

22. In the context of child abduction it is arguable, based on the Explanatory Report, that a child could have a *different habitual residence for the purpose* of child support, and the 1980 Hague Abduction Convention proceedings. Where the child is residing in a new State, the creditor should be able to apply to the CA in that State (according to Art. 9). This will be important in situations where the proceedings take longer than they should, and the child remains in the State of refuge for a prolonged period. The child should not be deprived of child support

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[11] Explanatory Report, para. 62.
[12] *Ibidem*, para. 444. Cf. lastly, for example, CJEU 12 May 2022, *WJ*, C-644/20, ECLI:EU:C:2022:371.
[13] From this perspective, similar remarks are referred to the concept of 'residence' (prel. doc. no. 4, p. 29) and to the concept of 'habitual residence' according to the responses received on the Protocol (prel. doc. no. 5, p. 12).

because of the behaviour of the abducting parent, and/ or delays caused by national authorities.

23. In the latter two situations the creditor will have an interest in making an application through the Central Authority of the Contracting State where he/she is *resident* at the time. And so we come to Article 9 and to the concept of ***residence*** according to the Convention. In this case as well, the Convention *does not* contain a precise definition. The Convention indicates at least that a creditor should apply to the CA in the State in which they reside as long as this equates to **more than «mere presence»** (Art. 9 itself). This provides only a *negative* definition which supports a low (minimum) threshold, suggesting that if a creditor child transferred to a new State then they should be able to claim maintenance from there. A move for a job, or study, or having two equal residences would indicate more than mere presence. This does not mean a maintenance creditor need make an application to a CA every time they move. If, for example, the maintenance obligation is being enforced privately and the debtor continues to pay then there would be no need to act. There is only a need to contact a new CA where the debtor defaults, the old CA (or relevant body) can no longer transfer the payment to the creditor, or where there is no existing maintenance obligation.

24. What has just been observed may give rise to a question: what's the relationship between concepts of 'residence' and '*legal* residence'? Are they synonyms in the context of the Convention? It seems that such a question – and the consequent answer to it – could be strongly influenced by the national perspective. According to the Explanatory Report, under the Convention the use of the concept of residence occurs where a more tenuous contact than that provided by the habitual residence is asked and needed[14]; and this is likely to be the most common national view as well. So that it follows that if a person is habitually resident in one place, she or he also usually also resides there; on the other hand, one's place of residence is not necessarily the place of one's habitual residence.

25. But if the concept of residence has to be interpreted according to domestic views, it also can happen that a different vision leads to opposite conclusions. For instance, the concept of residence is likely to be interpreted as requiring a quite strong link with the Country according to Italian ('*residenza*') or some British national laws. In such Countries the habitual residence could even be acquired *before* the residence.

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[14] Explanatory Report, para. 228: «Article 9 contains a definition of residence for the purpose of this provision only. The "residence" of the applicant must be more than "mere presence". On the other hand, *"habitual residence" is not required; the intention behind the use of simple "residence" is to provide easier access to the Central Authorities and to ensure that it is as easy as possible to apply* for the international recovery of child support. A child requires financial support wherever she or he may be living and should not have to satisfy a strict residency test in order to apply for assistance to receive it.» [emphasis added].

26. The *favor creditoris* principle should give the creditor (/maintenance seeker) the option of making an application through the Central Authority on the basis of Art. 9. It can not be the case that the creditor who lives between two States, does not have one option which *qualifies itself as his/her residence*! This could happen if, having a dual contact with two Contracting States, the stronger contact is with the State requiring an even higher threshold for residence to be recognised there, while the other contact being weaker, is considered insufficient to establish residence by the other State. This problem could be avoided if the Convention (i) gave some interpretive guidance on the **minimum threshold** (for example, residence will always be achieved where the creditor is working or studying in the Country, or has travelled there for more than the purpose of a holiday); (ii) clarified that under its application **it is possible that the applicant should be able to avail him/herself of services provided by more than just one Central Authority**. The latter case could arise when one's life is split between two places, i.e. working one week in one country and the other in another country (where children are concerned, this is less common but could happen in case of e.g. 'shuttle agreements' concerning parental responsibility, where the child resides one week with one parent and the other with the other parent in a different Country).

27. To sum up, it seems that both (*a*) the use of two different but related concepts, in different provisions of the Convention, and (*b*) the choice not to define either of them (with the relevant exception represented by the (minimum) low threshold established for the residence by Art. 9), could determine serious difficulties of interpretation for the practitioners, as indeed reported by the German CA.

28. Potentially a more precise explanation on the concept of 'residence' could assist with these problems:

- further information on the "**minimum threshold**" that can be requested for the residence to be recognised in a Contracting State; and/or
- is it possible that the applicant should be considered as resident in more than just one Contracting State, making him/her able to **apply before different Central Authorities under Art. 9?**

C Art. 4 Protocol and CJEU

29. There is also a problem of (uniform) interpretation in the context of Article 4 of the Protocol. The CJEU has explained how this provision should be interpreted when a maintenance debtor applies for a reduction in the amount of maintenance awarded (on the basis of a change in his/her income) where a decision has become final. In particular, the national court questioned whether these claims are governed by the law of the State of the creditor's habitual residence,

even if the amount of maintenance previously payable was determined by the court according to the law of the State of the debtor's habitual residence, which has not changed (because Art 4(3) applied).

30. The CJEU found that because Article 4(3) is an exception to the general rule in Article 3, it should only apply for the purpose of the specific proceedings issued by the creditor. This allows the creditor to indirectly select the law of the habitual residence of the debtor. If the debtor later attempts to modify the decision, in their own Member State, the main rule in the Protocol should take over and Article 3 should apply[15].

31. Considering that the CJEU's interpretation is only binding for those Contracting States which are EU Member States, it would be necessary to discuss it with non-EU Contracting States, in order to understand how do they interpret this provision.

D Relations with other instruments, especially the Lugano Convention 2007

32. The relationship between the 2007 Child Support Convention and the **Lugano II Convention** might be perceived as problematic and requiring clarification, as all EU Member States and **Norway** are parties to both instruments.

33. Pursuant to Article 67(5) of the Lugano II Convention «where a convention on a particular matter to which both the State of origin and the State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Convention which concern the procedures for recognition and enforcement of judgments may be applied». This seems to suggest that when it comes to procedure for recognition and enforcement the 2007 *Child Support Convention takes precedence* over the Lugano II Convention, as the Child Support Convention is a 'convention on a particular matter'. The explanatory report to the Convention also supports this view in expressing that «existing and future conventions on a particular matter prevail over the Lugano Convention» (para. 179).

34. However, Article 51(1) 2007 Child Support Convention provides that it «does not affect any international instrument concluded before this Convention to which Contracting States are Parties and which contains provisions on matters governed by this Convention». The Explanatory Report to 2007 Child Support Convention suggests that while drafting Article 51(1), the drafters had in mind Lugano II Convention («in order to safeguard the revised Lugano Convention» concluded on 30 October 2007[16]).

35. Hence, the instruments seem to suggest different solutions, *each pointing to the*

[15] CJEU 20 September 2018, *Mölk*, C-214/17, ECLI: ECLI:EU:C:2018:744.
[16] Explanatory Report, p. 217.

other one.

36. This seems problematic, however, when analyzed from the perspective of a maintenance creditor. The Hague Convention provides for a system of central authorities which support the maintenance creditor throughout the whole process of recovery of maintenance (Article 6). It also provides for a free legal assistance (Article 15). If practicalities are considered, **it would be more beneficial to the maintenance creditor** if the Hague Convention applied instead of the Lugano II Convention. The Lugano II Convention already seems to suggest this solution. However, it is also important to note that if a maintenance order made in Norway has to be enforced in another Contracting State to the Lugano II Convention, it could be that the Lugano II Convention provides a quicker procedure than the Hague Convention, due to the fact that some States have not properly implemented the Hague Convention within their legal systems.

37. Considering that Article 52 of the Hague Convention allows creditors to select an instrument or arrangement that has more effective rules than the Convention, this could also be interpreted to give the creditor the **right to choose between** the 2007 Child Support Convention and the Lugano II Convention, according to the principle of ***favor executionis*** (which should undoubtedly guide the choices of the court, where the convention to be applied is not directly indicated by the creditor/claimant). In the writers' opinion, it would be appropriate to provide for **a specific duty to inform creditors of the possibility to choose** between the two instruments, in certain situations.

E Conclusions / Summary to be addressed to the HCCH

38. In the light of the above, the European Association of Private International Law (EAPIL) draws the attention of the Special Commission on the following issues:

I. the concept of ***marriage/spouse***, being *de jure* included in the scope of application of the Convention, unlike other family relationships to which the Convention might apply by virtue of declaration under Art. 63 of the Convention, has a pivotal role in determination of the Convention's scope. The main problem arises with reference to **same-sex marriages**. However, other relationships **that could be equated to marriage** in the national law of the State of origin, such as cohabitation, should also be considered. There are two potential options: (i) allow each Contracting State to define the concept based on its national law (so that differences between the law of the State of origin and the requested State can be faced accordingly) or (ii) find an autonomous definition of the concept;

II. the concept of **creditor**: based on domestic experiences, it is clear that there are two opposing models concerning the formal ownership of the legal action. On the one hand, those systems where it is the child him/herself who qualifies as 'creditor' acting for the protection of his/her own interests, even if procedurally through an adult (parent) acting on his/her behalf. On the other hand, some State laws provide that a dependent child cannot be the creditor, so the action for the maintenance recovery is brought by the parent on his/her *own* behalf. It seems that a preference should be (uniformly) given to always granting a **direct indication of the real creditor**, even in case of a child;

III. the concept of **residence**: a more precise explanation seems to be appropriate on (i) the "**minimum threshold"** which can be requested (in addition to the negative definition which is fixed by the second sentence of Art. 9); and/or (ii) the fact that it should be possible for the applicant to be considered as resident in more than just one Contracting State, making him/her able to **apply before different Central Authorities under Art. 9**;

IV. the (uniform) interpretation of **Art. 4 of the Protocol**, considering that the CJEU has explained how this provision should be interpreted when a maintenance debtor applies on the basis of a change in his income, for a reduction in the amount of maintenance awarded by a decision that has become final (see *Mölk*, C-214/17): considering that the CJEU's interpretation is only binding for those Contracting States which are EU Member States, it would be necessary to discuss it with non-EU Contracting States, in order to understand how do they interpret this provision;

V. The relationship between the 2007 Child Support Convention and the **Lugano II Convention**, as all EU Member States and **Norway** are parties to both instruments: the instruments seem to suggest different solutions, each pointing to the other one. Considering that Article 52 of the 2007 Child Support Convention allows creditors to select an instrument or arrangement that has more effective rules than the Convention, this could also be interpreted as giving the creditor the **right to choose between** the 2007 Child Support Convention and the Lugano II Convention. The principle of ***favor executionis*** should undoubtedly guide the choices of the court, where the convention to be applied is not directly indicated by the creditor/claimant. In the writers' opinion, it would be appropriate to provide for **a specific duty to inform creditors of the possibility to choose** between the two instruments, in certain situations.