

CROSS BORDER RECOVERY OF CHILD MAINTENANCE: Should South Africa ratify and implement the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance?

By

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A mini thesis submitted in the partial fulfilment of the requirements for the degree of Master of Laws (LLM) in the Faculty of Law of the University of the Western Cape

The logo of the University of the Western Cape, featuring a classical building facade with columns and a pediment.
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Maintenance Act 99 of 1998

Maintenance Amendment Act 9 of 2015



DECLARATION

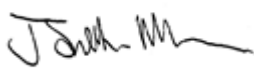
I declare that '*CROSS BORDER RECOVERY OF CHILD MAINTENANCE: Should South Africa ratify and implement the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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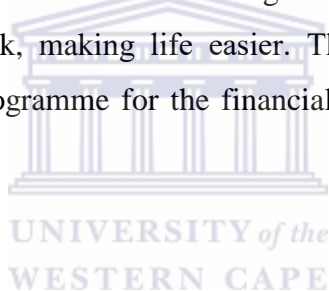
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LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CA	Central Authority
CRC	Convention on the Rights of the Child
CSG	Child Support Grant
EU	European Union
HCCH	Hague Conference on Private International Law
REMO	Reciprocal Enforcement of Maintenance Orders Act 80 of 1963
REMO Africa	Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989
SCC	Special Commission for the Convention
UK	United Kingdom
USA	United States of America

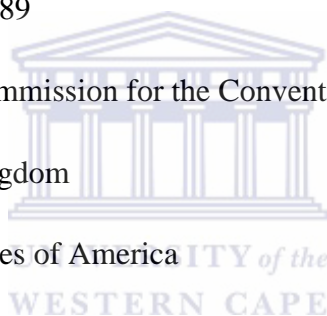


TABLE OF CONTENTS

	PAGE
Keywords/Phrases	2
Declaration	3
Acknowledgements	4
List of Abbreviations	6
Table of Contents	7
CHAPTER 1: INTRODUCTION	11
1.1 Background to the Study	11
1.2 Research Questions	13
1.3 Significance of the Study	13
1.4 Problem Statement	15
1.5 Literature Review	16
1.6 Methodology	20
1.7 Limitations of the Study	21
1.8 Overview of the Chapters	21
CHAPTER 2: A DETAILED ANALYSIS OF THE HAGUE CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE	24
2.1 Introduction	24
2.2 The Need for a New Maintenance Convention	25
2.3 The Objectives of the Convention	26
2.4 The Convention's Scope	27
2.5 Administrative Co-operation	28
2.5.1 Central Authorities	28
2.5.2 The Central Authorities' application process	30
2.6 Limits on Proceedings under the Convention	33

2.7	Recognition and Enforcement	33
2.7.1	Procedures under Recognition and Enforcement	35
2.7.1.1	Procedure under Article 23	36
2.7.1.2	Article 24's Alternative Procedure	37
2.7.1.3	Direct Requests	38
2.7.2	An Existing Maintenance Agreement	38
2.8	Enforcement under the Convention	39
2.8.1	Internal Law Enforcement	40
2.8.2	Types of Enforcement Measures and their Effectiveness	41
2.8.2.1	Wage Withholding	41
2.8.2.2	Garnishment Orders	42
2.8.2.3	Deductions from Social Security Payments	42
2.8.2.4	Lien or Forced Sale of Property	42
2.8.2.5	Tax Refund Withholding	43
2.8.2.6	Withholding or Attachments of Pension Benefits	43
2.8.2.7	Credit Bureau Reporting	44
2.8.2.8	Denial, Suspension, or Revocation of Various Licences	44
2.8.2.9	Mediation, Conciliation, or Similar Processes for Voluntary Compliance	44
2.8.2.10	Imprisonment	45
2.8.3	The iSupport Project	45
2.9	Costs	47
2.10	Co-ordination	48
2.11	The Convention's Pre- and Post-Requirements	49
2.12	Conclusion	50

**CHAPTER 3: THE CURRENT POSITION OF THE SOUTH AFRICAN LEGAL SYSTEM
IN DEALING WITH THE CROSS BORDER RECOVERY OF CHILD
MAINTENANCE** 52

3.1	Introduction	52
3.2	The Duty of Support	53
3.2.1	Internationally Recognised Duty: Convention on the Rights of the Child	55
3.2.2	South Africa's Recognition of the Duty of Support	56

3.2.2.1	Ratification of the Convention on the Rights of the Child	57
3.2.2.2	African Charter on the Rights and Welfare of the Child	57
3.2.2.3	The Constitution of the Republic of South Africa	58
3.2.2.4	The Children's Act 38 of 2005	60
3.3	South African Legislation relating to Child Maintenance	61
3.3.1	The Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 and the Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989	61
3.3.2	The Maintenance Act 99 of 1998	64
3.3.3	The Maintenance Amendment Act 9 of 2015	64
3.4	Bilateral Agreements	65
3.5	Conflict of Law Provisions	67
3.6	South Africa's Enforcement Measures for the Recovery of Child Maintenance	70
3.6.1	Domestic Recovery Measures	72
3.6.2	International Recovery Measures	76
3.7	Conclusion	77

CHAPTER 4: THE NEED FOR THE HAGUE CONVENTION ON THE RECOVERY OF CROSS BORDER CHILD SUPPORT TO APPLY IN SOUTH AFRICA'S LEGAL SYSTEM 80

4.1	Introduction	80
4.2	Current Issues within the South African Cross Border Child Maintenance Recovery System	82
4.2.1	A Flawed System?	82
4.2.1.1	Out dated Legislation	83
4.2.1.2	Limited Recognition of Foreign Orders	85
4.2.1.3	Lack of Effective Enforcement Measures	85
4.2.1.4	An Expensive and Time-consuming Procedure	88
4.2.1.5	Knowledge is Scarce	88
4.2.1.6	Termination of the Duty of Support	89
4.2.2	Socio Economic Contributors	90
4.2.2.1	Poverty and its Alleviation: the Child Support Grant	91
4.2.2.2	High Unemployment Rates	93

4.2.2.3	Limited State Resources	94
4.3	Acknowledgement of Some Issues Plaguing the Maintenance Recovery System and the Improvements to be put into Operation	95
4.3.1	Legal Amendments made regarding Enforcement Measures	95
4.3.2	Locating Debtors within South Africa	96
4.4	Benefits to the Convention's Application in South Africa	97
4.4.1	Ensures South Africa's Compliance with its International Obligations regarding Child Maintenance Recovery	97
4.4.2	Recognition of Foreign Orders: Uniform Approach	98
4.4.3	Comprehensive and Up to Date Means of Dealing with Cross Border Child Maintenance Disputes	100
4.4.4	Improving Enforcement	101
4.4.5	Efficient Procedural Aspects	102
4.4.6	Certainty as to when the Duty of Support Terminates	103
4.4.7	Increases Knowledge in the Cross Border Maintenance Field	103
4.4.8	State Expense to Decrease: the Child Support Grant	104
4.5	Conclusion	105
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS		109
5.1	Introduction	109
5.2	Conclusion	109
5.3	Recommendations	113
BIBLIOGRAPHY		116

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The recovery of child maintenance has gained renewed support over the past few years, particularly within South Africa. However, the cross border recovery of child maintenance remains a troublesome issue, due to the lack of complete uniformity in dealing with the topic. The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (hereafter referred to as the Convention) provides a sense of partial uniformity due to its ratification in countries such as the United States of America (USA) and those that form part of the European Union (EU).¹ However, the lack of uniformity can be seen when considering countries that have not ratified the Convention, i.e. the majority of countries within the African continent, including South Africa.²

Disputes regarding the cross border recovery of child maintenance arise where the maintenance-paying parent resides in a different country to the child and defaults in making maintenance payments.³ For example, Mr X resides in the United Kingdom (UK). His daughter, P, resides in the USA with her mother Ms Y. Mr X is required to pay maintenance for P to Ms Y but has defaulted in making those payments. A dispute arises relating to Ms Y wishing to recover the maintenance owing to her for P from Mr X.

In the above example, as both parents reside in a member country to the Convention, there are few problems in the process for ensuring recovery. The Convention is applicable in such circumstances and states the procedure to be followed.⁴ The dispute becomes problematic when one parent resides in a non-member country to the Convention. In continuation of the above-mentioned example, Ms Y and P now reside in a non-member country, i.e. South Africa. The Convention will not be applicable in these circumstances. As such, there is minimal assurance of recovering child maintenance.⁵ The domestic laws of one country to the

¹ Duncan W 'The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance: Comments on its Objectives and some of its Special Features' in Sarcevic P (founding ed) *Yearbook of Private International Law* (2008) 314.

² Hammond D & Barnes M *International Child Maintenance and Family Obligations: A Practical Guide* (2013) 255.

³ Duncan W (2008) 317.

⁴ Long E 'The New Hague Maintenance Convention' (2008) 57 *International and Comparative Law Quarterly* 991.

⁵ Duncan W (2008) 328.

dispute will determine its method of resolution.⁶ In most instances, this lengthy and expensive process may cost more than the amount of child maintenance looking to be recovered.⁷

Custodial parents are often deterred from instituting claims for the cross border recovery of child maintenance due to the prolonged process to resolve disputes when the Convention lacks applicability.⁸ The high cost and lengthy time period involved in the resolution process allows the defaulting maintenance-paying parent to avoid payment.⁹ A possibility may occur where the child for whom maintenance is owed reaches the age of majority or becomes self-supporting before the maintenance recovery dispute is resolved.¹⁰ When factoring this aspect into the previous example, P now has reached the age of majority and Ms Y's dispute relating to maintenance recovery from Mr X has yet to be resolved. Ms Y no longer has capacity to continue pursuing her claim. P would have to reinstitute the claim against Mr X and the process would start anew. However, in the South African case of *Burse v Bursey* [1997] 4 All SA 580 (E) an argument made by the father that the mother lacked locus standi to continue to enforce maintenance obligations for the now major child was rejected by the court as the mother retained locus standi in that instance due to an existing maintenance agreement made for the child when still a minor and by means of a warrant of execution held by the mother in this instance.¹¹

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The importance of exploring this topic is shown through the above-mentioned example. It is necessary to explore the current position of the cross border recovery of child maintenance in South Africa and the possibility of improving that problematic position by considering ratifying the Convention. The problematic position in South Africa includes a lack of legal knowledge and guidance regarding the cross border recovery of child maintenance as well as out dated legislation to govern this subject matter. It will be discussed whether ratification would assist in providing clarity and consistency in dealing with matters relating to this topic. It will be examined whether ratification would result in a more cost effective and timeous method of resolving maintenance disputes and ensuring compliance with decisions that have been made.

⁶ Duncan W (2008) 326.

⁷ Duncan W (2008) 326.

⁸ Hammond D and Barnes M (2013) 256.

⁹ Hammond D and Barnes M (2013) 256.

¹⁰ Skelton A and Carnelley M *Family Law in South Africa* (2010) 353.

¹¹ *Burse v Bursey* [1997] 4 All SA 580 (E) at para 11.

1.2 Research Questions

The main question that this study attempts to ask is ‘Should South Africa ratify and implement the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance?’ The sub-questions that stem from this question include:

- What is the current legal position regarding the cross border recovery of child maintenance in South Africa?
- Is this current position adequate, considering both the international duty to maintain children as well as South Africa’s means of enforcing this duty? If not, why?
- How would ratification and implementation of the Convention, after giving a detailed analysis of this international instrument, assist in improving the current legal position of cross border child maintenance recovery in South Africa?
- What are the benefits of ratification and implementation of the Convention as a whole, while focusing on those particular to the cross border recovery of child maintenance in South Africa?

1.3 Significance of the Study

This study is particularly significant in that it addresses a problematic *lacuna* in the South African legal system, namely the cross border recovery of child maintenance. The current legal position in South Africa regarding this subject matter is inadequate, particularly when considering measures of enforcement.¹² The lack of knowledge by legal professionals, court officials and maintenance officers regarding the cross border recovery of child maintenance is a challenging feature in South Africa.¹³ Other problematic aspects include the uncertainty as to the practical elements in attempting to enforce an existing maintenance order and applying for a maintenance order as well as the long process utilised in attempting to recover child maintenance. While these problematic features apply to the cross border recovery of child maintenance, the domestic position in South Africa is impacted by these issues also.

Domestically in South Africa, a recent development has occurred in maintenance legislation - the Maintenance Amendment Act.¹⁴ This new legislative measure amended the existing Maintenance Act in order to address concerns that arose with the older legislation. Concerns

¹² Heaton J *South African Family Law* 3ed (2010) 57; *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) at para 27 (Hereafter referred to as *Bannatyne v Bannatyne*).

¹³ Palmeira N ‘Maintenance of Children in Foreign Countries’ available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

¹⁴ Act 9 of 2015.

include the lack of efficient processing of claims for maintenance as well as enforcement measures that limit the possibility of maintenance-paying parents evading their maintenance payments for their children.¹⁵ While it is clear that children are not the only persons who are affected by and suffer loss as a result of the non-payment of maintenance but woman as well.¹⁶ However as the nature of this dissertation focuses on children, the effect that the non-payment of maintenance has on women will only be considered as an extension to that of children. The evasion of a maintenance-paying parent increases the burden placed on the State to provide for children. A custodial parent who is unable to maintain the child's growing needs without the assistance provided for by the maintenance payments becomes reliant of the State to provide financial support.¹⁷ It is necessary for the State to provide a legal framework that is sufficient and that works sufficiently.¹⁸ "Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system."¹⁹ When a system lacks efficient operating standards, the people affected by that system suffer and lose the system's offered protection. A weak and defective system is habitually taken advantage of resulting in the loss of protection to the specified group. This study will show that it is necessary to address the defects in the domestic maintenance recovery system, as children suffer from the loss of protection. The Convention will be considered as the focus for resolving the defects in both the domestic and cross border maintenance recovery systems.

The value of this study is its proposal to deal with the above-mentioned problematic features comprehensively. It will focus on giving an analysis of the Convention as well as the current legal position in South Africa relating to the cross border recovery of child maintenance. This study will also contemplate that the best means of resolving the defects found in the maintenance recovery system is to adopt the Convention using a complete legal reform of South Africa's current legal position regarding the cross border recovery of child maintenance. This study will be at an advantage due to the inclusion of recent and up to date research including the latest in legal amendments and further improvements in both international and South African law.

¹⁵ Maintenance Amendment Act 9 of 2015.

¹⁶ De Jong M and Sephai KKB 'New measures to better secure maintenance payments for disempowered women and vulnerable children' 2014 (77) *THRHR* 196-197.

¹⁷ *Bannatyne v Bannatyne* at para 28.

¹⁸ *Bannatyne v Bannatyne* at para 26.

¹⁹ *Bannatyne v Bannatyne* at para 28.

1.4 Problem Statement

There is a lack of consistency when dealing with cross border recovery of child maintenance disputes as each country uses different methods for recovery. Utilising bilateral agreements is a more common method, though this limits the resolution of such disputes if there is no agreement between the participating countries to the specific dispute.²⁰ Occasionally if no bilateral agreement exists, there is no legal means of solving the dispute, particularly for the more limited legal systems of underdeveloped countries.²¹ Ensuring consistency relating to cross border recovery of child maintenance disputes is necessary. It will create awareness for the recovery process at an international level for those countries that have no legal means of dealing with disputes of such a nature as well as countries that need to consider updating their legal options regarding the cross border recovery of child maintenance.

When dealing with matters that affect children, it is internationally recognised that their best interests be of primary importance in all matters involving them.²² Child maintenance payments are used to provide for the needs of the child.²³ As such if the maintenance payments are not made, the child may not receive certain necessities, i.e. clothes, food, or housing.²⁴ In South Africa, a Child Support Grant (CSG) is made available to primary caregivers in order to deal with the increasing number of children who do not receive maintenance payments from the maintenance-paying parent.²⁵ The CSG acts as a substitute payment for the lack thereof, from the maintenance-paying parent.²⁶ However, the amount given to the residential parent by the CSG is ordinarily less than the amount to be paid by the maintenance-paying parent.²⁷

The CSG is one way to attempt to deal with child maintenance absconders but it places a heavy financial burden on the State. As at 31 March 2016 the current number of recipients of

²⁰ Keith R 'The Modern History, Evolution and Projected Future of Child Support Enforcement in the United States and Globally: 1975 to 2025' in Beaumont P, Hess B, Walker L and Spancken S (eds) *The Recovery of Maintenance in the EU and Worldwide* (2014) 38 and 108.

²¹ Abbot R 'Are Developing Countries Deterred from Using the WTO Dispute Settlement System?' available at <http://ecipe.org/events/are-developing-countries-deterred-from-using-the-wto-dispute-settlement-system/> (accessed on 17 March 2016).

²² United Nations Convention on the Rights of the Child, 1989 United Nations General Assembly Resolution 44/25 (1989), Article 3.

²³ Morei N 'Where to for Maintenance Law as Child Support Grants and Defaulters put it to the test' (2014) 5 *Mediterranean Journal of Social Sciences* 758.

²⁴ Clark B 'Duties of Support of Living Persons' in Van Heerden B, Cockrell A and Keightley R (eds) *Boberg's Law of Persons and the Family* 2 ed (1999) 244.

²⁵ Morei N (2014) 756.

²⁶ Morei N (2014) 760.

²⁷ Morei N (2014) 762.

the CSG in South Africa is 11 972 900, making this grant the most received grant in the country.²⁸ The burden placed on the State is problematic as it allows for parents to avoid making their maintenance payments. To alleviate the burden placed on the State, new legislative measures should be considered to enforce the payment of child maintenance. South Africa has recently added a new amendment to its maintenance laws. The amendment has contributed to decreasing the legal loopholes responsible for the lack of maintenance payments but it remains void of consideration regarding the cross border recovery of child maintenance. The *lacuna's* in South Africa's legal system pertaining to the cross border recovery of child maintenance allows for the continued avoidance of maintenance payments. It is necessary to consider methods to fill those gaps.

1.5 Literature Review

Research regarding the cross border recovery of child maintenance is limited when focusing on the South African perspective. Current international writers focus on the Convention when considering the cross border recovery of child maintenance, usually writing a general analysis of its provisions. South African writers focus on South Africa's legislation and legal policies regarding child maintenance at a domestic level. Areas of focus for the South African writers include the shortfalls of the current maintenance recovery system, particularly the measures of enforcement afforded to the custodial parent to ensure that maintenance payments are made regularly, and the many opportunities afforded to the maintenance-paying parent to abscond from payment.

When considering the Convention, William Duncan gives a well-rounded analysis of the Convention's chapters and provisions.²⁹ His detailed focus on the Convention itself allows for a better holistic understanding as well as elaborating on the individual provisions. Though the main consideration is the Convention, Duncan also gives background information as to how the Convention was created and how the cross border recovery of child maintenance cases are dealt with when the Convention is not ratified and implemented in a country.³⁰ Procedural aspects of the Convention are generalised and not country specific. My analysis of the Convention would differ to Duncan's in that it will provide additional focus to both the chapters and provisions of the Convention itself. Duncan's analysis post-dates the

²⁸ SASSA 'Current Statistics on Grants for Children' available at http://www.childrencount.org.za/social_grants.php (accessed 3 October 2016).

²⁹ Duncan W (2008) 326.

³⁰ Duncan W (2008) 328-332.

Convention's adoption by the Hague Conference of Private International Law (HCCH) by one year, 2008, while this study will give an updated and more in depth look at the Conventions chapters and provisions now that time had been afforded to make possible necessary corrections to its interpretation.

Eimear Long's 2008 analysis of the Convention is similar to Duncan's analysis.³¹ Their analyses are similar in that both writers consider the Convention as a whole and mainly focus on its chapters as opposed to the individual provisions. The depth and detail of the analyses differs, as Long's analysis considers the Protocol on the Law Applicable to Maintenance Obligations in more detail while Duncan's mentions it without going into detail.³² The additional details that Long states in her analysis will assist in adding important informational aspects to the updated analysis provided in this study. Long lacks focus on specific provisions that will aid in analysing the Convention in more depth. This study will not consider the Protocol when providing an analysis of the Convention. However, this study will consider how its analysis of the Convention will assist South Africa specifically in dealing with cross border recovery of child maintenance cases.

Melanie Barnes and David Hammond consider both the Convention and the EU's Maintenance Regulation of 2009 (hereafter referred to as the Maintenance Regulation).³³ Barnes and Hammond deliberate aspects of both the Convention and the Maintenance Regulation though no comparison of the two instruments takes place.³⁴ While both instruments are discussed, the Convention is considered in more detail. This study will differ from Barnes and Hammond's research as the Convention will be the focus instrument for consideration. The Maintenance Regulation will not be considered in this study as it only applies to member countries of the EU. The focus of this study is whether South Africa should ratify and implement the Convention and as South Africa is not a member to the EU; the consideration of the Maintenance Regulation will be irrelevant to the study's context. Barnes and Hammond's research is helpful to this study through their consideration of the Convention.

³¹ Long E (2008) 991.

³² Long E (2008) 998.

³³ Hammond D and Barnes M (2013) 256.

³⁴ Hammond D and Barnes M (2013) 258.

The HCCH's guides and handbooks are helpful aids when analysing the Convention.³⁵ The guides and handbooks give a detailed and thorough explanation of the different provisions in the Convention. Definitions of concepts are given to ensure understanding. In giving further explanations of relevant concepts, the guides and handbooks focus on detailing how to implement the Convention's provisions step-by-step.³⁶ With a 2013 publication date for the main handbook regarding the Convention's practical implementation, it gives clarity on promising measures of enforcement while also taking into account previous successes and failures in the international arena.³⁷ Focus is allocated to practical scenarios and giving various options for resolution. This study will take account of the necessary concepts and explanations to aid in analysing the Convention while also determining the best means of practical implementation of the Convention in the South African legal system.

Lesbury Van Zyl's research regarding South Africa's child maintenance legal system focuses on the best interests of the child principle. Though her research predates the Convention, it does consider the South African Maintenance Act.³⁸ She argues that with the right to child maintenance being recognised in both the Maintenance Act³⁹ as well as in the Convention on the Rights of the Child (CRC), the best interests of the child must be considered as the primary factor in dealing with matters pertaining to children.⁴⁰ Van Zyl states that South Africa fails in applying the best interests principle due to its inadequate child maintenance recovery system. This study will consider the current legal position in South Africa regarding the recovery of child maintenance at both a national and international level, though its focus will be on cross border recovery disputes. In the above-mentioned consideration, the South African Maintenance Act⁴¹ and the best interests principle will be deliberated to reflect South Africa's need for legal reform regarding child maintenance recovery, specifically at an international level.

Bridgette Clark focuses her 1999 analysis of South Africa's legal position regarding child maintenance on the duty of support owed by parents to their children. She elaborates on the minimum standard acceptable as well as the duty owed by both parents.⁴² Though her

³⁵ Hague Conference on Private International Law Permanent Bureau – *Practical Handbook for Caseworkers under the 2007 Hague Child Support Convention* (2013) The Hague: Netherlands.

³⁶ Hague Conference on Private International Law (2013) 168.

³⁷ Hague Conference on Private International Law (2013) 169.

³⁸ Act 99 of 1998.

³⁹ Act 99 of 1998.

⁴⁰ Van Zyl L *Handbook of the South African Law of Maintenance* (2000) 61; CRC, Article 3.

⁴¹ Act 99 of 1998.

⁴² Clark B (1999) 241.

research pre-dates the Convention considerably, she already shows the need for a reform regarding the legal system surrounding child maintenance recovery. In her analysis, Clark focuses on the CRC's best interests of the child principle and South Africa's lack of adherence to the principle although it is a signatory.⁴³ Considering the South African perspective, Clark then argues that the increasing need for the State to assume the financial responsibilities of custodial parents and their dependent children is due to the prevalence of inadequate, irregular, or unfulfilled maintenance obligations by defaulters. She claims that this is attributable to an increasing inability to meet maintenance obligations due to poverty and other family commitments, i.e. having new families.⁴⁴ Clark also contends that the enforcement system regarding maintenance payments needs reform in order to combat this increasing need for State involvement.⁴⁵ This study will differ to Clark's research due to its inclusion of up to date features relating to child maintenance recovery. An inclusion will be the Convention and its necessary consideration when considering a possible legal reform in the South African maintenance recovery system. This study will also discuss the Convention's possible implementation into South Africa's legal system as a means of lessening the current burden placed on the State regarding the payment of a CSG in place of enforcing maintenance payments.

In a detailed analysis of the South African legal position regarding child maintenance, Ann Skelton and Marita Carnelley consider both the Maintenance Act⁴⁶ and the Children's Act.⁴⁷ They argue that parents have a responsibility to contribute towards the maintenance of their children, as they are holders of both parental responsibilities and rights in that respect.⁴⁸ These authors also consider the importance of the need for effective enforcement measures and elaborate on the current measures catered for under the South African legal system, i.e. imprisonment, execution against property, the attachment of debts and emoluments.⁴⁹ This study will consider measures of enforcement to ensure maintenance recovery for children though these measures of enforcement will be focused on the cross border recovery of child maintenance. However, the study will also consider measures that could be added, amended, or removed from the system of child maintenance recovery to ensure the payment of child maintenance considering both domestic legislation in South Africa and the Convention.

⁴³ Clark B (1999) 259-260.

⁴⁴ Clark B (1999) 263.

⁴⁵ Clark B (1999) 264.

⁴⁶ Act 99 of 1998.

⁴⁷ Act 38 of 2005.

⁴⁸ Skelton A and Carnelley M (2010) 353; CRC, Article 18.

⁴⁹ Skelton A and Carnelley M (2010) 358-359.

Jacqueline Heaton mainly focuses on the current position of the enforcement of maintenance orders within South Africa. She particularly considers the sanctions applicable for the failure to comply with a maintenance order.⁵⁰ In her analysis, Heaton elaborates on the judicially accepted enforcement measures used to ensure compliance with maintenance orders.⁵¹ Although, Heaton does not consider the cross border child maintenance recovery environment in her analysis of the South African maintenance recovery system, her arguments regarding imprisonment not being an effective enforcement measure hold weight in both the South African context and the international environment. This study will consider the enforcement measures for the recovery of child maintenance but its focus will be on determining if those enforcement measures can be used in disputes containing a cross border element. Great detail is afforded to South Africa's domestic enforcement measures throughout Heaton's analysis of the maintenance recovery system. Yet, this study will afford such detail to the enforcement measures relating to the cross border recovery of child maintenance due to this being an important consideration in the study.

1.6 Methodology

In determining whether South Africa should ratify and implement the Convention, reference will be made to the Convention itself as an international instrument, South African legislation including the Maintenance Act⁵² and its Amendment Act⁵³ as well as other domestic legislation. International focus stems from inclusion of the CRC and African Charter on the Rights and Welfare of the Child (ACRWC). Reports written by international organisations, including the HCCH will also be considered as they assist in giving further explanations of the practical application of the Convention. Due to the focus of this study being cross border maintenance recovery, internationally focused textbooks, yearbooks and journal articles will be considered when analysing the many aspects of the research and subject matter. As a South African perspective is required regarding cross border child maintenance recovery, textbooks, reports and journal articles need to be considered concerning both cross border maintenance recovery from a South African perspective as well as certain aspects of the current domestic maintenance legal system. Judicial decisions will be referred to when dealing with the South African aspect of the research. Internet resources will form a sizable

⁵⁰ Heaton J (2010) 55.

⁵¹ Heaton J (2010) 57-58.

⁵² Act 99 of 1998.

⁵³ Act 9 of 2015.

amount of the research pertaining to both the position of the Convention and that of South Africa when dealing with the cross border recovery of child maintenance.

1.7 Limitations of the Study

This study will be constrained by two specific limitations. The first of these limitations is that even though the Convention and the South Africa legal system allows for the recovery of both child and spousal maintenance, only the aspects pertaining to the recovery of child maintenance, specifically in cross border circumstances, will be considered for the purpose for this research. The remaining limitation applies to the volume of information provided for in the study regarding comparative aspects relating to the Convention and its application in countries that have already ratified and implemented the Convention. Due to the Convention's infancy in its application, there are a limited number of countries already members or signatories to the Convention, namely 35, with the majority of these 35 being in Europe and even less countries who have reached the implementation level.⁵⁴

1.8 Overview of Chapters

Chapter 1: This chapter introduces the study. While this chapter will give some direction to the study, it will also shed some light on the current works and author's opinions regarding the cross border recovery of child maintenance. Other aspects considered in this chapter include the reason for the study, i.e. the current problematic aspects of the current maintenance legal system in South Africa and references to the possible benefits and solutions to ratifying and implementing the Convention. These problems include access to legal knowledge on the subject, the costs relating to the process as well as the extensive periods to resolve disputes. This chapter will act as a guide to the substantive chapters that follow.

Chapter 2: This chapter will consider the Convention. The focus will be on analysing the Convention as a whole while also considering the theoretical aspects regarding the suggested methods of implementation. The main consideration in this chapter will be an in depth examination regarding the important subcategories stated in the Convention itself. Aspects considered will include the methods used to put forth an application under the Convention, the flexibility afforded to each member country during the application process and the need

⁵⁴ Hague Conference on Private International Law 'Child Support Specialised Section: Status Table' available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131> (Accessed 13 June 2016).

for a Central Authority (CA). The process regarding existing maintenance agreements and the measures suggested for enforcement will be considered. This chapter will aid in determining South Africa's need for ratifying and implementing the Convention (Chapter 4).

Chapter 3: The focus of this chapter will be on the current position of the South African legal system in dealing with cross border child maintenance issues. In considering the current legal position, the Reciprocal Enforcement of Maintenance Orders (hereafter referred to as REMO),⁵⁵ the Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act (hereafter referred to as the REMO Africa Act),⁵⁶ the Maintenance Act,⁵⁷ and the Amendment Act⁵⁸ will be discussed. The duty of support requires consideration, both at an international level and within South Africa's domestic legal system. A discussion of the best interests of the child principle is given to provide clarity in its application to cross border maintenance recovery. This chapter will focus on South Africa's domestic legal position in considering the practical aspects relating to this position. These practical aspects include bilateral agreements that South Africa already has in place and conflict of law provisions concerning the cross border recovery of child maintenance. While this chapter gives the current position of South Africa on the cross border recovery of child maintenance, aspects relating to improvements will also share the focus. The impact of globalisation will be considered in this chapter to show the resulting impact of increased mobility for persons and its contribution to the need for effective systems of cross border maintenance recovery.

Chapter 4: This chapter will draw on aspects mentioned the previous chapters in order to show whether there is a need for South Africa to ratify and implement the Convention. These aspects include focusing on the problems in current legal position of South Africa regarding cross border child maintenance recovery and how applying the Convention will address these issues. The above-mentioned problems will include a lack of enforcement measures and options available to ensure the payment of maintenance. This chapter will also consider the increased need in South Africa for more CSGs due to the lack of payments made for child maintenance. Another aspect to be dealt with in this chapter is to show that it is necessary for South Africa to reform its current legal position regarding the cross border recovery of child maintenance completely, specifically using the Convention as its main and guiding feature.

⁵⁵ Act 80 of 1963.

⁵⁶ Act 6 of 1989.

⁵⁷ Act 99 of 1998.

⁵⁸ Act 9 of 2015.

Chapter 5: This chapter will conclude this thesis. It will deliberate the important aspects mentioned in the previous substantive chapters that need to be considered when contemplating maintenance legal reform in South Africa. The chapter will focus on giving recommendations on how best to go about the reform through the ratification and implementation of the Convention specifically. The determination of this best method will be drawn from the outcomes and on-going methods that are deemed effective for ratifying and implementing the Convention.



CHAPTER 2

A DETAILED ANALYSIS OF THE HAGUE CONVENTION ON THE
INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF
FAMILY MAINTENANCE

2.1 Introduction

The recovery of child maintenance is a continued problem for most countries at an international level. This stems from the lack of an effective legal system to deal with child maintenance recovery issues at a national level. As a means of addressing the issues surrounding the cross border recovery of child maintenance, the HCCH started work on a new Convention, which was subsequently finalised and adopted in 2007.⁵⁹ The new Convention,⁶⁰ was concluded through focusing on both the current successes in the cross border recovery of child maintenance field as well as the continued problems that previous four Hague Conventions⁶¹ and the New York Convention of 2 June 1956 on the Recovery Abroad of Maintenance (hereafter referred to as the New York Convention) fell short of addressing effectively.⁶²

This chapter will consider the need for the Convention as a new international instrument and will provide an analysis which will focus on the overall content and specific provisions found in the Convention. Important aspects will be considered including the flexibility in applying the Convention in different legal systems, the use of Central Authorities (hereafter referred to as CAs) and the processes involved in recovering child maintenance. The costs of the recovery process and the effectiveness of the enforcement measures suggested in the Convention itself will also be considered to give a well-rounded and up to date analysis.

⁵⁹ Long E (2008) 984.

⁶⁰ *The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, 2007.

⁶¹ *The Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children*; *Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children*; *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations*; and *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*.

⁶² Duncan W 'The Development of the New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance' (2004) 38 *Family Law Quarterly* 664; Long E (2008) 985.

2.2 The Need for a New Maintenance Convention

After the extensive monitoring of the operation of the New York Convention as well as the four Hague Conventions⁶³ regarding cross border maintenance recovery, it was discovered that many member states to the above-mentioned Conventions were failing to fulfil their Convention imposed obligations.⁶⁴ The member states to the New York Convention were particularly guilty of completely failing to fulfil their obligations regarding the Convention.⁶⁵ Another problem found with the previously mentioned Hague Conventions was the lack of consistency in interpreting and implementing the provisions found in the respective Conventions.⁶⁶ Although the HCCH was at first reluctant to consider further international instruments regarding international maintenance recovery due the many instruments already in existence, it was decided to take a radical approach and work on a new worldwide instrument dealing with the international recovery of maintenance.⁶⁷

A new mandate was developed stating that in preparing the new Convention it would ‘build on the best features of the existing Hague Conventions and include rules on judicial and administrative co-operation’.⁶⁸ Problematic areas of the existing Conventions as well as aspects not covered therein would also need to be considered during the negotiation process. Work on the new Convention started in May 2003 and negotiations continued over the subsequent years culminating in a three week Diplomatic Session in November 2007 where the final text was completed and adopted as the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.⁶⁹

⁶³ *The Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children; Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children; Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations; and Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.*

⁶⁴ Duncan W (2004) 664.

⁶⁵ Bariatti S *Cases and Materials on EU Private International Law* (2011) 1172.

⁶⁶ Duncan W (2004) 664.

⁶⁷ Duncan W (2004) 665.

⁶⁸ Long E (2008) 985.

⁶⁹ Duncan W ‘The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance: Comments on its Objectives and some of its Special Features’ in Sarcevic P (founding ed) *Yearbook of Private International Law* (2008) 314.

2.3 The Objectives of the Convention

The objective stated in Article 1 of the Convention is ‘to ensure the effective international recovery of child support and other forms of family maintenance’.⁷⁰ The Convention pursues its objective using a combination of means. In processing international obligations, the Convention establishes a ‘comprehensive system of cooperation between the authorities of the Contracting States.’⁷¹ As stated within the Convention, CAs make applications for the establishment of maintenance decisions available, while also ‘providing for the recognition and enforcement of maintenance decisions.’⁷² Effective measures for the prompt enforcement of maintenance decisions are required by the Convention.⁷³ The main means of meeting the Article 1 objective of effective international recovery of child maintenance is to have a broadly based system, in Contracting States, for the recognition and enforcement of maintenance decisions. The system would have to include ‘expedited and simplified procedures for recognition and enforcement’ and ‘a requirement for prompt and effective enforcement’.⁷⁴

The Convention considers smaller practical details that are often overlooked when dealing with international considerations regarding maintenance recovery. These practical details include language requirements due to the international aspect of the maintenance recovery, standardised forms relating to the full process in recovering maintenance and the exchange of information on national laws.⁷⁵ One important aspect featured in the Convention is its allowance and encouragement of new information technologies to aid in international recovery of maintenance claims. The purpose of encouraging new information technologies is to reduce problematic issues such as costs and delays, which have often been detrimental to international maintenance recovery claims.⁷⁶ The iSupport project is an example of the use of new information technologies to be used to assist in managing international maintenance claims.⁷⁷ The iSupport project will be discussed later in this analysis (see 2.8.3).

⁷⁰ *Hague Convention 2007*, Article 1.

⁷¹ Duncan W (2008) 317; *Hague Convention 2007*, Article 1(a).

⁷² Bariatti S (2011) 1172; Duncan W (2008) 317; *Hague Convention 2007*, Article 1(b) and (c).

⁷³ *Hague Convention 2007*, Article 1(d).

⁷⁴ Duncan W (2008) 318.

⁷⁵ *Hague Convention 2007*, Article 44, 11(4), 12(2) and 57.

⁷⁶ Duncan W (2008) 318.

⁷⁷ Walker L *Maintenance and Child Support in Private International Law* (2015) 195.

2.4 The Convention's Scope

The Convention applies to 'maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years'.⁷⁸ Also, all provisions of the Convention will apply to children regardless of their parents' marital status.⁷⁹ During the negotiations stage of the Convention's development it was argued that there is a greater willingness at a political level within the international community to devote resources to the recovery of child maintenance as opposed to that of spousal support.⁸⁰ However, the Convention has recognised the importance of spousal support, but child maintenance is at the core of the Convention and as such spousal support will not be dealt with in this study. With regards to spousal support, the Convention allows for recognition and enforcement of a spousal support decision when the claim is made in conjunction with a claim for the child maintenance.⁸¹

Reservations are permitted to be made by a Contracting State under the Convention. One particular reservation that may be made pertains to 'the right to limit the application of the Convention...to persons who have not yet attained the age of 18 years'.⁸² However, any limitation of this nature made by a Contracting State means that such a Contracting State is not permitted to claim maintenance obligations for persons who are between the ages of 18 and 21 years.⁸³ Contracting States, whose domestic laws state the age of 18 years to be their age of majority for children, such as is the case in South Africa, are not forced to modify the domestic laws due to the right to limit the age for the Convention's application in child maintenance cases.⁸⁴ However, the Contracting State is required to recognise and enforce maintenance orders up to 21 years of age.⁸⁵

It is important to note that when a Contracting State declares that the Convention will apply to 'any maintenance obligation arising from a family relationship, parentage, marriage or

⁷⁸ *Hague Convention 2007*, Article 2(1)(a).

⁷⁹ Borrás A and Degeling J *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance Explanatory Report* (2013) 5; *Hague Convention 2007*, Article 2(4).

⁸⁰ Duncan W (2008) 319.

⁸¹ Herman G 'Report in support of the Recommendation that the USA become a party to the 2007 Hague Convention' available at www.americanbar.org/content/dam/aba/migrated/.../reports/haguechilidsup_report.pdf (Accessed on 13 October 2016); *Hague Convention 2007*, Article 2(1)(b).

⁸² *Hague Convention 2007*, Article 2(2).

⁸³ Long E (2008) 986; Hammond D & Barnes M *International Child Maintenance and Family Obligations: A Practical Guide* (2013) 257.

⁸⁴ Hammond D and Barnes M (2013) 257.

⁸⁵ Hammond D and Barnes M (2013) 257.

affinity, including in particular obligations in respect of vulnerable persons⁸⁶, this declaration will only give rise to obligations between Contracting States if such declarations made by each Contracting State cover that same maintenance obligations and parts of the Convention as the other.⁸⁷ For example, if one Contracting State declares that the Convention will apply to a maintenance obligation arising from a particular family relationship; it will only be obligated to recognise the obligation if another Contracting State has also made the same declaration regarding the recovery of child maintenance. Once the Convention is implemented in any country, it applies wholly on a mandatory basis to all child maintenance cases.⁸⁸

2.5 Administrative Co-operation

Due to the many operational problems in the maintenance recovery system under the New York Convention, the Special Commission for the Convention (SCC) determined that the ‘establishment of an effective system of administrative co-operation would be essential,’ and the most important element of the Convention.⁸⁹ The SCC determined that a new ‘modern system’ of administrative co-operation should be developed. Focus points in the negotiations included that the ‘modern system’ of administrative co-operation should be swift in processing applications, cost effective, not too burdensome on Contracting States to fulfil their necessary obligations in the maintenance recovery process, flexible in its application to different national systems, efficient and user-friendly.⁹⁰ To achieve the above points, it was decided early on in the negotiations that administrative co-operation would be structured through CAs designated in each Contracting State.⁹¹

2.5.1 Central Authorities

Each Contracting State has one CA for dealing with international maintenance disputes.⁹² If there is more than one legal system within one Contracting State, such is the case with the USA, more than one CA may be appointed, each with a clear indication of the extent of the

⁸⁶ *Hague Convention 2007*, Article 3(f) – ‘Vulnerable person’ means a person who, by reason of an impairment or insufficiency of his or her personal faculties, is not able to support him or herself.

⁸⁷ Long E (2008) 986; *Hague Convention 2007*, Article 2(3).

⁸⁸ Duncan W (2008) 319.

⁸⁹ Europa ‘Summary of Treaty’ available at

<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=9281> (Accessed on 18 October 2016); Duncan W (2004) 667.

⁹⁰ Duncan W (2004) 667.

⁹¹ *Hague Convention 2007*, Article 4(1); Duncan W (2004) 667.

⁹² Borrás A and Degeling J (2013) 7.

functions and territory limitations.⁹³ CAs are to co-operate with each other and promote co-operation among the competent authorities in their States in order to achieve the purposes of the Convention, as well as seeking possible solutions to difficulties that arise in the Convention's application.⁹⁴

More specifically, CAs are responsible for transmitting and receiving applications and initiating or facilitating the institution of proceeding of such applications.⁹⁵ Obligations that stem from the above responsibilities include taking all appropriate measures to provide or facilitate the provision of legal assistance, help to locate the debtor or creditor and encourage amicable solutions for the voluntary payment of maintenance.⁹⁶ CAs should also facilitate the on-going enforcement of maintenance, the collection and transfer of maintenance payments and obtaining evidence, documentary or otherwise, and providing assistance in establishing parentage as well as facilitate the service of documents.⁹⁷ Due to the many obligations placed on CAs, they are permitted to designate some of these obligations to other public bodies as long as this designation is allowed by the State and provided that the competent authorities are supervised in their performance of the designated functions.⁹⁸ The Convention does not allow CAs to hold any power to make decisions regarding international maintenance cases that can only be exercised by judicial authorities.⁹⁹

Any CA has the power to make a request to any other CA for assistance in attaining information even when no application regarding maintenance is pending. The CAs are permitted upon request to locate the maintenance debtor or creditor.¹⁰⁰ When needed, a CA will obtain relevant information concerning the income and financial circumstances of a maintenance debtor or creditor as well obtaining documentary or other evidence as additional confirmation of the debtor or creditor's monetary standing.¹⁰¹ Establishing the parentage of a child and facilitating the service of documents can be requested of a CA should the need arise.¹⁰² Lastly, a CA has the power to request a determination of any provisional measures to

⁹³ Bariatti S (2011) 1173; *Hague Convention 2007*, Article 4(2).

⁹⁴ *Hague Convention 2007*, Article 5(a); Long E (2008) 987.

⁹⁵ Long E (2008) 987; *Hague Convention 2007*, Article 5(1)(a) and (b).

⁹⁶ *Hague Convention 2007*, Article 6(2)(a) – (d); Long E (2008) 987.

⁹⁷ Long E (2008) 988; *Hague Convention 2007*, Article 6(2)(e) – (j).

⁹⁸ Borras A and Degeling J (2013) 7 and 9; *Hague Convention 2007*, Article 6(3).

⁹⁹ *Hague Convention 2007*, Article 6(4).

¹⁰⁰ Bariatti S (2011) 1174; *Hague Convention 2007*, Article 6(2)(b).

¹⁰¹ *Hague Convention 2007*, Article 2(c) and (g).

¹⁰² Borras A and Degeling J (2013) 7; *Hague Convention 2007*, Article 2(h) and (j).

be taken in order to secure the outcome of a pending maintenance application.¹⁰³ If any of the above-mentioned measures are requested by a CA, the responding CA must take all appropriate measures to ensure compliance with the request.¹⁰⁴

Each CA is responsible for its own costs in applying the Convention.¹⁰⁵ A CA is not permitted to charge an applicant for its services.¹⁰⁶ The exception arises when the costs incurred are exceptional in nature and stem from an application using the above-mentioned measures.¹⁰⁷ When exceptional costs arise, a CA cannot recover said costs without prior consent from the applicant.¹⁰⁸

2.5.2 The Central Authorities' application process

Applications under the Convention will be made through the CA where the applicant resides to the CA of the Requested State.¹⁰⁹ It is important to note that regarding this application process, 'resides excludes mere presence'.¹¹⁰ The types of applications that are available to the creditor to use to recover child maintenance are more extensive in number than those applications available to the debtor. A creditor can recover maintenance under the Convention using the specific types of applications. Included in the specific applications are ones for 'recognition or recognition and enforcement of a decision' and the 'enforcement of a decision made or recognised in the requested State.'¹¹¹ A creditor may request in his or her application for the 'establishment of a decision in the Requested State where there is no existing decision, including where necessary the establishment of parentage.'¹¹² When a creditor has an existing maintenance order which requires recognition in the Requested State, but the existing order cannot be recognised due to irregularities such as fraud, no notice given to respondent or no opportunity was given to the respondent to take part in proceedings or an appeal, the creditor is permitted to apply for a new maintenance order.¹¹³ A modification of a

¹⁰³ *Hague Convention 2007*, Article 2(i).

¹⁰⁴ Bariatti S (2011) 1175; *Hague Convention 2007*, Article 7(1).

¹⁰⁵ Long E (2008) 988; *Hague Convention 2007*, Article 8(1).

¹⁰⁶ *Hague Convention 2007*, Article 8(2); Long E (2008) 988.

¹⁰⁷ Long E (2008) 988; *Hague Convention 2007*, Article 8(2).

¹⁰⁸ *Hague Convention 2007*, Article 8(3).

¹⁰⁹ Borrás A and Degeling J (2013) 9.

¹¹⁰ *Hague Convention 2007*, Article 9.

¹¹¹ Hammond D and Barnes M (2013) 260; *Hague Convention 2007*, Article 10(1)(a) and (b).

¹¹² Bariatti S (2011) 1175; *Hague Convention 2007*, Article 10(1)(c).

¹¹³ *Hague Convention 2007*, Article 10(1)(d); Hammond D and Barnes M (2013) 260.

decision order may be applied for by the creditor based on a decision made in the Requested State or a decision made in a State other than the Requested State.¹¹⁴

A debtor, who has an existing maintenance decision against him or her, is only permitted to use three out of the above-mentioned six applications under the Convention. One application is for the ‘recognition of a decision, or an equivalent procedure leading to a suspension, or limiting the enforcement, of a previous decision in the Requested State’.¹¹⁵ The remaining applications are for the ‘modification of a decision made in the Requested State’ or for the ‘modification of a decision made in a State other than the Requested State’.¹¹⁶

An application for enforcement arises out of circumstances where the applicant has a decision from the Requested State and wants it to be enforced in that State. Where the applicant has a decision from a Contracting State and wants that decision recognised and enforced in another State, the applicant will apply for recognition or recognition and enforcement of that existing maintenance order.¹¹⁷ If the applicant does not yet have an existing maintenance decision in the Contracting State where the maintenance absconder resides or if the applicant has an existing decision but needs a new decision due to problems with recognition and enforcement of such existing order, the applicant will need to apply to establish a new maintenance decision.¹¹⁸ A modification order will be used when applying to change an existing maintenance decision made in a Contracting State and the maintenance creditor or debtor resides in another Contracting State.¹¹⁹

All applications made using CAs have a minimum standard of requirements such as the personal particulars of the applicant, those of the maintenance absconder as well as of all the dependants for whom maintenance is claimed and the grounds for and nature of the application.¹²⁰ It is necessary to include all financial circumstances about both the creditor and debtor, including the debtor’s place of employment.¹²¹ Each application must include

¹¹⁴ Borrás A and Degeling J (2013) 9; *Hague Convention 2007*, Article 10(1)(e) and (f); Hammond D and Barnes M (2013) 260.

¹¹⁵ *Hague Convention 2007*, Article 10(2)(a); Hammond D and Barnes M (2013) 260.

¹¹⁶ Borrás A and Degeling J (2013) 9; *Hague Convention 2007*, Article 10(2)(b) and (c).

¹¹⁷ Hammond D and Barnes M (2013) 259.

¹¹⁸ Herman G (2008) 4.

¹¹⁹ Hammond D and Barnes M (2013) 260.

¹²⁰ *Hague Convention 2007*, Article 11(1)(a) – (e).

¹²¹ Bariatti S (2011) 1176; *Hague Convention 2007*, Article 11(2)(a) and (b).

necessary documentation that shows and supports the claim of entitlement to free legal assistance (see 2.9 below).¹²²

During the application process, the CA of the requesting State who is responsible for assisting the applicant with his or her application must ensure that all the necessary documentation is attached to said application.¹²³ Once the application is checked by the CA for meeting the requirements, it is submitted to the CA of the Requested State.¹²⁴ When the Requested State's CA has received the application, it must acknowledge receipt within six weeks.¹²⁵ If any further documentation is required, the documentation must be requested within the same six-week period.¹²⁶ After acknowledging receipt of an application, the Requested State has three months to inform the requesting State of the status of the application.¹²⁷ Each CA involved in an application for cross border maintenance recovery must ensure to keep all other parties to the application apprised of the progress of the application timeously. This includes the applicant, the maintenance debtor, the CA in the Contracting State and the CA in the Requested State.¹²⁸

It is important for all CAs to act efficiently when dealing with applications and in doing so using rapid means of communication, such as electronic mail systems to send and receive documents as opposed to a postal system for hard copies.¹²⁹ A respondent is not able to challenge the means of communication used by the CAs involved in the specific application.¹³⁰ Refusal to process an application is only permitted by a CA when the application does not fulfil the requirements of the Convention and a CA must give reasons for the refusal to process to the requesting CA.¹³¹ An application may be rejected only if the request for further documentation is not adhered to within a three-month or longer period.¹³² The requested CA must inform the Requesting State's CA of the application's rejection.¹³³

¹²² *Hague Convention 2007*, Article 11(3).

¹²³ Borrás A and Degeling J (2013) 11; *Hague Convention 2007*, Article 12(1).

¹²⁴ *Hague Convention 2007*, Article 12(2).

¹²⁵ *Hague Convention 2007*, Article 12 (3).

¹²⁶ Borrás A and Degeling J (2013) 11; *Hague Convention 2007*, Article 12(3).

¹²⁷ *Hague Convention 2007*, Article 12(4).

¹²⁸ Bariatti S (2011) 1177; *Hague Convention 2007*, Article 12(5)(a) and (b).

¹²⁹ *Hague Convention 2007*, Article 12(6) and 12(7).

¹³⁰ Borrás A and Degeling J (2013) 11; *Hague Convention 2007*, Article 13.

¹³¹ *Hague Convention 2007*, Article 12(8).

¹³² Bariatti S (2011) 1177; *Hague Convention 2007*, Article 12(9).

¹³³ *Hague Convention 2007*, Article 12(9).

2.6 Limits on Proceedings under the Convention

Article 18 of the Convention states that proceedings cannot be brought in another State to modify a decision made in the State of habitual residence of the creditor as long as the creditor remains habitually resident in that State.¹³⁴ This Article 18 limitation will also apply to a debtor when said debtor requests that a new decision be made. The aim for adding this limitation to the Convention is to prevent multiple decisions being made regarding the same maintenance case.¹³⁵ The SCC deemed this provision necessary to be included in the Convention to aid in protecting the creditor and preventing a denial of justice.¹³⁶

A few exceptions to the above-mentioned limitation on proceedings are also stated under Article 18 of the Convention. One exception is that parties to the dispute agree in writing to the jurisdiction of any other Contracting State to the Convention.¹³⁷ However, this exception does not apply to child maintenance disputes.¹³⁸ For example, a creditor who is habitually resident in England and a debtor who resides in Spain may contract to agree to the jurisdiction of France to resolve their dispute as another Contracting State to the Convention. If the creditor does not object to the jurisdiction of the other Contracting State i.e. France in the above example at the first available opportunity then he or she is deemed to have consented to its jurisdiction.¹³⁹ Proceedings are allowed to take place in the other Contracting State's jurisdiction if the State of Origin cannot or refuses to exercise jurisdiction to modify a decision or make a new one.¹⁴⁰ In addition, a decision made in the State of Origin cannot be recognised or declared enforceable in the Contracting State, specifically where proceedings to modify or make a new decision are being contemplated.¹⁴¹

2.7 Recognition and Enforcement

Under chapter V of the Convention, the recognition and enforcement of decisions is stated to specifically deal with maintenance obligations owing which have been determined by a

¹³⁴ Turner B 'Family Law Update: Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance' available at <http://www.nlrg.com/family-law-legal-research/bid/82980/FAMILY-LAW-UPDATE-Hague-Convention-on-the-International-Recovery-of-Child-Support-and-Other-Forms-of-Family-Maintenance> (Accessed on 18 October 2016); *Hague Convention 2007*, Article 18(1).

¹³⁵ Long E (2008) 989.

¹³⁶ Borrás A and Degeling J (2013) 153 and 155; Long E (2008) 989.

¹³⁷ *Hague Convention 2007*, Article 18(2)(a).

¹³⁸ Bariatti S (2011) 1178; *Hague Convention 2007*, Article 18(2)(a).

¹³⁹ *Hague Convention 2007*, Article 18(2)(b).

¹⁴⁰ Borrás A and Degeling J (2013) 13; *Hague Convention 2007*, Article 18(2)(c).

¹⁴¹ *Hague Convention 2007*, Article 18(2)(d).

judicial or administrative authority.¹⁴² The Convention states that a decision includes a ‘settlement or agreement concluded before or approved by such an authority’.¹⁴³ An administrative body, under the Convention, is a ‘public body whose decisions, under the law of the State where it is established, may be made the subject of an appeal to and review by a judicial authority; and have similar force and effect to a decision of a judicial authority on the same matter’.¹⁴⁴

A decision made in one Contracting State will be recognised and enforced in other Contracting States if the respondent, the creditor or, the child for whom maintenance is owed, was habitually resident in the State of Origin when proceedings were instituted.¹⁴⁵ Regarding the child, the respondent must have lived with the child in the State of Origin or resided there himself and have provided support to the child during that time.¹⁴⁶ If the respondent has submitted to the jurisdiction of the State of Origin expressly or by defending the merits of the case without raising an objection to said jurisdiction at the first available opportunity, recognition and enforcement will take place.¹⁴⁷ Parties are permitted to agree to the jurisdiction in writing.¹⁴⁸ However, an agreement to jurisdiction will not carry weight when the dispute relates to child maintenance obligations.¹⁴⁹ Recognition and enforcement of a decision will also occur if the decision was made by an authority, exercising jurisdiction on a matter of personal status or parental responsibility, unless the decision was solely based on the nationality of one of the parties.¹⁵⁰

If a situation arises where the recognition and enforcement of a decision is not permitted due to a reservation made by a Contracting State, that Contracting State is obligated to ‘take all appropriate measures’ to establish a decision that is beneficial to the creditor.¹⁵¹ The obligation to establish a decision which is favourable to the creditor, has a limitation in that the debtor must be habitually resident in that State.¹⁵² Partial recognition of a decision can

¹⁴² Bariatti S (2011) 1178; *Hague Convention 2007*, Article 19(1).

¹⁴³ *Hague Convention 2007*, Article 19(1).

¹⁴⁴ *Hague Convention 2007*, Article 19(3).

¹⁴⁵ Herman G (2008) 4; *Hague Convention 2007*, Article 20(1)(a), (c), and (d).

¹⁴⁶ *Hague Convention 2007*, Article 20(1)(d).

¹⁴⁷ Herman G (2008) 4; *Hague Convention 2007*, Article 20(1)(b).

¹⁴⁸ *Hague Convention 2007*, Article 20(1)(e).

¹⁴⁹ Bariatti S (2011) 1179; *Hague Convention 2007*, Article 20(1)(e).

¹⁵⁰ *Hague Convention 2007*, Article 20(1)(f).

¹⁵¹ Hammond D and Barnes M (2013) 265; *Hague Convention 2007*, Article 20(4).

¹⁵² Borrás A and Degeling J (2013) 15; *Hague Convention 2007*, Article 20(4); Hammond D and Barnes M (2013) 265.

occur if the whole decision cannot be recognised.¹⁵³ The recognition and enforcement of a decision is based on indirect rules of jurisdiction to favour a cooperative approach when dealing with maintenance disputes.¹⁵⁴ Article 20(3) of the Convention provides:

‘A Contracting State making a reservation under paragraph 2 shall recognise and enforce a decision if its laws would in similar factual circumstances confer or would have conferred jurisdiction on its authorities to make such a decision.’¹⁵⁵

This provision allows a decision to be recognised when it is made in factual circumstances that would be a basis for jurisdiction in the State addressed.¹⁵⁶ This is done by changing only the parts of the decision that is necessary, reinforcing the allowance of partial recognition.¹⁵⁷

Recognition and enforcement of a decision may be refused based on it being ‘manifestly incompatible with the public policy’ of the addressed State, or that the decision was obtained by fraud in connection with a matter of procedure.¹⁵⁸ Another basis for refusal is *lis pendens*, including where a decision is rendered incompatible, as there is litigation pending with the same parties involved and having the same purpose elsewhere.¹⁵⁹ If the respondent is not informed of proceedings against him and as a result, he or she was not present for the proceedings, it is grounds for refusal to recognise and enforce a decision.¹⁶⁰ The remaining basis for refusal is that a decision was made in violation of Article 18 (see 2.6 above).¹⁶¹

2.7.1 Procedures under Recognition and Enforcement

The Convention states the procedures to be followed when dealing with recognition and enforcement.¹⁶² Article 23 sets out the preferred procedure to be followed due to its efficiency and timely processing of applications while an alternative procedure is stated under Article 24.¹⁶³ The alternative procedure concerns a longer process due to giving parties adequate opportunity to be heard.¹⁶⁴ A noteworthy aspect of the Convention is that it remains

¹⁵³ Hammond D and Barnes M (2013) 265.

¹⁵⁴ Hammond D and Barnes M (2013) 265.

¹⁵⁵ Bariatti S (2011) 1180; *Hague Convention 2007*, Article 20(3).

¹⁵⁶ Hammond D and Barnes M (2013) 265.

¹⁵⁷ Hammond D and Barnes M (2013) 265.

¹⁵⁸ Borrás A and Degeling J (2013) 15; *Hague Convention 2007*, Article 22(a) and (b).

¹⁵⁹ *Hague Convention 2007*, Article 22(c) and (d); Hammond D and Barnes M (2013) 266.

¹⁶⁰ Hammond D and Barnes M (2013) 266; *Hague Convention 2007*, Article 22(e).

¹⁶¹ *Hague Convention 2007*, Article 22(f); Hammond D and Barnes M (2013) 266.

¹⁶² Bariatti S (2011) 1181-1182; *Hague Convention 2007*, Article 23 and 24; Duncan W (2008) 324.

¹⁶³ Duncan W (2008) 324; Long E (2008) 990.

¹⁶⁴ Long E (2008) 991.

silent on stating a specific procedure if applying for recognition and enforcement without the use of a CA.¹⁶⁵

2.7.1.1 Procedure under Article 23

does not explain what constitutes an exceptional circumstance for the purpose of staying the enforcement order.¹⁷⁵ Any application or challenge lodged must be processed expeditiously.¹⁷⁶

2.7.1.2 Article 24's Alternative Procedure

The alternative procedure listed under Article 24 differs from the preferred procedure listed in Article 23 in that it is a single step procedure that requires that the respondent be duly notified of any proceedings against him or her and that all parties are given the opportunity to be heard.¹⁷⁷ A competent authority will make a decision regarding an application for recognition and enforcement.¹⁷⁸ If the competent authority refuses to recognise and enforce the application, the refusal must be based on the grounds that granting the application would be incompatible with public policy, it would fall under the *lis pendens* principle and it would be incompatible with an existing decision made regarding the same matter involving the same parties.¹⁷⁹

The other grounds for review of a refusal to recognise and enforce a decision are those listed under Articles 20, 22 and 23(7)(c), all of which have been previously stated, and must be reviewed by the competent authority of its own motion.¹⁸⁰ The review must be raised by the respondent or it must be based on concerns relating to the documents submitted during the application process.¹⁸¹ Some documents to be included in either procedure are a complete written copy of the decision, written proof of enforcement of the decision, proof of the respondent's notification of the proceedings and proof of the amount of arrear maintenance owing to the applicant.¹⁸² Fulfilment of the debt requested in the application for recognition and enforcement will also be considered as a ground for refusal, as is the case under the preferred procedure stated under Article 23.¹⁸³ Though this procedure differs from that stated under Article 23 in that it allows for all parties to be heard, the process must still be expeditious and efficient.¹⁸⁴

¹⁷⁵ *Hague Convention 2007*, Articles 9 and 10.

¹⁷⁶ *Hague Convention 2007*, Article 11.

¹⁷⁷ Long E (2008) 991; *Hague Convention 2007*, Article 24(3).

¹⁷⁸ Bariatti S (2011) 1181; *Hague Convention 2007*, Article 24(2).

¹⁷⁹ *Hague Convention 2007*, Article 24(4).

¹⁸⁰ Borrás A and Degeling J (2013) 17; *Hague Convention 2007*, Article 24(4).

¹⁸¹ *Hague Convention 2007*, Article 24(4).

¹⁸² *Hague Convention 2007*, Article 25(1)(a) – (d).

¹⁸³ Bariatti S (2011) 1182; *Hague Convention 2007*, Article 24(5).

¹⁸⁴ *Hague Convention 2007*, Article 24(7).

2.7.1.3 Direct Requests

Though the Convention remains silent on stating a specific procedure to be used when dealing with direct requests, Article 37 does allow for the applicant to decide to forego using a CA to deal with the maintenance application.¹⁸⁵ When not using the CA system provided for under the Convention, the applicant will have to apply directly to a competent authority in the State where he or she wishes to apply for recognition and enforcement of a decision.¹⁸⁶ The competent authority in the State addressed for the decision may use the procedures stated in the Convention when dealing with such matters but as no CA is used in the application process, the payment benefits offered within the Convention will not apply to any direct request application (see 2.9 below).¹⁸⁷ Any direct request applications involving vulnerable persons over the age of 21 years must still be considered for recognition and enforcement in the State addressed if the continued maintenance obligation stems from the vulnerable persons' impairment.¹⁸⁸

2.7.2 An Existing Maintenance Agreement

Article 30 of the Convention provides for the recognition of an existing maintenance agreement. In order for a maintenance agreement to be classified as such, the Convention states a set of requirements that the alleged agreement must fulfil.¹⁸⁹ One such requirement is that a competent authority must have formally and officially recognised the maintenance agreement.¹⁹⁰ Other requirements include that the agreement must be written, it must relate to the payment of maintenance and it must be recognised as an 'authentic instrument by a competent authority'.¹⁹¹ A document will be considered as an authentic instrument if said document was formally drawn up or registered by a competent authority or 'authenticated by, or concluded, registered or filed with a competent authority'.¹⁹² Regardless of how the authenticated instrument came into being, a competent authority must be able to review and modify the agreement.¹⁹³ Once the maintenance agreement fulfils the above mentioned

¹⁸⁵ Borrás A and Degeling J (2013) 1186; *Hague Convention 2007*, Article 37; Duncan W (2008) 325.

¹⁸⁶ Duncan W (2008) 325-326.

¹⁸⁷ *Hague Convention 2007*, Article 37(2); Duncan W (2008) 326.

¹⁸⁸ *Hague Convention 2007*, Article 37(3).

¹⁸⁹ Duncan W (2008) 325; Long E (2008) 992.

¹⁹⁰ Long E (2008) 992.

¹⁹¹ *Hague Convention 2007*, Article 30(3)(a) and (b).

¹⁹² Duncan W (2008) 325; Long E (2008) 992.

¹⁹³ Long E (2008) 992.

requirements it is considered to be an enforceable decision in the State of origin, it will also be entitled to be recognised and enforced in all other Contracting States to the Convention.¹⁹⁴

Most of the recognition and enforcement provisions found in the Convention apply to maintenance agreements as well.¹⁹⁵ However, there are a few distinctions. Regarding a maintenance agreement, there are no jurisdictional requirements for recognition and there is also a separate set of circumstances in which a maintenance agreement will be refused recognition and enforcement.¹⁹⁶ A State making a reservation to the effect that it will not recognise or enforce a maintenance agreement is considered to be a circumstance for refusal to recognise and enforce a maintenance agreement.¹⁹⁷ A refusal to recognise and enforce a decision may also be based on its incompatibility with public policy because it was obtained through fraud or falsification.¹⁹⁸ Refusal may also be based on the ground that the decision is incompatible with another decision which has already been given in the same matter.¹⁹⁹ Though the new decision may be entitled to be recognised and enforced in the State addressed, it may be refused due to the *lis pendens* principle.²⁰⁰ A State is also permitted to make a declaration that all applications for recognition and enforcement of a maintenance agreement shall only be made through CAs.²⁰¹

2.8 Enforcement under the Convention

During the negotiations it was determined that effective enforcement provisions and measures were lacking in previous conventions regarding maintenance recovery.²⁰² An important part of the negotiations was to ensure that the Convention catered for effective enforcement measures.²⁰³ It was decided at the negotiations that to achieve the aforementioned purpose, a list of internal enforcement measures would be included in the Convention.²⁰⁴ The enforcement measures stated in Article 34 are adequate in showing the tough stance taken by negotiators to ensure that effective enforcement becomes a reality in an

¹⁹⁴ Duncan W (2008) 325; Long E (2008) 992.

¹⁹⁵ Long E (2008) 992.

¹⁹⁶ Long E (2008) 992.

¹⁹⁷ Bariatti S (2011) 1184; *Hague Convention 2007*, Article 30(8).

¹⁹⁸ *Hague Convention 2007*, Article 30(4)(a) and (b); Long E (2008) 992.

¹⁹⁹ Long E (2008) 992; *Hague Convention 2007*, Article 30(4)(c).

²⁰⁰ Borrás A and Degeling J (2013) 17; *Hague Convention 2007*, Article 30(4)(c).

²⁰¹ *Hague Convention 2007*, Article 30(7); Long E (2008) 992.

²⁰² Duncan W (2008) 326.

²⁰³ Bariatti S (2011) 1185; *Hague Convention 2007*, Article 34(1); Long E (2008) 991; Duncan W (2008) 326.

²⁰⁴ Long E (2008) 991; Duncan W (2008) 326; *Hague Convention 2007*, Article 34(1).

international setting.²⁰⁵ The enforcement measures listed in the Convention are not compulsorily to be provided for by each Contracting State.²⁰⁶ The choice of which measures to implement are left to the specific Contracting State to decide upon as it would likely be based on what measures are already present in their domestic legal system dealing with maintenance recovery.²⁰⁷

2.8.1 Internal Law Enforcement

Enforcement of a decision will ‘take place in accordance with the law of the State addressed’.²⁰⁸ When an applicant has applied for an enforcement order, such an order will be enforced in the State to where the applicant applied, due to the respondent’s current residence, allowing for prompt and effective enforcement to occur.²⁰⁹ When an application has been sent through a CA and such application has been successful under Chapter V, no further application by the applicant is required for enforcement to occur.²¹⁰ It is an automatic response to a decision being recognised and registered for enforcement.²¹¹

Though enforcement follows the law of the State addressed, the duration of a maintenance obligation follows the law or rules of the State of origin, which are to be given effect in the State addressed.²¹² Any arrear payments of maintenance that are claimed for in an application have a limitation on the length of time for which the arrears can be claimed.²¹³ Under the Convention, the length of time afforded to enforce a claim for arrear maintenance will be determined by either the State addressed or the State of origin.²¹⁴ The determination of either State will be based on the State that has the longer limitation period for the enforcement to be in effect.²¹⁵

The Convention states clearly that the measures available for enforcement at a domestic level in a country must be the same as those that will be used for cross border enforcement.²¹⁶ The

²⁰⁵ Hammond D and Barnes M (2013) 272.

²⁰⁶ Duncan W (2008) 326; Long E (2008) 991- 992.

²⁰⁷ Long E (2008) 991.

²⁰⁸ Trimmings K and Beaumont P ‘General Report on Surrogacy’ in Trimmings K and Beaumont P (eds) *International Surrogacy Arrangements: Legal Regulation at the International Level* (2013) 546; Hammond D and Barnes M (2013) 272; *Hague Convention 2007*, Article 32(1).

²⁰⁹ *Hague Convention 2007*, Article 32(2) and 34(1).

²¹⁰ Duncan W (2008) 326; *Hague Convention 2007*, Article 32(3); Long E (2008) 991.

²¹¹ Borrás A and Degeling J (2013) 1185; *Hague Convention 2007*, Article 32(3).

²¹² *Hague Convention 2007*, Article 32(4).

²¹³ Bariatti S (2011) 1185; *Hague Convention 2007*, Article 32(5).

²¹⁴ *Hague Convention 2007*, Article 32(5).

²¹⁵ Borrás A and Degeling J (2013) 21; *Hague Convention 2007*, Article 32(5).

²¹⁶ *Hague Convention 2007*, Article 33.

list of enforcement measures (see 2.8.2 below) provided for under Article 34 is considered an illustrative list.²¹⁷ The listed measures are not mandatorily applicable to each country that ratifies and implements the Convention but are rather listed as suggestive methods of enforcement.²¹⁸ Therefore, each Contracting State will have different enforcement measures applicable to maintenance recovery.²¹⁹

2.8.2 Types of Enforcement Measures and their Effectiveness

There are nine enforcement measures recorded under the non-exhaustive list in the Convention.²²⁰ As stated previously, these enforcement measures are listed as possible options for Contracting States to use within their domestic legal system.²²¹ The listed measures are those that were found to be the most effective for enforcement during the negotiations for the Convention.²²² Subsequently, using these suggested enforcement measures to deal with maintenance enforcement will ensure that a Contracting State has effective internal law measures in place, thereby complying with the remainder of Article 34.²²³ One enforcement measure not listed in the Convention but that will be discussed under this sub heading is that of imprisonment (see 3.5 below for further discussion).

2.8.2.1 Wage Withholding

Wage withholding is an enforcement measure that requires a maintenance debtor's employer to withhold a portion of the debtor's wages or salary and to send that withheld portion to an enforcement authority.²²⁴ An enforcement authority is a body that ensures the payment of maintenance to the maintenance creditor and keeps records of such payments when received and then paid to the creditor. It is important to note that this particular measure may be initiated voluntarily at the maintenance debtor's request or be started as a result of an action taken by an enforcement authority.²²⁵ In countries such as Norway and Australia, this

²¹⁷ Long E (2008) 991-992; *Hague Convention 2007*, Article 34; Duncan W (2008) 326.

²¹⁸ Duncan W (2008) 326; Long E (2008) 992; Hammond D and Barnes M (2013) 272.

²¹⁹ Hammond D and Barnes M (2013) 272.

²²⁰ *Hague Convention 2007*, Article 34(2)(a) – (i); Hammond D and Barnes M (2013) 272; Borrás A and Degeling J (2013) 195.

²²¹ Hammond D and Barnes M (2013) 272.

²²² Long E (2008) 991.

²²³ Long E (2008) 991.

²²⁴ Hague Conference on Private International Law *Practical Handbook for Caseworkers under the 2007 Child Support Convention* (2013) 168.

²²⁵ Hague Conference on Private International Law (2013) 169.

measure is considered as the primary means of securing payments of maintenance to the maintenance creditor and is used whenever possible.²²⁶

2.8.2.2 Garnishment Orders

Garnishment is a 'process of intercepting funds that might otherwise be payable to a debtor before they are paid and requiring those funds to be transferred either to a competent authority or to a court or administrative authority.'²²⁷ A garnishment order requires the person or organisation that would have paid the funds to the debtor, to pay the funds to the enforcement authority for the benefit of the maintenance creditor instead.²²⁸ Depending on the State responsible for enforcement, funds such as tax refunds, lump sum payments, bank accounts, rent payments, payment for services and commissions can be subjected to garnishment.²²⁹ This particular enforcement measure is considered to be directly effective as the funds stemming from the garnishment would be used directly for the maintenance payment.²³⁰

2.8.2.3 Deductions from Social Security Payments

This is an enforcement measure that allows for the enforcement authority to enforce a maintenance decision by allowing for the maintenance funds to be deducted from any social security or support payments made by the government to the debtor.²³¹ Deductions from the government's social security or support payments to the debtor are only applicable in circumstances where the debtor is entitled to receive such payments. This enforcement measure is limited in its effectiveness when there are not many debtors who qualify for its use.

2.8.2.4 Lien or Forced Sale of Property

'A lien is a notice filed against the title or registration of property owned by the debtor.'²³² A lien can be filed against real property, being land or a house or building, or personal property, being cars, boats or similar possessions and if the property with the lien is later sold, any

²²⁶ Walker L (2015) 179.

²²⁷ Hague Conference on Private International Law (2013) 169.

²²⁸ Hague Conference on Private International Law (2013) 169.

²²⁹ Bryant A *Complete Guide to Federal and State Garnishment* 16 ed (2015) 47; Hague Conference on Private International Law (2013) 169.

²³⁰ Walker L (2015) 178.

²³¹ Hague Conference on Private International Law (2013) 169.

²³² Hague Conference on Private International Law (2013) 169.

maintenance arrears will be paid from the sale proceeds.²³³ A forced sale of property is when the lien gives the enforcement authority the right to sell the property as a means of recovering the maintenance from the proceeds of the sale.²³⁴ This enforcement measure is directly effective in that the proceeds from the sale of property would be used for maintenance payments straight away. As most persons own some form of property, whether real or personal, this enforcement measure should be easily and effectively implemented against debtors for maintenance recovery payments.

2.8.2.5 Tax Refund Withholding

A tax refund is a sum of money given back to taxpayers when they have paid excess tax.²³⁵ Withholding the payment of a tax refund can be used as a means of enforcing maintenance payments by the debtors.²³⁶ When this enforcement measure is utilised, the State may allow for an enforcement authority to intercept any tax refunds payable to debtors in order to make maintenance payments.²³⁷ A tax refund is not paid out to a maintenance debtor in monthly intervals similar to a salary. The refund is generally an annual payment. As such the withholding of a tax refund will likely be a short term solution to the lack of maintenance payments and is probably better to utilise it as such.

2.8.2.6 Withholding or Attachments of Pension Benefits

A State is able to attach or withhold any pension benefits payable to the debtor in order to pay outstanding maintenance.²³⁸ Some States, for example Brazil (though not yet a member state to the Convention), utilise this measure as a means of enforcement.²³⁹ The measure itself is not one that can be consistently applied due to many debtors not having any pension benefits. As pensions are meant to aid in the debtor being financially stable once he or she is unable to remain or be employed, using that money to pay current maintenance obligations may only be a short term solution as it will impact the debtor negatively in the future when he or she no

²³³ Lopes I – Professor of Private International Law, University of Brasilia, inezlopes@unb.br - ‘Migration, maintenance and the challenge of new types of transnational households’ presented at the Hague Conference on the Global Recovery of Child Support and Family Maintenance in Asia Pacific and Worldwide 9 – 11 November 2015 in Hong Kong, presentation 13-14; Hague Conference on Private International Law (2013) 169.

²³⁴ Hague Conference on Private International Law (2013) 169.

²³⁵ Hague Conference on Private International Law (2013) 169.

²³⁶ IRS ‘Tax Refund Withholdings and Offset’ available at <https://www.irs.gov/uac/tax-refund-withholdings-and-offsets> (Accessed on 28 October 2016).

²³⁷ Hague Conference on Private International Law (2013) 169.

²³⁸ Hague Conference on Private International Law (2013) 169.

²³⁹ Lopes I (2015) presentation slide 15.

longer receives an income.²⁴⁰ The future consequences of an attachment of pension benefits would have to be determined based on the circumstances of each case.

2.8.2.7 Credit Bureau Reporting

‘Reporting outstanding maintenance obligations to a credit reporting agency is a mechanism used by enforcement authorities in some States to ensure that any credit granter, such as a financial institution, is aware of the obligation of the debtor to pay maintenance, and the fact of any arrears.’²⁴¹ This can be an effective enforcement measure in securing maintenance payments from the debtor as it would be unlikely that they would be granted further credit or financing with the current outstanding maintenance debt. Stopping the debtors from creating more debt for themselves increases the likelihood that they will pay the outstanding maintenance debt.

2.8.2.8 Denial, Suspension, or Revocation of Various Licences

In some States, an enforcement authority may make a request to restrict or deny licence privileges to a debtor who is in arrears of maintenance.²⁴² The licence privileges include not only driver’s or other motor vehicle licences but also professional licences or other special permits.²⁴³ The use of this enforcement measure would be to inconvenience the debtor in an attempt to compel the debtor to pay outstanding maintenance.²⁴⁴

2.8.2.9 Mediation, Conciliation, or Similar Processes for Voluntary Compliance

Alternative dispute resolution processes such as mediation and conciliation promote a compromise leading to voluntary maintenance payments.²⁴⁵ ‘Many maintenance enforcement programmes have found that efforts to seek voluntary compliance by the debtor are extremely effective in getting arrears paid and reducing the likelihood of future default.’²⁴⁶ The enforcement programmes often consist of developing a payment plan with the debtor that ensures that both the current payments as well as any outstanding arrears are paid.²⁴⁷

²⁴⁰ Lopes I (2015) presentation slide 15.

²⁴¹ Hague Conference on Private International Law (2013) 169.

²⁴² Borrás A and Degeling J (2013) 195; Hague Conference on Private International Law (2013) 169.

²⁴³ Hague Conference on Private International Law (2013) 170.

²⁴⁴ Walker L (2015) 178.

²⁴⁵ Hague Conference on Private International Law (2013) 170.

²⁴⁶ Borrás A and Degeling J (2013) 195; Hague Conference on Private International Law (2013) 170.

²⁴⁷ Palos N – Support Magistrate, New York State Family Court (Kings County), npalos@nycourts.gov – ‘Problem Solving Courts: Fostering Reliable Compliance with Familial Support Obligations’ presented at the Hague Conference on the Global Recovery of Child Support and Family Maintenance in Asia Pacific and

2.8.2.10 Imprisonment

In some States, incarceration is used as an enforcement measure for defaulting in maintenance payments.²⁴⁸ In most cases, debtors who are able to make the maintenance payments but choose to ignore their maintenance obligations and default in payments are the debtors who are incarcerated.²⁴⁹ This measure then acts as a means of punishing the debtor for wilfully disregarding his or her maintenance obligations.²⁵⁰ Imprisonment is a less efficient means of enforcement when the debtor is defaulting in maintenance payments due to a lack of financial means.²⁵¹ In cases where the debtor lacks funds to meet his or her maintenance obligations, imprisonment will decrease the possible opportunities for better employment to improve the debtor's financial obligations.²⁵² However, incarceration for a debtor based on a lack of maintenance payments regardless of the reasons for the default prolongs any payment to the creditor.²⁵³ As the creditor relies on the maintenance payments to meet the many necessary expenses, it would be ineffective to imprison the debtor as the creditor would not receive the maintenance payments, likely resulting in a worsening financial situation.²⁵⁴

2.8.3 The iSupport Project

'The objective of the iSupport project is to develop an electronic case management and secure communication system to facilitate the cross-border recovery of maintenance obligations under the EU 2009 Maintenance Regulation and the 2007 Hague Child Support Convention.'²⁵⁵ The iSupport project is 'designed to help with the effective application of the Convention when it is in force.'²⁵⁶ When activated, the iSupport system should allow for CAs

Worldwide 9 – 11 November 2015 in Hong Kong, presentation slide 8; Hague Conference on Private International Law (2013) 170.

²⁴⁸ Hague Conference on Private International Law (2013) 170.

²⁴⁹ De Jongh Bekkali F – Head of Section, NAV National Office for Social Insurance Abroad, floor.de.jongh.bekkali@nav.org – 'Norway's Efficient and Effective Administration System for the Establishment and Enforcement of Child Support' presented at the Hague Conference on the Global Recovery of Child Support and Family Maintenance in Asia Pacific and Worldwide 9 – 11 November 2015 in Hong Kong, presentation slide 13; Hague Conference on Private International Law (2013) 170.

²⁵⁰ Hague Conference on Private International Law (2013) 170.

²⁵¹ Griffin A – Director at the Californian Department of Child Services, alisha.griffin@dcss.ca.gov – 'The Evolution of US/North American Enforcement Practices: 20 Years of Learning' presented at the Hague Conference on the Global Recovery of Child Support and Family Maintenance in Asia Pacific and Worldwide 9 – 11 November 2015 in Hong Kong, presentation slide 23.

²⁵² Griffin A (2015) presentation slide 23.

²⁵³ Griffin A (2015) presentation slide 23.

²⁵⁴ Griffin A (2015) presentation slide 23.

²⁵⁵ Hague Conference on Private International Law 'iSupport: Cross-border recovery of maintenance obligations' available at <https://www.hcch.net/en/instruments/conventions/isupport1> (accessed 13 June 2016).

²⁵⁶ Walker L (2015) 197.

to operate efficiently with more ease than their current operation, should a Contracting State choose to use the iSupport System.²⁵⁷ Storing all necessary information regarding each individual application, generating statistics and translating necessary forms are key features of the project.²⁵⁸

The need for this project can be determined through the CAs need to assist with the on-going enforcement of maintenance obligations.²⁵⁹ Child support cases last for many years and the cases often require some sort of modification prior to the dissolution of the maintenance obligations.²⁶⁰ ‘An effective technical system and database will make (on-going enforcement of maintenance obligations) simpler, as changes to the payments can be updated and it will enable Central Authorities to keep track of payments and whether they are being discharged or not.’²⁶¹ The benefit of Contracting States using the iSupport system, when activated, is not only its effective and efficient implementation of the Convention but also the development to greater uniformity in the Convention’s practical application in different States.²⁶² The iSupport system will improve communications between CAs by allowing for real time updates in information and all day access regardless of a corresponding Contracting State’s working hours.²⁶³

The design of the iSupport system has several key features. The design has a case specific function concerning actual enforcement which includes a module that assists in the enforcement and monitoring of electronic funds transfers.²⁶⁴ With the above-mentioned function, CAs will find it easier to fulfil their duties in relation to enforcement, assist in ensuring that funds are transferred timeously and it has the additional benefit that all information which may be needed is collated in one database.²⁶⁵ It would be prudent for Contracting States to utilise the Convention specific design of the iSupport system.

²⁵⁷ Walker L (2015) 197.

²⁵⁸ European Commission *Recovery of Maintenance in the European Union and Worldwide: Conclusions and the Next Steps of the Heidelberg Conference from 5 – 8 March 2013* (2013) para17 and 18; ‘Walker L (2015) 197.

²⁵⁹ Walker L (2015) 197.

²⁶⁰ Lortie P ‘The Development of Medium and Technology Neutral International Treaties in Support of Post-Convention Information Technology Systems: The Example of the 2007 Hague Convention and Protocol’ in Sarcevic P (founding ed) *Yearbook of Private International Law* (2008) 359-360.

²⁶¹ Walker L (2015) 197.

²⁶² Walker L (2015) 197.

²⁶³ Lortie P ‘Developing an Electronic Case Management and Communication System for the 2007 Hague Child Support Convention and 2009 EU Maintenance Regulation’ in Beaumont P, Hess B, Walker L and Spancken S (eds) *The Recovery of Maintenance in the EU and Worldwide* (2014) 275.

²⁶⁴ Walker L (2015) 198.

²⁶⁵ Walker L (2015) 198.

2.9 Costs

Under the Convention, one of the most important principles is that applicants must have effective access to procedures necessary to complete their applications in the Requested State.²⁶⁶ The procedures stated above include both enforcement and appeal procedures.²⁶⁷ During the negotiations, it was decided that in order to provide the necessary effective access, free legal assistance would be given pertaining to each international maintenance claim.²⁶⁸ The free legal assistance given will be no less than that afforded to domestic cases in each Contracting State.²⁶⁹ Applications for child and other forms of family maintenance, i.e. spousal maintenance, qualify for free legal assistance.²⁷⁰

When dealing with child maintenance cases, the Requested State ‘shall provide free legal assistance in respect of all applications by a creditor’ when using a CA to process said applications.²⁷¹ Free legal assistance will be given when a dispute concerns maintenance obligations that stem from ‘a parent-child relationship towards a person under the age of 21 years’.²⁷² However, a State may refuse free legal assistance if it considers that the application or appeal, based on the merits, is manifestly unfounded.²⁷³ ‘That is a high threshold’ so it is likely that the majority of cross border child maintenance cases will be dealt with free of charge.²⁷⁴ The practical effect is that the high threshold discourages applicants to use direct requests to the Requested State when dealing with child maintenance disputes and promotes using CAs to apply for child maintenance recovery.²⁷⁵

Contracting States are permitted under Article 63 to declare that free legal assistance will be given subject to a means test.²⁷⁶ The test is an assessment of the financial means of the child.²⁷⁷ The means test may also be used for direct applications to the Requested State’s competent authority or those not concerning recognition and enforcement orders using

²⁶⁶ *Hague Convention 2007*, Article 14(1); Long E (2008) 988.

²⁶⁷ Hammond D and Barnes M (2013) 271; *Hague Convention 2007*, Article 14(1).

²⁶⁸ Duncan W (2008) 322; Hammond D and Barnes M (2013) 271.

²⁶⁹ Borrás A and Degeling J (2013) 13; *Hague Convention 2007*, Article 14(4); Hammond D and Barnes M (2013) 271.

²⁷⁰ Bariatti S (2011) 1177; *Hague Convention 2007*, Article 14(2).

²⁷¹ Hammond D and Barnes M (2013) 271; *Hague Convention 2007*, Article 15(1); Long E (2008) 988; Duncan W (2008) 323.

²⁷² Borrás A and Degeling J (2013) 13; *Hague Convention 2007*, Article 15(1).

²⁷³ *Hague Convention 2007*, Article 15(2); Hammond D and Barnes M (2013) 271; Duncan W (2008) 323; Long E (2008) 988.

²⁷⁴ Hammond D and Barnes M (2013) 271.

²⁷⁵ Hammond D and Barnes M (2013) 271.

²⁷⁶ Long E (2008) 988; *Hague Convention 2007*, Article 16(1).

²⁷⁷ *Hague Convention 2007*, Article 16(2).

CAs.²⁷⁸ For non-child disputes, if the applicant received legal aid in the proceedings in the Contracting State of origin, said applicant would receive legal aid to same extent in the international proceedings.²⁷⁹ Yet, this would only be the case if the application were for recognition and enforcement of a decision.²⁸⁰

2.10 Co-ordination

Under the general provisions chapter, namely chapter VII, the Convention clarifies its position in regards to previous Hague Conventions, not only those conventions relating to maintenance obligations, but also current and supplementary international instruments.²⁸¹ The 1973 Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations as well as the 1958 Hague Convention also concerning maintenance obligations are both replaced by the 2007 Convention.²⁸² The replacement is only in reference to the scope of application between Contracting States where it coincides with the scope of application of the 2007 Convention.²⁸³ The 1956 New York Convention is included in the above mentioned replacement regarding the scope of its application.²⁸⁴

It is important to note that the Convention does not affect any international instrument concluded prior to the Convention itself, to which Contracting States are parties or members and which contain provisions on matters governed by the Convention.²⁸⁵ Contracting States are permitted to conclude additional agreements between other Contracting States if the agreement is an attempt to improve the application of the Convention between or among them.²⁸⁶ When concluding such agreements, they must maintain consistency with the objects and purpose of the Convention while also not affecting the relationship of the Contracting States to the new agreement and those Contracting States that are not a part of the new agreement regarding the application of the Convention.²⁸⁷

The Convention allows for the premise of the most effective rule.²⁸⁸ This premise is based on the idea that the Convention does not prevent the applications of agreements, arrangements,

²⁷⁸ Bariatti S (2011) 1177; *Hague Convention 2007*, Article 16(1).

²⁷⁹ *Hague Convention 2007*, Article 17(a) and (b); Hammond D and Barnes M (2013) 271.

²⁸⁰ Hammond D and Barnes M (2013) 271.

²⁸¹ *Hague Convention 2007*, Chapter 7.

²⁸² Borrás A and Degeling J (2013) 25; *Hague Convention 2007*, Article 48.

²⁸³ *Hague Convention 2007*, Article 48.

²⁸⁴ Bariatti S (2011) 1187-1188; *Hague Convention 2007*, Article 49.

²⁸⁵ *Hague Convention 2007*, Article 51(1).

²⁸⁶ Borrás A and Degeling J (2013) 27; *Hague Convention 2007*, Article 51(2).

²⁸⁷ *Hague Convention 2007*, Article 51(2).

²⁸⁸ *Hague Convention 2007*, Article 52.

or international instruments already in force between particular States as long as they provide for a better or a more effective means of dealing with cross border maintenance recovery obligations than those provided for under the Convention.²⁸⁹ This stands to reason that if the above mentioned applications do not improve on the standards set in the Convention then the Convention would take precedence regarding international maintenance obligations making the agreement, arrangement or international instrument redundant.

2.11 The Convention's Pre- and Post-Requirements

In order to ensure the continued effective and efficient application of the Convention, both pre- and post-requirements are provided for implementation. Pre-requirements refer to providing information on national laws and procedures of a State that goes beyond the traditional obligation of sharing information regarding contact details of CAs.²⁹⁰ The post-requirements focus on the need for monitoring and reviewing how a Contracting State applies the provisions of the Convention.²⁹¹ A special monitoring and reviewing committee meets at regular intervals to discuss the Convention's application in any of its Contracting States.²⁹²

In order to comply with the pre-requirements, States have to provide a description of their current laws and procedures concerning maintenance obligations as well as how said State will meet its obligations regarding the functions of CAs provided for under Article 6.²⁹³ A State is also required to describe how it will provide for effective access to procedures, including access to free legal assistance and access to enforcement and appeal procedures, for matters concerning the Convention.²⁹⁴ A description of what the above mentioned procedures entail is also required.²⁹⁵

The committee meetings discussions use case law and statistics as a means of fulfilling the post-requirement obligation to monitor and review Contracting States' application of the Convention.²⁹⁶ Other means of fulfilment include considering a Contracting State's development of good practices and the co-operation between the Contracting State and the HCCH's Permanent Bureau in gathering information about the Convention's practical

²⁸⁹ Bariatti S (2011) 1189; *Hague Convention 2007*, Article 52(1).

²⁹⁰ Duncan W (2008) 328.

²⁹¹ Duncan W (2008) 329.

²⁹² Borrás A and Degeling J (2013) 221.

²⁹³ *Hague Convention 2007*, Article 57(1)(a).

²⁹⁴ Bariatti S (2011) 1191.

²⁹⁵ Duncan W (2008) 329.

²⁹⁶ Duncan W (2008) 330.

operation in the specific Contracting State.²⁹⁷ Another post-requirement refers to interpreting the provisions of the Convention as it is necessary to focus on the Convention's international character as well as the need to promote uniformity in its practical application when interpreting the Convention.²⁹⁸

2.12 Conclusion

As can be seen from this chapter, the Convention is a well-researched and comprehensive international instrument. With the conscious effort of negotiators when determining what to include in the Convention's provisions, their focus on the successes and failures of all previous conventions regarding the cross border recovery of child maintenance make for an up to date Convention with a definite propensity for future triumph.²⁹⁹ The Convention gives necessary clarity on when it is applicable, which relationships allow for its use in resolving disputes and it gives two detailed methods of recovery to utilise the provisions it contains to the fullest.³⁰⁰

While the Convention provides a uniform process to be used when handling cross border maintenance applications, specifically when using CAs, it does not limit an applicant's choice to use other means, such as directly requesting a State to recognise and enforce a foreign maintenance order.³⁰¹ This is but one example of the Convention's flexibility in resolving disputes. Another example concern the list of enforcement measures stated within the Convention. The list of nine measures gives Contracting States a choice in relation to which of the measures to apply in their implementation of the Convention.³⁰² It is clear that each Contracting State has different resources available within its legal system to utilise in ensuring enforcement. Having a choice in which measures to apply will aid in the successful resolution of disputes as the Contracting State will most likely choose the measures shown to be emitting favourable results in both the domestic and international field. The USA will likely choose the wage withholding enforcement measure provided for in the Convention as it has had success using that measure in its domestic recovery system.³⁰³

²⁹⁷ *Hague Convention 2007*, Article 54(1).

²⁹⁸ Duncan W (2008) 330.

²⁹⁹ Long E (2008) 985.

³⁰⁰ *Hague Convention 2007*, Article 1(a), 2(3), 23 and 24.

³⁰¹ Duncan W (2008) 325; *Hague Convention 2007*, Article 37.

³⁰² Borrás A and Degeling J (2013) 195.

³⁰³ Griffin A (2015) presentation slide 7.

Time and cost constraints are included in the Convention. Both types of restrictions are used in the application process. An application once sent to the CA in the Requested State is to be acknowledged within six weeks.³⁰⁴ Each CA is to be in constant communication when dealing with an active application and progress must be communicated at regular intervals to all persons involved.³⁰⁵ Costs are to be absolved by the State who initiated the application allowing for more persons affected by cross border maintenance disputes to utilise the Convention without worrying about the costs involved in the dispute.³⁰⁶

Contracting States are required to ensure the Convention's application to cross border maintenance recovery disputes. Each State is required to inform the monitoring and reviewing committee of its progress in resolving disputes and the continued assurance of enforcement at the regularly scheduled meetings.³⁰⁷ Another means of ensuring enforcement is the iSupport project. Under the project, maintenance orders which have received recognition and enforcement in the Requested State will have the details of the resolution uploaded onto the electronic database, enabling all members to the Convention to have access to the information.³⁰⁸ All persons required to make maintenance payments will be monitored by the system as to when payments are made and when defaulting occurs, meaning that enforcement exceeds the resolution of the initial dispute.

The following chapter will focus on the South Africa's current means of resolving cross border maintenance recovery disputes. While the majority of the chapter will focus on the cross border legal framework, aspects relating to the domestic maintenance recovery system cannot be ignored and will be included in the discussion. Legislation and bilateral agreements will be given careful consideration when determining South Africa's legal position regarding cross border maintenance recovery. Sufficient weight will be given to the duty of support and South Africa's obligations regarding compliance with both national and international instruments concerning the duty. Measure of enforcement used in South Africa for both domestic and cross border maintenance recovery will be discussed. Domestic measures in particular will carry weight in the determination of their applicability in solving cross border disputes.

³⁰⁴ *Hague Convention 2007*, Article 12(3).

³⁰⁵ *Hague Convention 2007*, Article 12(5)(a) and (b).

³⁰⁶ Hammond D and Barnes M (2013) 271.

³⁰⁷ Duncan W (2008) 329-330.

³⁰⁸ Walker L (2015) 197.

CHAPTER 3

THE CURRENT POSITION OF THE SOUTH AFRICAN LEGAL SYSTEM IN DEALING WITH THE CROSS BORDER RECOVERY OF CHILD MAINTENANCE

3.1 Introduction

Over the last few years in South Africa, the legal position regarding maintenance recovery has undergone a number of changes, specifically with the new legislation providing amendments to the topic, i.e. the Maintenance Amendment Act 9 of 2015. However, it is important to note that these amendments have yet to come into operation, as discussed later in this chapter.³⁰⁹ In the lead up to this new legislative change, the legal position regarding maintenance recovery and the enforcement of maintenance orders was called into question.³¹⁰ The maintenance recovery system was found to be ineffective, tedious and lacked speedy means of resolving cases.³¹¹ Campaigns were launched throughout the country attempting to create awareness of the current system's flaws while also giving options to solve the problem. One such solution was the name and shame campaign, which listed the names of maintenance debtors and the amounts each owed in maintenance payments.³¹² The list was then publicised creating awareness of the need for an effective system of enforcement.

While considering the need for an effective maintenance recovery system within South Africa, there was no mention of the maintenance recovery system regarding cross border recovery instances. In fact, maintenance cases concerning a cross border element have and remain overlooked.³¹³ Though South Africa has legislation pertaining to the cross border recovery of maintenance, it is out dated and rarely used.³¹⁴ Little to no interest has been shown in helping to discover an effective means of resolving maintenance disputes when such disputes contain cross border elements.³¹⁵ However, it remains important to consider the current legal position in South Africa in dealing with cross border maintenance recovery disputes.

³⁰⁹ Maintenance amendment act 9 of 2015, s19.

³¹⁰ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 1.3.

³¹¹ *Bannatyne v Bannatyne* at para 26.

³¹² South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.14.

³¹³ Maintenance Act 99 of 1998; Maintenance Amendment Act 9 of 2015.

³¹⁴ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

³¹⁵ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 1.2 and 1.3.

In examining South Africa's current legal position regarding the cross border recovery of maintenance, it is important to extend a focus to the duty of support and its recognition under South African law. The international obligations imposed on South Africa regarding said duty will reaffirm the duty's importance in maintenance disputes, as without this duty parents would not have a legal obligation to support their children.³¹⁶ As will be discussed in detail in this chapter, the duty of support relating to maintenance of the child is considered to be in said child's best interests.³¹⁷ Legislation supporting the duty of support and its enforcement in both domestic and international cases will be a focus in the discussion of South Africa's current legal position regarding cross border maintenance recovery and enforcement.

Bilateral agreements and conflict of laws provisions require attention in giving a full account of the current cross border maintenance recovery system in South Africa. While bilateral agreements show a positive step forward in effectively recognising and enforcing foreign maintenance orders, thereby minimising the problematic and prolonged system for cross border recovery, conflict of laws provisions assist in speedily determining which law will be applicable to a particular case and allowing for the recovery process to continue to the enforcement stage without many objections. The enforcement stage requires effective and expedient measures, which ensure payment of maintenance.³¹⁸ As maintenance payments are required as soon as possible to ensure children are properly cared for, particularly considering the financial needs of children, enforcement of a maintenance order must be timeous and very effective in securing payment.³¹⁹ The current measures of enforcement used in South Africa for both domestic and cross border maintenance recovery are discussed in this chapter.

3.2 The Duty of Support

The duty of support refers to the duty to maintain one's child or other legally recognised dependant.³²⁰ The duty applies to both parents of the child equally and both parents are to maintain their child to the best of their ability with regard to their financial circumstances.³²¹ The duty is widely recognised at an international level and as such places obligations on countries to ensure that they provide for the means necessary for parents to maintain their

³¹⁶ Clark B 'Duties of Support of Living Persons' in Van Heerden B, Cockrell A and Keightley R (eds) *Boberg's Law of Persons and the Family* 2 ed (1999) 241, 259-260.

³¹⁷ *Soller v Maintenance Magistrate of Wynberg and Others* 2006 (2) SA 66 (C) at paras 15 and 16.

³¹⁸ *Bannatyne v Bannatyne* at para 28.

³¹⁹ *Bannatyne v Bannatyne* at para 30.

³²⁰ Clark B (1999) 241.

³²¹ Clark B (1999) 241.

children.³²² Such obligations include food, shelter, education, health services and social services.³²³

Regarding cross border maintenance cases where the residential parent³²⁴ and non-residential parent³²⁵ reside in different countries, the non-residential parent will make maintenance payments to the residential parent for the child. The residential parent must then use these payments to contribute to the child's welfare and upbringing.³²⁶ Remarriage of either parent does not absolve the other parent from maintaining the child they share.³²⁷ The means of terminating the duty of support is when the child becomes self-supporting, meaning that the child is able to live off his or her earnings without the financial assistance of his or her parents.³²⁸ When a child has left school or has completed his or her schooling, many debtors assume that the duty of support that they owe to their children is terminated and they are now no longer required to make financial contributions to the child.³²⁹ This is incorrect. The duty of support will be deemed satisfied or terminated in two instances; when a child has the capability of supporting himself or herself or when a child earns a liveable income.³³⁰ A child who studies further is an example of this. When studying further most students will do so on a full time basis leaving little to no time to work to earn a liveable salary, keeping them dependent on their parents and keeping the duty of support in effect. Reaching the age of majority, i.e. when a child reaches the age of 18 years, is not a ground for the automatic termination of the duty of support, though it can be agreed to be such a ground by the parents of the child within their maintenance agreement.³³¹

³²² CRC, Articles 3(2) and 27(3); ACRWC, Article 20(2).

³²³ Clark B (1999) 243-244.

³²⁴ Children's Act 38 of 2005, s1 – *The residential parent refers to the parent who cares for the child in that he or she provides a child with a suitable place to live, living conditions conducive to a child's health, well-being and development, and the necessary financial support. Essentially the residential parent is the parent with whom a child resides.*

³²⁵ Children's Act 38 of 2005, s1 – *The non-residential parent refers to the parent who maintains a personal relationship with the child, yet the child does not live with this parent. In maintaining the personal relationship with the child, the non-residential parent communicates on a regular basis in person i.e. through visitation, or communicates through other means i.e. through telephone calls and messages.*

³²⁶ Clark B (1999) 241.

³²⁷ McLaren I 'The Reciprocal Duty of Support between Parents and their Children' available at <http://mclarens.co.za/reciprocal-duty-of-support-between-parents-and-their-children/> (Accessed on 17 July 2016).

³²⁸ Botha M F T 'The Duration of the Duty to Maintain and of a Maintenance Order' (2008) 125 *South African Law Journal* 717.

³²⁹ Botha M F T (2008) 718.

³³⁰ Botha M F T (2008) 718.

³³¹ *Bursey v Bursey* 1997 (4) SA 1018 (SE) at 1021; Children's Act 38 of 2005, s1.

It is important to note that self-supporting in a legal sense means when the child is able to support him or herself at the family standard of living.³³² In other words, ‘the mere fact that a child has an income from employment does not make him or her self-supporting in the legal sense, for the income may be insufficient to maintain the child at the family standard of living.’³³³ Furthermore, the attainment of majority does not automatically terminate the duty to support a child, the importance lies in the ability of the child to support him or herself.³³⁴ However, a parent is not obligated to support his or her child if this parent is unable to do so by reason of indigence, ill-health or otherwise while children who can support themselves, cannot require their parents to support them.³³⁵

3.2.1 Internationally Recognised Duty: Convention on the Rights of the Child

‘The Convention on the Rights of the Child is the most rapidly and widely ratified international human rights treaty in history.’³³⁶ The CRC has been ratified by 196 States leaving only USA that has not ratified it.³³⁷ Due to the wide recognition of the CRC, all countries who have ratified it have acknowledged the importance of protecting children and affording them a system of specialised rights and freedoms to further their development for the better.³³⁸ Included in these specialised rights and freedoms are rights relating to parental care and responsibilities relating to the child, to maintaining a child, as well as the principle that when it comes to cases involving a child, the child’s best interests are considered to be of paramount importance when determining an outcome.³³⁹

In the CRC it is clearly shown that parents have a duty to support their children and that in doing so, the parents should keep the best interests of the child as their main concern regarding the child’s upbringing and development.³⁴⁰ Article 27 states that ‘States Parties recognise the right of every child to a standard of living adequate for the child’s physical,

³³² Clark B (1999) 246.

³³³ Botha M F T (2008) 717.

³³⁴ Clark B (1999) 247.

³³⁵ Clark B (1999) 245.

³³⁶ UNICEF ‘Convention on the Rights of the Child’ available at <http://www.unicef.org/crc/> (Accessed on 23 August 2016).

³³⁷ Metha S ‘There’s Only One Country That Hasn’t Ratified the Convention on Children’s Rights: US’ available at <https://www.aclu.org/blog/speak-freely/theres-only-one-country-hasnt-ratified-convention-childrens-rights-us> (Accessed on 8 November 2016).

³³⁸ Humanium ‘The Convention on the Rights of the Child: Issues of the Convention’ available at <http://www.humanium.org/en/convention/issues/> (Accessed on 23 August 2016).

³³⁹ CRC, Articles 3, 6, 18 and 27.

³⁴⁰ Clark B (1999) 260.

mental, spiritual, moral and social development.’³⁴¹ The standard of living differs from child to child and most countries consider basic nutrition, shelter, health care and social services as a minimum standard that can be applied to fulfil this Article 27 obligation.³⁴² Due to the differences in economic structures and financial means of parents, the minimum standard mentioned above will act as a blanket standard within a particular country; however, the State’s duty is based on the means available to each country.³⁴³ For example, parents whose financial circumstances are superior to others will be able to provide for their child at a higher standard than those who earn a lesser income. States have a duty to ensure that, even with the vast differences in economic standing, all parents are still able to provide for their child.³⁴⁴

The duty of support is one also recognised and provided for in the ACRWC.³⁴⁵ The objective of the ACRWC not only requires States to ‘recognize the rights, freedoms and duties enshrined within the Charter’ but also to ‘undertake the necessary steps’ to adopt ‘legislative and other measures as may be necessary to give effect to the provisions of this Charter’ in accordance with the states’ constitutional processes and the provisions of the Charter.³⁴⁶ Article 20 provides for the duty of support and a child’s right to be maintained.³⁴⁷ Specifically found in Article 20(2) is a State’s obligation to assist parents in fulfilling the duty of support.³⁴⁸ It is important to note that the ACRWC places a limitation on a State’s obligation i.e. that the State’s obligation is to be fulfilled within its means and according to its resources available.³⁴⁹ The material assistance to be provided by a State in assisting parents to comply with the duty of support needs to be considered when a State has high levels of family poverty.³⁵⁰ South Africa is such a State.³⁵¹

3.2.2 South Africa’s Recognition of the Duty of Support

South Africa has recognised the duty of support at both an international and domestic level. The recognition of the duty is seen through the ratification of international instruments

³⁴¹ CRC, Article 27(1).

³⁴² Clark B (1999) 260-261.

³⁴³ Van Zyl L (2000) 62; CRC, Article 27(3); Clark B (1999) 260.

³⁴⁴ CRC, Article 27(2).

³⁴⁵ Sloth-Nielsen J ‘The Protection of Children’s Economic, Social and Cultural Rights under the African Children’s Charter’ in Chenwi L and Chirwa D (eds) *Litigating Socio Economic Rights in Africa* (2016) 159.

³⁴⁶ ACRWC, Article 1.

³⁴⁷ ACRWC, Article 20.

³⁴⁸ Sloth-Nielsen J (2016) 159.

³⁴⁹ ACRWC, Article 20(2).

³⁵⁰ Sloth-Nielsen J (2016) 159.

³⁵¹ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 4.

relating to children's rights and from its use of the international obligations stemming from the ratifications to develop national laws allowing for South Africa to adhere to the rights stated in the international instruments.³⁵² Examples of the above mentioned instance include the ratification of the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC).³⁵³ The obligations found within the international instruments are also included in the South African Constitution as well as in specific children's rights legislation in the form of the Children's Act.³⁵⁴

3.2.2.1 Ratification of the Convention on the Rights of the Child

With South Africa's ratification of the CRC in 1995, the country assumed international obligations relating to the maintenance of children.³⁵⁵ Included in the international obligations is the duty to ensure that all appropriate measures are taken to secure the recovery of child maintenance both in domestic and cross border circumstances.³⁵⁶ As will be shown in more detail under 3.3, the South African legislative position regarding domestic maintenance recovery has up dated legislation dealing with the position post ratification of the CRC.³⁵⁷ Yet, the cross border recovery position has out dated legislation in place from more than 30 years prior to the CRC's ratification.³⁵⁸ The out dated legislation regarding cross border maintenance recovery is indicative of the need for a reconsideration of the legal position that includes new developments in the cross border recovery field, i.e. the consideration of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

3.2.2.2 African Charter on the Rights and Welfare of the Child

South Africa ratified the ACRWC on 7 January 2000.³⁵⁹ Article 4 states that in all matters concerning children, the best interests of children will be the primary consideration.³⁶⁰ The

³⁵² Clark B (1999) 259.

³⁵³ Clark B 'Children's right to support – a public responsibility?' (1996) *Acta Juridica* 82; African Commission on Human and Peoples' Rights 'Ratification Table: African Charter on the Rights and Welfare of the Child' available at <http://www.achpr.org/instruments/child/ratification/> (Accessed on 24 August 2016).

³⁵⁴ Constitution of the Republic of South Africa, 1996; Children's Act 38 of 2005.

³⁵⁵ Van Schalkwyk N 'Maintenance for Children' in Boezaart T (ed) *Child Law in South Africa* (2009) 61.

³⁵⁶ CRC, Article 27(4).

³⁵⁷ Maintenance Amendment Act 9 of 2015.

³⁵⁸ Reciprocal Enforcement of Maintenance Orders Act 80 of 1963.

³⁵⁹ African Commission on Human and Peoples' Rights 'Ratification Table: African Charter on the Rights and Welfare of the Child' available at <http://www.achpr.org/instruments/child/ratification/> (Accessed on 24 August 2016).

³⁶⁰ ACRWC, Article 4.

wording is similar to that found in Article 3 of the CRC.³⁶¹ ‘Primary consideration’ in the context of the best interests principle refers to a larger weight being placed on the child’s best interests when weighing up all the other interests.³⁶²

Articles 18 and 20(1) in the ACRWC give rise to the duty to support one’s children. The latter reaffirms the CRC’s position that parents are primarily responsible for the upbringing and development of the child as well as stating that they have a duty ‘to secure, within their abilities and financial capacities, conditions of living necessary to the child’s development.’³⁶³ Article 18 concerns the protection of the family unit. It states that the State is required to ensure the equal distribution of rights and responsibilities of spouses even in cases of divorce as well as ensure that the child receives the necessary protections involved.³⁶⁴ The necessary protections include retaining the same or at least similar standard of living the child was maintained at prior to the dissolution of the family unit and the Article also expressly states that no child loses the protection of being maintained as a result of the parents’ marital or non-marital status.³⁶⁵ This means that the duty to support one’s child does not end as a result of divorce. In reality, ensuring the maintenance of the child after divorce by both parents becomes a constant struggle for the State.³⁶⁶ The State’s struggle mentioned here will be discussed in greater detail in the following chapter (see 4.2).

3.2.2.3 Constitution of the Republic of South Africa, 1996

Section 28 of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution) considers the rights afforded to children.³⁶⁷ One such right relates to having family or parental care while another states that a child be afforded basic nutrition, shelter, social and health care services.³⁶⁸ The latter right relates to the necessary means of maintaining a child.³⁶⁹ The best interests of the child principle referred to earlier in the chapter also features in the Constitution. The principle differs in its wording to the CRC and ACRWC in that the use of the principle in all matters relating to children is of paramount importance as opposed to a primary consideration.³⁷⁰ The Constitution’s use of paramount

³⁶¹ CRC, Article 3.

³⁶² Buck T *International Child Law* 3 ed (2014) 139.

³⁶³ ACRWC, Article 20(1).

³⁶⁴ ACRWC, Article 18.

³⁶⁵ ACRWC, Article 18(2) and (3).

³⁶⁶ Clark B (1999) 263.

³⁶⁷ Constitution of the Republic of South Africa, 1996.

³⁶⁸ Van Schalkwyk N (2009) 61; Constitution of the Republic of South Africa, 1996, s28(1)(b) – (c).

³⁶⁹ Maintenance Act 99 of 1998, s15(2); Van Zyl (2000) 5; Clark B (1999) 261.

³⁷⁰ Constitution of the Republic of South Africa, 1996, s28(2).

importance ‘emphasises that the child’s best interests are determinative: they determine the course of action to take.’³⁷¹

The South African legal interpretation of the best interests principle is shown through judicial precedent. In *R v H and Another*,³⁷² the Cape High Court stated that:

‘Implicit in the best interests of the child is his or her well-being, education, physical and mental health, spiritual, oral, and social development. The primary responsibility for the protection and promotion of these interests of the child vests in the parents.’³⁷³

The above-mentioned aspects detailed to be included under the best interests principle are indicative of a parent’s duty of support to maintain his or her child.³⁷⁴ However, the aspects listed in the case above will be considered against the financial means of both parents.³⁷⁵ As such, what is considered to be in the best interests of the child regarding the parents’ duty of support will differ depending on each case’s circumstances.³⁷⁶

The Constitutional Court has also discussed the interpretation of the best interests’ principle regarding the duty of support. When considering the best interests’ principle stated in s28(2), the Constitutional Court determined that ‘children have the right to proper parental care.’³⁷⁷ The Court also explained that the Constitution places the obligation primarily on parents to care for their children.³⁷⁸ It can be deduced that the duty of support would be included in the phrase ‘proper parental care’ and as stated previously, maintaining a child financially would fall under the meaning of the phrase.³⁷⁹ Therefore, the South African Constitution upholds the duty of support with reference to children.

³⁷¹ Freeman M ‘Article 3, The Best Interests of the Child’ in Alen A, Vande Lanotte J, Verhellen E, Ang F, Berghmans E and Verheyde M (eds) *A Commentary on the United Nations Convention of the Rights of the Child* (2007) 73.

³⁷² 2005 (6) SA 535 (C).

³⁷³ *R v H and Another* at 541.

³⁷⁴ Clark B (1999) 260-261.

³⁷⁵ Maintenance Act 99 of 1998, s15(3)(a)(i) and (ii); Van Zyl (2000) 2; Van Schalkwyk N (2009) 43; Heaton J *South African Family Law* 3 ed (2010) 178.

³⁷⁶ Van Zyl (2000) 5.

³⁷⁷ *Bannatyne v Bannatyne* at para 24.

³⁷⁸ *Government of Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 77; *Bannatyne v Bannatyne* at para 24.

³⁷⁹ *Bannatyne v Bannatyne* at para 24.

3.2.2.4 The Children's Act 38 of 2005

Included in the Children's Act (hereafter referred to as the Act) are provisions relating to the duty of support.³⁸⁰ Under chapter 3, which concerns parental responsibilities and rights, s18(2)(d) states that included in the parental responsibilities and rights is the parents' responsibility to contribute to the maintenance of the child.³⁸¹ The duty to maintain one's child is placed on the child's biological or adoptive mother and biological or adoptive father regardless of their current marital status.³⁸² If adoption has occurred then the duty of support regarding the adopted child is removed from the biological parents of said child and transferred to the adoptive parents.³⁸³

The best interests principle being of paramount importance in all matters relating to children is also included in the Act.³⁸⁴ In *Centre for Child Law v Minister of Justice and Constitutional Development*,³⁸⁵ Justice Cameron held that paramount means that 'the child's interests are more important than anything else, but that does not mean that everything else is unimportant.'³⁸⁶ The best interests principle, though being of paramount importance in all child matters, does not supersede all other constitutional rights and deem them so unimportant as to be ignored.³⁸⁷ A delicate balance is necessary when dealing with conflicting or competing rights and interests.³⁸⁸ The correct approach in dealing with the best interests principle would be to apply the principle in a meaningful way without unduly obliterating other valuable constitutionally protected rights or interests.³⁸⁹ Applying the best interests principle in maintenance cases would be dependent on the individual circumstances of each case.³⁹⁰ Inclusive in the individual circumstances stated above would be the financial means of the parents and the standard of living the child is accustomed to.³⁹¹ However, as the

³⁸⁰ Children's Act 38 of 2005.

³⁸¹ Children's Act 38 of 2005, s18(2)(d).

³⁸² Mc Laren I 'The Reciprocal Duty of Support between Parents and their Children' available at <http://mclarens.co.za/reciprocal-duty-of-support-between-parents-and-their-children/> (Accessed on 17 July 2016).

³⁸³ Carmelley M 'Liability for the Payment of Public School Fees' (2011) 14(6) *Potchefstroom Electronic Law Journal* 39.

³⁸⁴ Children's Act 38 of 2005, s9.

³⁸⁵ *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2006 (6) SA 632 (CC).

³⁸⁶ *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2006 (6) SA 632 (CC) at para 29.

³⁸⁷ Bekink M 'Child Divorce: A Break from Parental Responsibilities and Rights due to the Traditional Socio-cultural practices and beliefs of the Parents' (2012) 15 *Potchefstroom Electronic Law Journal* 191.

³⁸⁸ Bekink M (2012) 191.

³⁸⁹ Bekink M (2012) 191.

³⁹⁰ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 24.

³⁹¹ Maintenance Act 99 of 1998, s15(3)(a)(i)-(iii).

duty of support has been recognised in the Act, it follows that maintaining one's child is considered to be in the child's best interests.³⁹²

3.3 South African Legislation relating to Child Maintenance

With there being a duty of support placed on parents to maintain their children, legislative means of governing this duty is necessary to ensure that parents share this duty of support equally and provide the procedural means to do so.³⁹³ The following pieces of legislation are considered the main pieces of South African legislation that deal with maintenance issues in both domestic and cross border cases.

3.3.1 The Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 (REMO) and the Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989 (REMO Africa Act)

Cross border maintenance recovery allows maintenance creditors to seek maintenance payments from debtors through enforcement of their maintenance orders in the State that the maintenance debtor is currently residing.³⁹⁴ South Africa passed legislation to this effect in the form of the REMO and the REMO Africa Act in 1963 and 1989 respectively.³⁹⁵ This 1963 Act makes provision for the reciprocal enforcement of maintenance orders in South Africa and certain proclaimed foreign countries, while the 1989 Act makes provision for reciprocal enforcement between South Africa and other African countries only.³⁹⁶ A proclaimed country, in terms of the REMO, is a country that has 'a special agreement with South Africa so that maintenance orders granted in one country can be enforced in the other'.³⁹⁷ Under the REMO Africa Act, a designated country 'means a country in Africa in respect of which this Act applies.'³⁹⁸ A list³⁹⁹ of the proclaimed foreign countries is found in

³⁹² Children's Act 38 of 2005, s18(2)(d).

³⁹³ Maintenance Act 99 of 1998, s15(1); Clark B (1999) 241; Van Zyl L (2000) 2.

³⁹⁴ Clark B (1999) 295; Van Zyl L (2000) 133; Department of Justice and Constitutional Development 'Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963' available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

³⁹⁵ Van Zyl L (2000) 133.

³⁹⁶ REMO, Preamble; Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989, preamble.

³⁹⁷ Department of Justice and Constitutional Development 'Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963' available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

³⁹⁸ REMO Africa Act, s1.

³⁹⁹ The list of proclaimed countries recognised in the Act include Australia, Botswana, Canada, Cocos (Keeling) Islands, Cyprus, Fiji, Germany, Bailiwick of Guernsey, Hong Kong, Isle of Jersey, Isle of Man, Kenya, Lesotho, Malawi, Mauritius, Namibia, New Zealand, Nigeria, Norfolk Island, Sarawak, Singapore, St Helena, Swaziland, United Kingdom, United States of America, Zambia and Zimbabwe. It is important to note that regarding

a Schedule to the REMO while a list⁴⁰⁰ of designated countries can be found in a Schedule to the REMO Africa Act.

The REMO and the REMO Africa Act makes a clear distinction between maintenance orders and provisional maintenance orders.⁴⁰¹ A provisional maintenance order is an order ‘which has effect only if it is confirmed by a competent court in the country where the person against whom the order has been made resides’.⁴⁰² A maintenance order is a final order of a competent court ‘for the payment...by any person of sums of money towards the maintenance of any other person whom he or she is liable to maintain in accordance with the law of the country in which the order was made’.⁴⁰³ In order for either the provisional or final maintenance order to be enforced in South Africa or in a proclaimed or designated country, it requires recognition in the country where the maintenance debtor resides.⁴⁰⁴

Under the REMO and the REMO Africa Act, the enforcement measures utilised to ensure payment when the debtor resides in South Africa comprise of those measures listed in the Maintenance Act 99 of 1998 (hereafter referred to as the Maintenance Act) used for the civil enforcement of payment only.⁴⁰⁵ The enforcement measures are only applicable once a maintenance order has been registered and confirmed as such by the Minister of Justice under the REMO and the Director-General for the REMO Africa Act.⁴⁰⁶ Prosecution enforcement measures listed under s31 of the Maintenance Act are not used when dealing with maintenance orders registered under the REMO.⁴⁰⁷ While the above is also true regarding the REMO Africa Act, this Act makes specific reference to emoluments. Under the REMO Africa Act, emoluments which are already attached to an order which is to be recognised in South Africa or where a South Africa maintenance order with an emolument attachment is to be recognised in an African country, that order is to be enforced with the attaching

Australia, Canada, United Kingdom and the United States of America, only certain states, provinces or territories are considered as proclaimed countries.

⁴⁰⁰ The list of designated countries recognised in the Act includes Botswana, Kenya, Lesotho, Malawi, Namibia, Nigeria, Swaziland, Zambia and Zimbabwe.

⁴⁰¹ Van Zyl L (2000) 133.

⁴⁰² REMO, s1; REMO Africa Act, s1.

⁴⁰³ Maintenance Act 99 of 1998, s1; REMO, s1; REMO Africa Act; s1.

⁴⁰⁴ Clark B (1999) 295-296.

⁴⁰⁵ Van Zyl L (2000) 134; Maintenance Act 99 of 1998, s27 - 30.

⁴⁰⁶ REMO, s3; REMO Africa Act, s3 and 4.

⁴⁰⁷ Van Zyl L (2000) 134.

emolument order.⁴⁰⁸ All enforcement measures will be discussed further later in this chapter (See 3.6 below).

The REMO and REMO Africa Act are limited in their application to cross border maintenance recovery and enforcement cases.⁴⁰⁹ The limitation lies in the fact that the REMO is only applicable when dealing with maintenance orders from the specifically listed proclaimed countries, while the REMO Africa Act is only applicable when dealing with maintenance orders from the listed designated countries.⁴¹⁰ If a maintenance order, made in a country that is not a proclaimed or designated country according to the REMO or REMO Africa Act, requires recognition in South Africa, the Acts would not apply. The legal position regarding a non-proclaimed country or non-designated country lacks legislative confirmation. However, the current practice is to launch formal proceedings in the courts of the foreign country based on an already existing maintenance order.⁴¹¹ The current practice option in most cases tends to be an expensive process, takes an indeterminable amount of time and does not always render favourable results.⁴¹²

In requesting for an order of recognition under the REMO or the REMO Africa Act, the procedure is one based solely on documents being forwarded to the Minister of Justice and Director-General respectively and then on to the maintenance court.⁴¹³ Using only documents as the basis of a decision for recognition limits the option for the debtor to contest the recognition, regardless of the reason for the contest.⁴¹⁴ For example, contesting recognition of the order due to it already being fulfilled or the duty of support found in the order has been terminated. Due to the above mentioned problems with the current practice when the REMO or REMO Africa Act is not applicable, a *lacuna* in the law exists in that the maintenance debtor can avoid making maintenance payments by moving abroad to a non-proclaimed or non-designated country.

⁴⁰⁸ REMO Africa Act, s8 and 9(1) – (3).

⁴⁰⁹ REMO, Preamble and s2; Department of Justice and Constitutional Development ‘Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963’ available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016); Clark B (1999) 295; REMO Africa Act, s2 and Preamble.

⁴¹⁰ Clark B (1999) 295; REMO, Preamble and s2; REMO Africa Act, 2.

⁴¹¹ Palmeira N ‘Maintenance of Children in Foreign Countries’ available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁴¹² Palmeira N ‘Maintenance of Children in Foreign Countries’ available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁴¹³ Ditshego J ‘SA Law Promotes Foreign Maintenance’ available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016); REMO Africa Act, s4 and 6.

⁴¹⁴ Ditshego J ‘SA Law Promotes Foreign Maintenance’ available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016).

3.3.2 The Maintenance Act 99 of 1998

Though the Maintenance Act is considered the main piece of legislation governing domestic maintenance cases within South Africa, it lacks any mention of cross border maintenance recovery instances.⁴¹⁵ The lack of reference to cross border maintenance recovery in the Maintenance Act could be indicative of the understanding that the above-mentioned REMO and REMO Africa Act are the only legislative means of dealing directly with cross border maintenance issues.⁴¹⁶ This omission in the Maintenance Act allows for a clearly out dated and defective system in dealing with cross border maintenance recovery issues due to the limited number of proclaimed or designated countries stated in the REMO and REMO Africa Act with which South Africa enforces foreign maintenance orders.⁴¹⁷ The above-mentioned oversight could also indicate that cross border maintenance recovery cases are not considered as important to the legislature as domestic recovery cases thereby enabling maintenance debtors to avoid complying with their maintenance obligations by leaving South Africa's borders.

3.3.3 The Maintenance Amendment Act 9 of 2015

The Maintenance Amendment Act 9 of 2015 (hereafter referred to as the Amendment Act) is the legislature's latest addition to the current maintenance law regime in South Africa. While the Amendment Act definitely adds to the domestic position regarding maintenance recovery and enforcement of maintenance payments, like the Maintenance Act, it lacks consideration of the cross border maintenance recovery system.⁴¹⁸ It could be said that the development of the Amendment Act was the perfect opportunity to include improvements to the current South African cross border maintenance recovery system. However, it could also be stated that as the Act is considered an amendment to the Maintenance Act, including any provisions regarding the cross border maintenance recovery system would add an entirely new aspect to the existing Maintenance Act. The cross border maintenance system should rather be considered as a separate piece of legislation; perhaps an updated amendment act to the REMO and REMO Africa Act, which already deals with cross border maintenance recovery, is preferable.

⁴¹⁵ Maintenance Act 99 of 1998.

⁴¹⁶ Clark B (2000) 296; Sinclair J, Heaton J and Hahlo H *The Law of Marriage Vol I* 5ed (1996) 476.

⁴¹⁷ Department of Justice and Constitutional Development 'Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963' available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁴¹⁸ Maintenance Amendment Act 9 of 2015.

3.4 Bilateral Agreements

A bilateral agreement contains a mutual agreement to either perform or refrain from performing an action.⁴¹⁹ The agreement will be between at least two parties.⁴²⁰ Bilateral agreements made within the field of child maintenance law allow for the parties' residence to be a factor in determining a resolution.⁴²¹ Each country, where a party to the dispute resides, is required to perform an action in terms of a bilateral agreement.⁴²² The performed action is often that each country has a reciprocal duty to recognise and enforce an existing maintenance order made in the other country which is party to the agreement.⁴²³ Other duties involved would be to amend an existing order if deemed necessary and even to create a maintenance order, which is then to be recognised in the country that is also party to the bilateral agreement.

The bilateral agreements that South Africa has entered into regarding maintenance are only those agreements applicable to the proclaimed and designated countries stated in the REMO and REMO Africa Act.⁴²⁴ No new agreements have been concluded outside of the proclaimed countries allowing for cross border maintenance recovery.⁴²⁵ Due to the dates of the REMO and REMO Africa Act, not many persons including legal professionals know about the 1963 or 1989 Act, though particularly the 1963 Act, causing their usage in modern day recovery processes to become near obsolete.⁴²⁶ Due to both Acts being used far less than the current practice methods in dealing with cross border maintenance recovery cases, the use of the bilateral agreements concluded with the proclaimed countries stated in the 1963 Act's

⁴¹⁹ Hutchison A 'Reciprocity in Contract Law' (2013) 1 *Stellenbosch Law Review* 3.

⁴²⁰ Win Global Partners Export and Import Management 'Multinational and Bilateral Trade Agreements and Their Effects on Your Business' available at http://winglobal.ca/multinational_and_bilateral_trade_agreements_and_their_effects_on_your_business/ (Accessed on 17 October 2016).

⁴²¹ NI Direct Government Services 'Reciprocal Enforcement of Maintenance Orders (REMOs)' available at <https://www.nidirect.gov.uk/articles/reciprocal-enforcement-maintenance-orders-remos> (Accessed on 17 October 2016).

⁴²² Vidigal G 'From Bilateral to Multilateral Law-making: Legislation, Practice, Evolution and the Future of Inter Se Agreements in the WTO' (2013) 24 *European Journal on International Law* 1028-1029.

⁴²³ NI Direct Government Services 'Reciprocal Enforcement of Maintenance Orders (REMOs)' available at <https://www.nidirect.gov.uk/articles/reciprocal-enforcement-maintenance-orders-remos> (Accessed on 17 October 2016).

⁴²⁴ Ditshego J 'SA Law Promotes Foreign Maintenance' available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016); REMO Africa Act, s2.

⁴²⁵ Department of Justice and Constitutional Development 'Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963' available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁴²⁶ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

Schedule and designated countries in the 1989 Acts Schedule have lessened.⁴²⁷ The current method of practice in dealing with cross border maintenance recovery cases is to ‘launch formal proceedings in the courts of the foreign country based on an already existing maintenance order.’⁴²⁸ It is important to note that the launching of formal proceedings is an expensive process and takes an indeterminable amount of time to resolve, often leading to unfavourable results as stated previously.

The decrease in using the REMO and REMO Africa Act as well as the bilateral agreements stemming from said Acts in resolving cross border maintenance recovery disputes hinders the effectiveness of the recovery and enforcement of maintenance payments. The REMO and REMO Africa Acts allow for a certain guaranteed process of recognising maintenance orders using diplomatic channels.⁴²⁹ However, even with using the diplomatic channels to get a maintenance order recognised in a proclaimed or designated country, it remains a yearlong process.⁴³⁰ Nevertheless, it is still a faster process than the current method of practice mentioned above.

Due to the current practice method being expensive, tedious, and lengthy in resolving disputes, considering the conclusion of both updated and new bilateral agreements is necessary. These updated and new bilateral agreements should be considered with the proclaimed countries listed in the REMO’s Schedule and the designated countries listed in the REMO Africa Act’s Schedule as well as with countries that fall out of these lists.⁴³¹ However, as the existing bilateral agreements are not widely used in current practice, whether due to a lack of knowledge regarding their existence or to their limitations in applicability in reference to the proclaimed or designated countries lists, it would seem prudent to find an alternative method of dealing with cross border maintenance recovery in South Africa.⁴³²

⁴²⁷ Department of Justice and Constitutional Development ‘Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963’ available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁴²⁸ Palmeira N ‘Maintenance of Children in Foreign Countries’ available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁴²⁹ REMO, s3 and 4; REMO Africa Act, s4, 6 and 7.

⁴³⁰ Palmeira N ‘Maintenance of Children in Foreign Countries’ available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁴³¹ Department of Justice and Constitutional Development ‘Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963’ available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁴³² Schedule of Countries Recognised under the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 and Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989; Palmeira N ‘Maintenance of Children in Foreign Countries’ available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

3.5 Conflict of Law Provisions

A conflict of laws provision concerns relations across different legal jurisdictions between persons, companies, corporations or other legal entities.⁴³³ Within the context of maintenance recovery, conflict of laws provisions would be present when determining which country's laws would be applicable or used to solve a maintenance dispute in cross border recovery circumstances. In such a dispute, it is necessary to determine which legal system will be used in resolving the dispute as the determined legal system will be responsible for ensuring that enforcement takes place and outstanding maintenance is paid.

With regard to cross border maintenance recovery, there are no set conflict of law provisions available for use in dealing solely with maintenance disputes at an international level.⁴³⁴ An assumption can be made that the point of departure in determining which law is applicable in cross border maintenance recovery disputes would be the law of the country where the maintenance order was granted.⁴³⁵ For example, if the maintenance order was granted in South Africa then the laws pertaining to maintenance recovery and enforcement used should be those of South Africa. Additionally reinforcing this is that when the maintenance order is granted, both parties are often in the country at that time. In the case of agreement between the parties' as to the maintenance order, it is necessary that both parties' sign this agreement. The agreement is then confirmed by the courts of the country making it clear that the parties have tacitly agreed to the use of the law of the country where the agreement was made.⁴³⁶

When a party to a maintenance agreement subsequently leaves the jurisdiction of the country in which the maintenance order was made, a conflict arises as to the law applicable to the maintenance recovery dispute, particularly in enforcing an existing maintenance agreement or the enforcement of maintenance payments.⁴³⁷ In continuation of the above mentioned example regarding a South African maintenance order, when the maintenance debtor moves out of South Africa's jurisdiction, enforcing compliance with a maintenance order becomes problematic. When following the above stated position that South African law should be followed, the South African measures available for solving cross border maintenance

⁴³³ CTI Reviews *The Legal and Regulatory Environment of Business: Business, Business Law* 16 ed (2016) 93.

⁴³⁴ Wakefield R *Enforcement of Foreign Jurisdictions in 28 Jurisdictions worldwide: South Africa* (2012) 108.

⁴³⁵ Wakefield R (2012) 108.

⁴³⁶ Preller B 'Family Law Matters...Child Maintenance' available at <http://www.divorcelaws.co.za/child-maintenance-frequently-asked-questions.html> (Accessed on 10 September 2016).

⁴³⁷ Wakefield R (2012) 109.

enforcement disputes (as discussed in 3.6 below) are not able to truly ensure enforcement.⁴³⁸ The measures available for enforcement will be those used when a matter concerns enforcement of a maintenance order at a domestic level, i.e. the attachment of property, emoluments or debts or imprisonment as there are no measures assigned specifically for cross border maintenance recovery.⁴³⁹ As stated previously, the domestic measures available in South Africa lack effectiveness when applied to a domestic maintenance dispute.⁴⁴⁰ Therefore, utilising them in cross border maintenance dispute will not be of assistance to the maintenance creditor in securing the maintenance owed for the child. As a result, the maintenance debtor is able to evade the consequences for not complying with a maintenance order made against him or her.

South Africa's enforcement measures in terms of the Maintenance Act as stated above require the maintenance debtor to be within South Africa's borders in order for the measures to have some form of effectiveness in recovering the monies owed to the maintenance creditor.⁴⁴¹ As the maintenance debtor is most often the party who no longer resides within the country, the measures used to enforce an existing maintenance order would have to be those measures used in the country where the maintenance debtor now resides.⁴⁴² This would indicate that the law applicable to maintenance recovery disputes should be the law of the country in which the maintenance debtor now resides as opposed to the law of the country where the maintenance order was issued. Countries are required to have effective enforcement measures available to be used in all instances of maintenance recovery whether disputes arise domestically within a country or when any disputes have a cross border element. In order to ensure effectiveness in cross border maintenance recovery, each country needs to have rules in place on the recognition of maintenance orders made in a country other than the country now tasked with ensuring enforcement of the order.⁴⁴³ For example, South Africa needs to have rules in place regarding the recognition and enforcement of a maintenance order made in Scotland.

The Convention allows for both recognition and enforcement measures to be efficient in that the processes are uniform in approach.⁴⁴⁴ However, the enforcement measures will be

⁴³⁸ Wakefield R (2012) 109.

⁴³⁹ Maintenance Act 99 of 1998, s26 – 31.

⁴⁴⁰ *Bannatyne v Bannatyne* at paras 26 – 28.

⁴⁴¹ Wakefield R (2012) 109.

⁴⁴² Wakefield R (2012) 110.

⁴⁴³ Clark B (1999) 264.

⁴⁴⁴ Duncan W (2008) 316.

dependent on the measures used by each country when dealing with a maintenance dispute.⁴⁴⁵ Under the Convention, the measures available for enforcement include the attachment of property, the attachment of debts as well as the attachment of emoluments, the revocation of licences and tax refund withholding but to name a few.⁴⁴⁶ Each country is afforded the position to choose the enforcement measures to be used within their borders.⁴⁴⁷ With the choice of which measures to use for the enforcement of decisions afforded to each member country to the Convention, less legal reform is necessary when implementing the Convention's Article 34 measures for enforcement.⁴⁴⁸ For example, with the attachment of property, emoluments and debts already being used in enforcing maintenance decisions at a domestic level, less reform and effort is required to include these measures in its choices for enforcement under Article 34.

Moreover, imprisonment of the maintenance debtor for failing to comply with a maintenance order made against them is one measure that many countries have removed from their array of enforcement measures due to its declining effectiveness.⁴⁴⁹ Imprisonment stalls the process of recovery due to a lack of earnings made by the maintenance debtor during his or her incarceration and as such is not in the best interests of the child for whom maintenance is to be paid.⁴⁵⁰ However, correctional supervision or periodical imprisonment could be considered as a means to combat the lack of employment faced by maintenance debtors when sentenced to prison for defaulting in making maintenance payments.⁴⁵¹ Correctional supervision, for example, allows for the maintenance debtor to leave the confinement of his home to attend work which would then be paid over the maintenance creditor.⁴⁵² Periodical imprisonment offers a similar effect to correctional supervision in that the maintenance debtor, for example, could be permitted to leave the prison on weekdays for employment purposes while having to return to the prison once work is completed.⁴⁵³

⁴⁴⁵ Hague Conference on Private International Law (2013) 168.

⁴⁴⁶ *Hague Convention 2007*, Article 34(2).

⁴⁴⁷ Borrás A and Degeling J (2013) 195.

⁴⁴⁸ Borrás A and Degeling J (2013) 195.

⁴⁴⁹ Magaya I 'Children's Rights: Imprisonment for Maintenance Defaulters?' available at <http://www.hsrc.ac.za/en/review/hsrc-review-april-to-june-2015/child-rights-imprisonment-for-defaulters> (Accessed on 18 October 2016).

⁴⁵⁰ Carnelley M 'A review of the criminal prosecution and sentencing of maintenance defaulters in South Africa, with commentary on sentencing strategies' (2012) 25(3) *South African Journal of Criminal Justice* 356.

⁴⁵¹ Carnelley M (2012) 358.

⁴⁵² Carnelley M (2012) 358.

⁴⁵³ Carnelley M (2012) 358.

It is clear under Article 34 of the Convention that imprisonment is not considered as an effective enforcement measure.⁴⁵⁴ Being a comprehensive legal instrument, the Convention has taken into account the problems surrounding incarceration of a maintenance debtor as being ineffective in recovering monies owing to the creditor for maintenance payments.⁴⁵⁵ It is not a practical outcome due to the imprisoned maintenance debtor not receiving an income.⁴⁵⁶ Incarceration also hinders the maintenance debtor's ability to find employment once released.⁴⁵⁷ Applying the uniform approach to recognition and enforcement measures found in the Convention will allow for a positive increase in resolving cross border maintenance disputes while also decreasing the number of maintenance debtors who are able to avoid compliance with orders made against them.

In resolving cross border maintenance recovery disputes where the Convention is not applicable, it is in the creditor's best interests to request for an existing maintenance order to be recognised in the country where the maintenance debtor now resides.⁴⁵⁸ As the debtor no longer resides in the country that made the original maintenance order, using the enforcement measures available to the State of Origin would be detrimental to the creditor as the effective recovery measures have no bearing on the debtor due to him residing outside the State of Origin's jurisdiction.⁴⁵⁹ The creditor is more likely to succeed in recovery the maintenance owing from the debtor through the recognition and enforcement of the maintenance order in the debtor's country of residence.⁴⁶⁰ Should the Convention be applicable to disputes of cross border maintenance recovery in the countries involved in the matter, the problems regarding the conflict of laws is already resolved. The Convention states that it is the country of the Requested State that has jurisdiction in matters of enforcement, i.e. the country where the debtor is resident.⁴⁶¹

3.6 South Africa's Enforcement Measures for the Recovery of Child Maintenance

Enforcement measures are used to ensure that maintenance payments are made timeously and regularly.⁴⁶² There are varieties of enforcement measures that are used in different

⁴⁵⁴ *Hague Convention 2007*, Article 34(2).

⁴⁵⁵ Walker L (2015) 256.

⁴⁵⁶ *S v Maponya* [2005] JOL 14896 (T) para 5.

⁴⁵⁷ Burman S and Berger S 'When family support fails: the problem of maintenance payments in apartheid South Africa: Part I' (1988) 4 *South African Journal of Human Rights* 205.

⁴⁵⁸ Borrás A and Degeling J (2013) 167.

⁴⁵⁹ Walker L (2015) 73.

⁴⁶⁰ Walker L (2015) 73.

⁴⁶¹ *Hague Convention 2007*, Article 32(1).

⁴⁶² *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) at para 31.

countries.⁴⁶³ The choice of enforcement measure is dependent on the availability of resources in each country.⁴⁶⁴ For example, the USA makes use of wage-withholding orders to ensure maintenance payments are made to the creditor. The employer will withhold monies from the maintenance debtor's salary or wages and pay the monies to an enforcement authority on the debtor's behalf.⁴⁶⁵ The enforcement authority is a body that acts as an objective intermediary in assisting that the maintenance debtor makes his maintenance payments to the creditor for his child while still taking into account the debtor's circumstances i.e. the reason for the debtor's non-payments and then assists him in complying with a maintenance order made against him.⁴⁶⁶ The enforcement authority keeps records of the payments made by the debtor. Wage withholding using an enforcement authority may be initiated voluntarily by the debtor showing his wish to comply with the order for maintenance made against him.⁴⁶⁷ This allows maintenance payments to be made regularly without the debtor stalling in paying or not making payments at all.⁴⁶⁸

Other enforcement measures include garnishment orders, property attachments, suspension of driver's licences and passports, credit bureau reporting, deducting from social security payments, imprisonment, tax refund withholding, wage withholding and attaching pension benefits.⁴⁶⁹ In addition, the use of mediation and conciliation processes are considered as enforcement measures as it promotes voluntary compliance with maintenance obligations.⁴⁷⁰ The above-mentioned processes are considered effective tools as it can be easily determined which maintenance debtor wishes to maintain their children and which do not.⁴⁷¹ It is important to have a variety of enforcement measures available due to the various and

⁴⁶³ *Hague Convention, 2007*, Art 34.

⁴⁶⁴ Hammond D and Barnes M (2013) 272.

⁴⁶⁵ Potts D – Senior Associate, Centre for the Support of Families, dpotts@csfmail.org – ‘The Nature of Child Support and the Role of Government in its Recovery’ presented at the Hague Conference on the Global Recovery of Child Support and Family Maintenance in Asia Pacific and Worldwide 9 – 11 November 2015 in Hong Kong, presentation slide 8.

⁴⁶⁶ Rosenak L – Sr, Vice President, Child Support Services, Human Services North America, MAXIMUS, childsupportinfo@maximus.com – ‘Early Intervention’ presented at the Hague Conference on the Global Recovery of Child Support and Family Maintenance in Asia Pacific and Worldwide 9 – 11 November 2015 in Hong Kong, presentation slide 5.

⁴⁶⁷ Hague Conference on Private International Law (2013) 169.

⁴⁶⁸ Griffin A – Director at the Californian Department of Child Services, alisha.griffin@dcss.ca.gov – ‘The Evolution of US/North American Enforcement Practices: 20 Years of Learning’ presented at the Hague Conference on the Global Recovery of Child Support and Family Maintenance in Asia Pacific and Worldwide 9 – 11 November 2015 in Hong Kong, presentation slide 7.

⁴⁶⁹ *Hague Convention 2007*, Article 34.

⁴⁷⁰ Hague Conference on Private International Law (2013) 170.

⁴⁷¹ Hague Conference on Private International Law (2013) 166.

individual circumstances surrounding maintenance disputes. South Africa has three civil enforcement measures and one criminal enforcement measure (See 3.6.1 below).⁴⁷²

3.6.1 Domestic Recovery Measures

The three civil law enforcement measures used in South Africa in dealing with domestic maintenance claims are issuing warrants of execution, attaching emoluments and attaching debts.⁴⁷³ The criminal law enforcement measure in dealing with maintenance obligations is imprisonment, paying a fine or both.⁴⁷⁴ Sections 26 to 31 of the Maintenance Act give legislative power to the above-mentioned domestic maintenance recovery measures.⁴⁷⁵

Under the civil execution chapter of the Maintenance Act, section 26 considers the enforcement of maintenance orders.⁴⁷⁶ Any person who does not comply with a maintenance order made under the Maintenance Act in failing to make periodical payments or that of a lump sum, shall be enforceable in respect of the amount the person has failed to pay with the interest thereon.⁴⁷⁷ Enforcing the maintenance debtor to make the maintenance payments owing to the maintenance creditor is done through execution of property, the attachment of emoluments, or the attachment of a debt.⁴⁷⁸ If a maintenance debtor is more than ten days late in making the ordered maintenance payment(s), the maintenance creditor is permitted to apply for a maintenance court to enforce the payment(s).⁴⁷⁹ The court will use the enforcement measures listed in the Maintenance Act.⁴⁸⁰ However, the maintenance court shall refrain from using the enforcement measures when the payments have been suspended by an appeal against the maintenance order.⁴⁸¹ An important aspect to note is that any pension, annuity, gratuity, compassionate allowance, or any other similar benefit shall be liable to be subjected to the civil enforcement measures listed in the Maintenance Act as a means of satisfying the maintenance payments owing.⁴⁸²

⁴⁷² Maintenance Act 99 of 1998, Chapters 5 and 6, s26-31.

⁴⁷³ De Jong M 'Ten Year Anniversary of the Maintenance Act 99 of 1998 – A Time to Reflect on Improvements, Shortcomings and the Way Forward' (2009) 126 *South African Law Journal* 595.

⁴⁷⁴ Mamashela M 'The Courts' Interpretation of Section 31 of the Maintenance Act 99 of 1998 and its Predecessors' (2005) 122 *South African Law Journal* 228.

⁴⁷⁵ Maintenance Act 99 of 1998, s26-31.

⁴⁷⁶ De Jong M (2009) 595.

⁴⁷⁷ *Turton v Turton and Another* [2012] ZAWCHC 2 para 13.

⁴⁷⁸ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) at para 4; Maintenance Act 99 of 1998, s26(1)(c)(i)-(iii).

⁴⁷⁹ *Van Dijk v Van Dijk* [2014] ZAKZPHC 5 para 17.

⁴⁸⁰ Maintenance Act 99 of 1998, s26-30.

⁴⁸¹ Maintenance Act 99 of 1998, s26(3)(a).

⁴⁸² *M v Minister of Justice and Constitutional Development and Others* [2014] ZAGPPHC 510 para 15.

Issuing a warrant of execution is one of civil execution methods listed in the Maintenance Act.⁴⁸³ A maintenance court may issue a warrant of execution against the maintenance debtor, upon application by the maintenance creditor.⁴⁸⁴ The warrant of execution will be issued against the maintenance debtor's movable property.⁴⁸⁵ If the maintenance debtor's movable property is insufficient to satisfy the debt owing to the maintenance creditor, the maintenance debtor's immovable property will be attached in order to satisfy the debt.⁴⁸⁶ The debt refers to the amount of maintenance the maintenance debtor owes the maintenance creditor, any interest on the amount of maintenance owing and the costs of the execution.⁴⁸⁷ Before issuing a warrant of execution, the maintenance court will consider the existing and prospective means of the maintenance debtor, the financial needs and obligations of the person who is to be maintained, the conduct of the maintenance debtor relating to his failure to pay maintenance and any other information the court deems necessary before issuing the warrant of execution.⁴⁸⁸ A warrant of execution may be set aside by the court that issued it when the maintenance debtor has shown that the order against him or her is satisfied, i.e. he or she has paid the outstanding debt.⁴⁸⁹

An attachment of emoluments order will be made by a maintenance court when a court suspends a warrant of execution or when the maintenance creditor applies for such an order.⁴⁹⁰ Emoluments for attachment will include present or future owing or accruing monies to the maintenance debtor that is then used to satisfy the maintenance payments outstanding to the maintenance creditor.⁴⁹¹ An order for the attachment of emoluments will authorise the maintenance debtor's employer to make payments to the maintenance creditor on behalf of the maintenance debtor until the debt has been paid in full.⁴⁹² Once again, the debt includes the outstanding maintenance still owing, interest thereon, and the costs of execution. An order for the attachment of emoluments may be suspended, amended, or rescinded at any time by the maintenance court if good cause can be shown.⁴⁹³ What constitutes as good cause is not stated in the Maintenance Act. However, good cause is deemed to have been shown when 'in

⁴⁸³ Maintenance Act 99 of 1998, s27.

⁴⁸⁴ Maintenance Act 99 of 1998, s27(1).

⁴⁸⁵ *Van Dijk v Van Dijk* [2014] ZAKZPHC 5 para 18.

⁴⁸⁶ Maintenance Act 99 of 1998, s27(1).

⁴⁸⁷ De Jong M (2009) 595.

⁴⁸⁸ Maintenance Act 99 of 1998. S27(5)(a)-(d).

⁴⁸⁹ *September v September* [2012] ZAWCHC 8 para 3.

⁴⁹⁰ Maintenance Act 99 of 1998, s28(1)(a) and (b).

⁴⁹¹ De Jong M (2009) 595.

⁴⁹² Maintenance Act 99 of 1998, s28(1).

⁴⁹³ Maintenance Act 99 of 1998, s28(2)(a).

the circumstances of the particular case, the legislative remedies available...are effective in protecting the rights of the complainant and the best interests of the children.⁴⁹⁴

A notice regarding the attachment of emoluments is to be sent along with a copy of the order attaching the emoluments to the maintenance debtor's employer informing the employer that he or she is to make maintenance payments on the maintenance debtor's behalf.⁴⁹⁵ The timing of payments and the manner in which they are to be paid is stated in the notice. If the employer fails to make the maintenance payments stipulated in the notice he or she has received, the maintenance order against the maintenance debtor may be enforced against the employer in respect of any amount that the employer has failed to pay.⁴⁹⁶ A duty is placed on the employer to inform the maintenance officer if the maintenance debtor leaves or is dismissed from that employer's company within seven days of his or her departure.⁴⁹⁷

Another measure of enforcement utilised by a maintenance court when ordering the payment of maintenance to a maintenance creditor is attaching any debts owed to the debtor.⁴⁹⁸ The court is permitted to attach any present or future debt owing or accruing to the maintenance debtor, who has failed to make maintenance payments, as a means of enforcing payment to satisfy the maintenance order given against him or her.⁴⁹⁹ The amount of maintenance monies to be paid to the maintenance creditor includes the outstanding maintenance the maintenance debtor has failed to pay, any interest thereon and the costs of the attachment or execution.⁵⁰⁰ When a maintenance court uses the attachment of debts as a method of enforcement, the order may be enforced as if it were a civil judgement of the court.⁵⁰¹ As is the case when attaching an emolument, an order for the attachment of a debt may be suspended, amended, or rescinded by the maintenance court if good cause can be shown.⁵⁰² As stated previously, what constitutes as good cause is determined considering the circumstances of each individual case.⁵⁰³ Determining if good cause has been shown, is dependent on whether or not

⁴⁹⁴ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) at para 23.

⁴⁹⁵ Maintenance Act 99 of 1998, s29(1).

⁴⁹⁶ Maintenance Act 99 of 1998, s29(4).

⁴⁹⁷ Maintenance Act 99 of 1998, s29(2).

⁴⁹⁸ De Jong M (2009) 595.

⁴⁹⁹ *M v Minister of Justice and Constitutional Development and Others* [2014] ZAGPPHC 510 para 16.

⁵⁰⁰ Maintenance Act 99 of 1998, s30(1).

⁵⁰¹ Maintenance Act 99 of 1998, s30(3).

⁵⁰² Maintenance Act 99 of 1998, s30(2)(a).

⁵⁰³ Heaton J (2010) 59

the enforcement remedies found in the Maintenance Act are effective in the best interests of children and in protecting the rights of the complainant.⁵⁰⁴

Regarding criminal enforcement measures, the Maintenance Act permits that a maintenance debtor be incarcerated for failure to pay maintenance.⁵⁰⁵ If convicted of the offence under s31, the maintenance debtor will be liable to a fine or imprisonment that will not exceed a period of three years or ‘to such imprisonment without the option of a fine.’⁵⁰⁶ A maintenance debtor has the opportunity to defend him- or herself against the possible conviction of failing to pay maintenance stating that he or she lacks the means to make the payments.⁵⁰⁷ A lack of means to make payments is not a suitable defence to failing to pay maintenance when the maintenance debtor is unwilling to work or to him or her acting with misconduct.⁵⁰⁸ The prosecution bears the onus of proving that the maintenance debtor’s lack of means stems from misconduct or an unwillingness to work.⁵⁰⁹ For example, an unwillingness to work could be shown through a maintenance debtor refusing employment when it is offered to him or when the maintenance debtor does not actively search for new employment as a means of continuing non-compliance with the maintenance order made against him or her. If a maintenance debtor has been convicted of the offence of failing to pay maintenance, his or her personal particulars shall be sent to any business, which as its objective the granting of credit or is involved in the credit rating of persons.⁵¹⁰

Credit bureau reporting is not a new measure of enforcement to be utilised in South Africa as a means of ensuring the payment of maintenance.⁵¹¹ The measure is adapted to both civil and criminal measures of enforcement.⁵¹² The furnishing of a maintenance debtor’s personal particulars to all businesses involved in granting credit to persons as well as in the credit rating of persons as well as including a copy of the maintenance order against the maintenance debtor will occur when any of the above-mentioned civil means of enforcement is ordered.⁵¹³ However, as of yet, credit bureau reporting for civil means of enforcement has yet to come into operation and will remain non-operational until a date is fixed by the

⁵⁰⁴ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) at para 23.

⁵⁰⁵ Maintenance Act 99 of 1998, s31.

⁵⁰⁶ Maintenance Amendment Act 9 of 2015, s13(a).

⁵⁰⁷ *De Haas v Fromentin and Others* 2013 (6) SA 621 (SCA) para 24; *De Jong* (2009) 596.

⁵⁰⁸ *Mamashela M* (2005) 229.

⁵⁰⁹ *De Jong* (2009) 596.

⁵¹⁰ Maintenance Amendment Act 9 of 2015, s13(b).

⁵¹¹ Maintenance Act 99 of 1998, s31(4).

⁵¹² Maintenance Amendment Act 9 of 2015, s11 and 13(b).

⁵¹³ Moodley P ‘Maintenance Amendment Act 2015’ presented at the 19th Annual Family Law Conference 17-18 March 2016 in Cape Town, South Africa, presentation slide 19.

President and proclaimed in the Government Gazette.⁵¹⁴ Under the criminal measures of enforcement, credit bureau reporting has been included within the Maintenance Act since its inception.⁵¹⁵ However, furnishing the personal particulars of a maintenance debtor was to be done at the discretion of the maintenance officer.⁵¹⁶ The Amendment Act now dissolves that discretion and the maintenance officer is obligated to send out the personal particulars of the maintenance debtor to all credit granting and credit rating businesses.⁵¹⁷ Yet, the regulations for handing over the personal particulars of maintenance debtors have not been finalised and until such time as this is completed, this enforcement method is not utilised.⁵¹⁸

3.6.2 International Recovery Measures

Within the South African legal system, there are no specific enforcement measures allocated to the recovery of maintenance when the recovery contains an international element.⁵¹⁹ This being said, it is clear that the above-mentioned enforcement measures used in domestic recovery circumstances can be utilised when dealing with cross border maintenance recovery cases.⁵²⁰ However, the domestic enforcement measures can only be truly effective in cross border instances when the maintenance debtor resides in South Africa and the maintenance creditor, who lives in France, applies for South Africa to recognise and enforce a maintenance order decided in France.⁵²¹

When a cross border court order regarding a maintenance obligation is recognised in South Africa, the domestic enforcement measures available could be used to ensure that the maintenance debtor, who resides in South Africa, comply with the maintenance order made against him or her. As the maintenance debtor currently resides in the jurisdiction of South Africa, the South African courts are able to make orders relating to warrants of execution, attaching emoluments, as well as attaching debts owing or accruing to the maintenance debtor as a means of enforcing compliance with the now recognised French maintenance order.⁵²²

⁵¹⁴ Maintenance Amendment Act 9 of 2015, S11 and 13(b).

⁵¹⁵ Maintenance Act 99 of 1998, s31(4).

⁵¹⁶ Maintenance Act 99 of 1998, s31(4).

⁵¹⁷ Maintenance Amendment Act 9 of 2015, s13(b); Moodley P (2016) 19.

⁵¹⁸ Moodley P (2016) 21.

⁵¹⁹ Maintenance Act 99 of 1998.

⁵²⁰ Wakefield R (2012) 109.

⁵²¹ Wakefield R (2012) 109.

⁵²² De Jong M (2009) 595.

The court is also permitted to convict the maintenance debtor for failing to comply with a maintenance order made against him or her and impose criminal sanctions.⁵²³

The domestic measures for enforcement cannot be utilised when requesting that a South African maintenance order be recognised and enforced in the country where the maintenance debtor now resides.⁵²⁴ For example, when issuing a warrant of execution as a means of enforcing the payment of maintenance, a court cannot attach moveable or immovable property as such property does not exist within South Africa's borders.⁵²⁵ However, it seems possible that issuing a warrant of arrest for failing to pay maintenance could still be ordered by a South African court though it cannot be executed until the maintenance debtor returns to South Africa.

3.7 Conclusion

This chapter has given insight into South Africa's legal position regarding cross border child maintenance recovery processes. Important aspects considered in the chapter include the duty of support, the measures of enforcement South Africa uses when dealing with both domestic and cross border maintenance recovery situations. Bilateral agreements and conflict of laws provisions affecting South Africa's legal position were discussed.

The duty to support one's child is recognised in international instruments including the CRC and ACRWC.⁵²⁶ South Africa's recognition of the duty stems from the common law and continues to grow in importance through its ratification of these above-mentioned instruments and its inclusion of the duty in its national legislation, specifically the Constitution as well as the Children's Act.⁵²⁷ In recognising the duty of support, practical elements relating to ensuring the payment of child maintenance need to be effective. South African judicial precedent acknowledges the importance of ensuring that maintenance payments are enforced when there are lapses in payments in order to promote protecting the rights of children.⁵²⁸ Legislative improvements have been made, in particular reference to the Maintenance Amendment Act now in effect.⁵²⁹ Though improvements have been made in the

⁵²³ Carnelley M (2012) 350.

⁵²⁴ Hague Conference on Private International Law (2013) 168.

⁵²⁵ Wakefield R (2012) 109.

⁵²⁶ Clark B (1999) 24, 259-260.

⁵²⁷ Constitution of the Republic of South Africa, 1996; Children's Act 38 of 2005.

⁵²⁸ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) paras 24-32.

⁵²⁹ Maintenance Amendment Act 9 of 2015.

recovery of child maintenance in domestic recovery instances, cross border recovery cases lack any improvement as regards the legislative sphere due to a lack of consideration.

As shown in the chapter, the lack of knowledge of bilateral agreements available for use in cross border recovery circumstances allows for the process of recovery to be drawn out and tedious while it also often yields unfavourable results.⁵³⁰ Creating awareness of bilateral agreements will assist in using those agreements in cross border cases when a proclaimed country is involved in a dispute. However, the use of the already existing bilateral agreements will not aid favourably in all cross border maintenance recovery cases, due to the limited amount of agreements concluded between South Africa and other countries.⁵³¹ While the REMO and REMO Africa Act states a procedure applicable for recognition and enforcement, namely sending the order through diplomatic channels to the Minister of Justice and Director-General respectively, for it to then be forwarded to a maintenance court for recognition, both Acts are silent on what aspects the court will consider in its determination for the order's recognition in South Africa.⁵³²

Using a purely documentary approach to recognition under the REMO or REMO Africa Act, while more efficient and affordable to instituting formal proceedings in a South African maintenance court, it does not allow for parties to the dispute to have any input into the matter of recognition.⁵³³ If the maintenance order is rejected by the maintenance court, there will be an increase in debtors escaping their duty to support their children. Improvements are needed to further the achievement of favourable results in cross border child maintenance recovery cases including determining how to incorporate a CA, possibly the Department of Justice and Correctional Services and / or the Department of Foreign Affairs, into the South African legal structure concerning the recovery of child maintenance. The CA will be able to assist the parties to the dispute and keep them informed of proceedings while also being held accountable if it breaches its specific functions discussed previously (see 2.5).⁵³⁴

⁵³⁰ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵³¹ Department of Justice and Constitutional Development 'Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963' available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁵³² REMO, s3; REMO Africa Act, s4 and 6.

⁵³³ Ditshego J 'SA Law Promotes Foreign Maintenance' available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016).

⁵³⁴ *Hague Convention 2007*, Article 6.

Enforcement measures found in South African domestic legislation are often used in attempting to ensure maintenance payments are made to the maintenance creditor.⁵³⁵ Both civil and criminal measures can be effective in recovering monies owing, yet this is not the case concerning cross border maintenance recovery.⁵³⁶ As it stands currently, South Africa's enforcement measures can be applied to cross border recovery disputes in reality only when the debtor resides in South Africa.⁵³⁷ When the debtor resides elsewhere, the enforcement measures used will be those found in the country where the debtor is presently.⁵³⁸ This means that it may not be possible to, for example, attach a debtor's movable property when the property is not within South Africa.⁵³⁹ The limited number of enforcement measures available to use in maintenance recovery instances hinders improvement in the number of cases attaining favourable results.

The following chapter will focus on South Africa's need to change its current system of recovering child maintenance when dealing with cross border circumstances. Shortfalls of the current cross border recovery system will be considered as well as the already existing improvements made to attempt to solve the existing problems. The chapter will show how the Convention will aid in alleviating the burden placed on the State in making it easier to recover monies from the maintenance debtor. In recovery monies for maintenance owing to the creditor, he or she is able to ensure that the child is well cared for and provided with all the basic amenities needed to maintain the lifestyle they are accustomed to. In ensuring that enforcement occurs, particularly in cross border situations, the maintenance creditor will benefit from the effective, efficient and timely resolution of disputes and enforcement of payments. With enforcement measure being used effectively, the maintenance creditor is able to provide sufficiently for the child's well-being and development as well as alleviating the burden of continuous cycles of court proceedings spanning over many years. Other aspects to be considered within the next chapter will be the economic circumstances relating to the South African people and noting the distinction between the debtor who is unable to pay and the debtor who chooses not to make payments. The distinction will allow for further improvements to an already problematic system.

⁵³⁵ Carnelley M (2012) 345.

⁵³⁶ Heaton J (2010) 55.

⁵³⁷ Wakefield R (2012) 109.

⁵³⁸ Hague Conference on Private International Law (2013) 168.

⁵³⁹ Wakefield R (2012) 109.

CHAPTER 4

THE NEED FOR THE 2007 HAGUE CONVENTION ON THE RECOVERY OF CROSS BORDER CHILD SUPPORT TO BE APPLIED IN SOUTH AFRICA'S LEGAL SYSTEM

4.1 Introduction

As noted by the South African judiciary, the current maintenance recovery system concerning both cross border and domestic positions is riddled with systemic failures.⁵⁴⁰ Mokgoro J in *Bannatyne v Bannatyne*⁵⁴¹ stated:

‘Despite the good intentions of this comprehensive legal framework specifically created for the recovery of maintenance, there is evidence of logistical difficulties in the maintenance courts that result in the system not functioning effectively.’⁵⁴²

While the legal framework governing maintenance is comprehensive and effective in theory, the practical implementation is mostly ineffective in resolving the many disputes brought to the courts each year.⁵⁴³ The systemic failures range from poor enforcement, inadequately trained staff, insufficient facilities and resources.⁵⁴⁴

At present, the issues surrounding a flawed legal system concerning the recovery of maintenance are not limited to the domestic recovery system but to the ability of the South African legal system to effectively resolve cross border maintenance disputes when its domestic system is already unable to operate effectively. It is important to note that while the domestic issues have some bearing on the effective resolution of cross border maintenance disputes, the true focus of this chapter is on the problems found in South Africa regarding cross border maintenance recovery. The issues to be discussed within the chapter include the sorely out of date legislation governing cross border recovery of maintenance, and the limited recognition afforded to foreign maintenance orders as a result.⁵⁴⁵ The lack of effective enforcement measures will be considered as well as how this lack of enforcement contributes to an already expensive and time consuming endeavour.⁵⁴⁶ Knowledge of the system in place

⁵⁴⁰ *Magewu v Zozo* [2004] ZAWCHC 18 at para 19.

⁵⁴¹ 2003 (2) SA 363 (CC).

⁵⁴² *Bannatyne v Bannatyne* at para 26.

⁵⁴³ Parliament of the Republic of South Africa *Briefing Note: Maintenance System in South Africa and Main Portfolio Committee Amendments to the Maintenance Amendment Bill [B16-2014]* (2015) 7.

⁵⁴⁴ *Bannatyne v Bannatyne* at para 26.

⁵⁴⁵ REMO, s3 and 4.

⁵⁴⁶ Heaton J *Casebook on South African Family Law* 3 ed (2010) 93; *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) at para 30.

for dealing with cross border maintenance recovery is lacking in legal professionals, maintenance officers and court officials resulting in a misinformed public making use of the sometimes incorrect system.⁵⁴⁷ Limited clarity on when a maintenance obligation is terminated adds to an already overburdened court system when it has to make a determination.⁵⁴⁸

Socio economic circumstances are required to be considered when determining whether the Convention will assist South Africa in updating its cross border maintenance recovery system. Contributors such as poverty levels, high unemployment rates and having limited resources available to improve the current system are necessary factors to be considered in determining if the Convention will aid the maintenance legal framework.⁵⁴⁹ For example, if a maintenance creditor lives in an area where there is limited access to legal and court assistance, would the Convention truly assist in resolving her dispute when she is unable to enforce the maintenance order as a result of economic circumstances. Particular focus will be on the Child Support Grant (CSG) when considering the poverty levels in South Africa.⁵⁵⁰

It is important to note that the South African State has acknowledged some of the flaws in the maintenance legal system; however, its concern has been limited to domestic recovery.⁵⁵¹ This chapter will discuss the proposed improvements in an attempt to determine their application in cross border circumstances. The improvements made include requesting the assistance of mobile service providers in locating defaulting debtors and mandatory credit bureau reporting for all defaulters when determined as such by a court, though it is important to note that these improvements have yet to come into operation.⁵⁵²

The need for the Convention will be discussed by explaining its benefits to the South African legal system regarding cross border maintenance recovery. The benefits focused on will include ensuring compliance with international obligations, showing that a uniform approach to recognising foreign orders will reduce the continued confusion in how to resolve a cross

⁵⁴⁷ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁴⁸ Clark B (1999) 246-247.

⁵⁴⁹ Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/eneews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁵⁵⁰ Clark B 'The South African Child's Right to Maintenance – a Constitutionally Enforceable Socio-Economic Right?' available at <https://archive.uea.ac.uk/swp/iccd2006/Presentations/Clark68.pdf> (Accessed on 14 August 2016).

⁵⁵¹ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 1.1.

⁵⁵² Maintenance Amendment Act 9 of 2015, s2, 11, 13(b) and 19.

border maintenance dispute, and that an updated system for recovery purposes will ensure greater success in achieving favourable results when a dispute arises. Other benefits considered are the improvements to enforcement of foreign maintenance orders with particular reference to the iSupport system, the effective procedural aspects the Convention provides due to its up to date nature, and the clarity it brings to the issue when maintenance obligations cease. Incorporating the Convention into South African law will increase knowledge on the subject of cross border maintenance recovery among not only persons in the legal discipline but also the public. Focusing on State expenditure, specifically the CSG, it is likely to decrease the high dependency on the grant which will in turn show a decrease in the need for State funding.⁵⁵³ The chapter will conclusively show that South Africa is in need of ratifying and implementing the Convention to effectively resolve disputes concerning the cross border recovery of child maintenance.

4.2 Current Problems within the South African Cross Border Child Maintenance Recovery System

Within the South African legal system, many issues arise concerning the recovery of child maintenance in cross border situations. Flaws found within the system itself are the main cause of current recovery problems; however, socio economic factors such as poverty, unemployment and limited resources contribute to the already expansive list of issues surrounding the flawed system.⁵⁵⁴ Other flaws in the system include limited knowledge of professionals in the field of maintenance recovery, out dated legislation governing cross border child maintenance recovery and the minimal recognition of foreign orders in South Africa and abroad.⁵⁵⁵ The current system is ineffective and time-consuming in its procedural aspects for recovery, while the lack of efficient enforcement options available adds to the existing flawed system.⁵⁵⁶

4.2.1 A Flawed System?

Unfortunately, even with the new amendments made to the existing South African legal system regarding maintenance recovery within its borders, the cross border system remains

⁵⁵³ SASSA 'Current Statistics on Grants for Children' available at http://www.childrencount.org.za/social_grants.php (Accessed 3 October 2016).

⁵⁵⁴ Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/enews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁵⁵⁵ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁵⁶ *Bannatyne v Bannatyne* at para 30.

out dated and for the most part forgotten. Out dated legislation governing maintenance recovery in cross border circumstances is limited in its current application.⁵⁵⁷ The legislation can only be used when a case concerns one of the proclaimed countries and even then, the dispute will remain lengthy and often ineffective in securing the outstanding and future maintenance payments.⁵⁵⁸ Enforcement measures assigned to cross border recovery cases are non-specific and the measures used in domestic disputes lack effectiveness in such circumstances that using them in cross border cases will not allow for improvement in their current state of ineffectiveness.⁵⁵⁹

4.2.1.1 Out dated Legislation

The South African legislation pertaining to cross border maintenance recovery stems from 1963 with the REMO and continues with the REMO Africa Act of 1989.⁵⁶⁰ This 1963 Act as stated previously concerns agreements with proclaimed countries to recognise maintenance orders made in either country while the 1989 Act concern similar agreements but between designated countries.⁵⁶¹ The list of proclaimed or designated countries is minimal and as such, the application of the Acts to cross border maintenance recovery cases is largely limited.⁵⁶² Without recognition and enforcement agreements in place with countries outside the Acts, many disputes with a cross border element will remain difficult to resolve efficiently and timeously. The long and drawn out process of recovering maintenance when dealing with countries not listed in the Acts often leads to unfavourable results, and creates a negative perception of the maintenance recovery system as a whole.⁵⁶³

Legislation is a crucial means of ensuring that maintenance recovery is dealt with consistently while still allowing for unique circumstances to be given due weight in legal proceedings.⁵⁶⁴ When legislation governing a particular topic is out dated, issues arising

⁵⁵⁷ REMO, s7.

⁵⁵⁸ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁵⁹ Wakefield R (2012) 109.

⁵⁶⁰ Ditshego J 'SA Law Promotes Foreign Maintenance' available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016); Van Zyl (2000) 218 - 220.

⁵⁶¹ Clark B 'Enforcement of the Duty of Support' in Van Heerden B, Cockrell A and Keightley R (eds) *Boberg's Law of Persons and the Family* 2 ed (1999) 295; REMO Africa Act, s2.

⁵⁶² Department of Justice and Constitutional Development 'Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963' available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁵⁶³ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁶⁴ Skelton A and Carnelley M (2010) 356.

under said topic will suffer when using the ineffective out dated legislation to determine an outcome to the disputes.⁵⁶⁵ For example, a cross border maintenance recovery case needs to be resolved in South Africa and the debtor resides in Greece, a country not on the proclaimed countries list in the Act. As no further legislation has been developed in South Africa regarding cross border maintenance recovery, the creditor has to approach a South African court with the existing maintenance order and the court officials will send the order to Greece for confirmation and recognition.⁵⁶⁶ If the order is recognised, the creditor either has to attend the legal proceedings in Greece or must rely on the South African courts to keep updated with the proceedings in Greece and for them to continually inform the creditor of any progress made.⁵⁶⁷ Unfortunately, without legislative guidance in such a situation, relating to time limits and documentation required by the Grecian courts, the process of recovery is long and tedious, often resulting in an unfavourable outcome for the maintenance creditor.⁵⁶⁸

While focus is placed on the limited application of the REMO and REMO Africa Act, it cannot be ignored that similar issues may be applicable to the Convention due to its limited ratification and implementation. As the Convention has only been ratified by 35 countries presently, with each of these countries found in the northern hemisphere, it retains limited effective application in resolving cross border maintenance disputes currently due to it only being utilised when both countries to a dispute are Contracting States to the Convention.⁵⁶⁹ However, while this may be the position currently, the uniformity offered by the Convention's implementation as well as its gaining of momentum as a result of its classification as an international instrument allows for regular improvements to be made if upon application in the 35 Contracting States or Members any issues arise.⁵⁷⁰ This differs to the REMO and REMO Africa Acts in that both have been placed into operation and then forgotten to a large extent by practitioners allowing for little to no improvement since their inception.⁵⁷¹

⁵⁶⁵ De Jong (2009) 590.

⁵⁶⁶ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁶⁷ Mthethwa S 'Duties of Support' available at <http://www.jlesliesmith.com/articles/legal-articles/Duties-of-Support/default.aspx> (Accessed on 28 May 2016).

⁵⁶⁸ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁶⁹ Long E (2008) 991; Duncan W (2008) 328.

⁵⁷⁰ Hague Conference on Private International Law 'Child Support Specialised Section: Status Table' available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131> (Accessed 13 June 2016).

⁵⁷¹ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

4.2.1.2 Limited Recognition of Foreign Orders

Under the current practices of the courts when dealing with maintenance orders issued outside of South Africa but requiring enforcement within our borders, recognition of these foreign orders is limited and rarely recognised.⁵⁷² When the maintenance order was made in a proclaimed country such as England, Hong Kong, or even Zambia, the order is sent to the Minister of Justice in South Africa through diplomatic channels for recognition and then sent to the courts for a decision determining the appropriate enforcement measure to be used.⁵⁷³ The process of receiving recognition from the Minister of Justice in instances as stated above can take as long as 12 months.⁵⁷⁴ Yet, the process for recognition when an order was made in a country not proclaimed or designated in the REMO or REMO Africa Act can, and often will, take even longer.⁵⁷⁵

4.2.1.3 Lack of Effective Enforcement Measures

The enforcement measures available in South Africa are only applicable to situations where the debtor resides within South Africa's borders.⁵⁷⁶ When the debtor resides outside of South Africa, it is not plausible to attempt to enforce a maintenance order against the debtor using the measures for enforcement found in the South African legal system even though the maintenance order is one made in South Africa.⁵⁷⁷ When the debtor resides outside of South Africa, the measures of enforcement applicable to the country in which he or she now resides will be used to enforce the maintenance order against him or her once the order has been recognised in that country.⁵⁷⁸

As stated in previous chapters, when the debtor resides in South Africa and has a foreign maintenance order made against him or her, the enforcement measures used in South Africa for domestic recovery, at present, will likely be applied to the cross border recovery dispute.⁵⁷⁹ Such measures include imprisonment, attaching property or a debt owing or

⁵⁷² Ditshego J 'SA Law Promotes Foreign Maintenance' available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016).

⁵⁷³ REMO s3.

⁵⁷⁴ Department of Justice and Constitutional Development 'Maintenance: Reciprocal Enforcement of Maintenance Orders Act 80 of 1963' available at <http://www.justice.gov.za/vg/mnt.html> (Accessed on 30 June 2016).

⁵⁷⁵ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁵⁷⁶ Wakefield R (2012) 109.

⁵⁷⁷ Wakefield R (2012) 109

⁵⁷⁸ Van Zyl L (2000) 135.

⁵⁷⁹ Van Zyl L (2000) 134.

accruing to the debtor, issuing a warrant of execution, or attaching emoluments.⁵⁸⁰ Once a foreign maintenance order has been recognised, the maintenance creditor will, in her application to the court, state which enforcement measure is requested.⁵⁸¹ Proceedings will continue according to the method used in domestic recovery cases.⁵⁸²

When a debtor is imprisoned for his or her failure to comply with a maintenance order made against him, the time he spends in prison does not resolve the main problem, namely ensuring that the debtor meets his maintenance obligations.⁵⁸³ While in prison, the maintenance debtor continues with non-compliance of the maintenance order as he or she is not making payments to the maintenance creditor due to a lack of income.⁵⁸⁴ Once released from prison, the debtor then loses marketability concerning employment, making it more difficult for the debtor to be employed and earn the money needed to comply with the maintenance order against him, thereby risking another period of incarceration.⁵⁸⁵ The continuous cycle of non-payment in such circumstances leaves little to be desired about using imprisonment as a means of resolving a maintenance recovery dispute.⁵⁸⁶

Other options for sentencing maintenance defaulters exist in South African law, namely periodical imprisonment and correctional supervision. Periodical imprisonment involves placing a person in prison for certain periods of time while allowing them to then be released for a particular purpose.⁵⁸⁷ This method of sentencing, which has been endorsed by the Supreme Court of Appeal in *Visser v S*⁵⁸⁸, can be of great benefit to maintenance debtors in that it strikes a balance between the need for 'prevention through deterrence and the preservation of the productivity of a family life of the offender.'⁵⁸⁹ This particular type of sentence can be crafted to suit the offender without placing undue burdens on the offender current employment or potential employment opportunities.⁵⁹⁰ Correctional supervision subjects the offender to 'house arrest, community service, continuous monitoring as well as treatment programmes.'⁵⁹¹ This method of sentencing is less costly than a prison sentence and

⁵⁸⁰ Skelton A and Carnelley M (2010) 358-360.

⁵⁸¹ Van Zyl L (2000) 135.

⁵⁸² REMO, s4(3)(a) – (d).

⁵⁸³ Maintenance Amendment Act 9 of 2015, s13(a).

⁵⁸⁴ Skelton A and Carnelley M (2010) 360; Clark B (1999) 281.

⁵⁸⁵ Clark B (1999) 282.

⁵⁸⁶ Skelton A and Carnelley M (2010) 360.

⁵⁸⁷ Carnelley M (2012) 358.

⁵⁸⁸ [2003] JOL 12204 (SCA).

⁵⁸⁹ Carnelley M (2012) 359.

⁵⁹⁰ Carnelley M (2012) 359.

⁵⁹¹ Correctional Services Act 111 of 1998, s52.

does not disrupt the offender's family and employment life.⁵⁹² The financial position of the offender could also be monitored while also punishing the offender in restricting his or her movement.⁵⁹³ Both of these sentencing options appear to be more effective concerning maintenance defaulters than a direct prison sentence.

Civil execution methods are considered more effective at ensuring payment of maintenance than imprisoning the debtor, as the purpose of the dispute is to recover outstanding maintenance owing to the creditor.⁵⁹⁴ Attaching property, emoluments, or debts owing to the debtor will resolve a current maintenance dispute as payment to the creditor will be ensured.⁵⁹⁵ Regarding the attachment of the debtor's property for settlement of an outstanding maintenance debt, once the property is sold the money necessary to settle the debt is given to the creditor.⁵⁹⁶ The above is also applicable to the attachment of a debt owing or accruing to the debtor.⁵⁹⁷ As emoluments are portions of the debtor's wages or salary, the employer will be required to take the maintenance amount owing to the creditor from the debtor's remuneration each month and send it to the creditor on the debtor's behalf.⁵⁹⁸

It is important to note that regardless of the civil or criminal execution method to enforce maintenance payments, a problem remains in that the resolution of the current dispute using civil means of execution will not ensure payment is maintained after the current outstanding debt is satisfied.⁵⁹⁹ As the debtor has not complied with a maintenance order against him or her at least once, there is a higher chance that the debtor will fall into non-compliance again, requiring that the creditor start new proceedings to deal with the same problem.⁶⁰⁰ The continuous cycle of maintenance proceedings is likely to remain in effect until the debtor's maintenance obligation ceases.

⁵⁹² Carnelley M (2012) 359.

⁵⁹³ Carnelley M (2012) 359.

⁵⁹⁴ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.7.

⁵⁹⁵ Skelton A and Carnelley M (2010) 359.

⁵⁹⁶ De Jong (2009) 595.

⁵⁹⁷ Maintenance Act 99 of 1998, s26(2)(a).

⁵⁹⁸ Heaton J (2010) 56.

⁵⁹⁹ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.23.

⁶⁰⁰ Geach C 'SA's Child Support Shame' available at <http://www.iol.co.za/news/crime-courts/sas-child-support-shame-1719323> (Accessed on 31 October 2016).

4.2.1.4 An Expensive and Time-consuming Procedure

Any form of court proceedings is an expensive and time-consuming endeavour to pursue.⁶⁰¹ Maintenance recovery proceedings when concerning a cross border element are no exception.⁶⁰² Due to the limited application of the REMO and REMO Africa Act in such cases as stated above, the current method used in cross border recovery cases is to launch formal proceedings in the courts of the foreign country based on an already existing maintenance order.⁶⁰³ This particular method is expensive, it takes an indeterminable amount of time to resolve, and when resolving the dispute it is often to the detriment of the creditor.⁶⁰⁴

Changing currency, flying to the other country to instigate and continually attend proceedings which are extended over long periods, and constant postponements and delay tactics used by the debtor only add to an already expensive endeavour. As such, it can be said that with the current means of trying to recover maintenance payments when the debtor resides in another country it is likely to cost more than the amount of maintenance which is outstanding.⁶⁰⁵ If this is the case, maintenance creditors are not likely to claim maintenance from the debtor even when there is an existing maintenance order against him or her.

4.2.1.5 Knowledge is Scarce

Due to the lack of development in the field of cross border maintenance recovery in South Africa over the last five decades, knowledge in how to deal with such a case is limited where legal professionals, maintenance officers, and court officials are concerned.⁶⁰⁶ While South Africa has courts specifically allocated to deal with maintenance disputes alone, the lack of knowledge persists when determining how to deal with a cross border maintenance recovery case.⁶⁰⁷ In the maintenance courts, officials tend to feel that they are wasting their time and talents working there, to such an extent that the officials have to be compelled to do the work

⁶⁰¹ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.18.

⁶⁰² Duncan W (2008) 322.

⁶⁰³ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁶⁰⁴ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁶⁰⁵ Geach C 'SA's Child Support Shame' available at <http://www.iol.co.za/news/crime-courts/sas-child-support-shame-1719323> (Accessed on 31 October 2016).

⁶⁰⁶ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁶⁰⁷ Palmeira N 'Children's Maintenance' available at <http://mclarens.co.za/childrens-maintenance/> (Accessed on 25 May 2016).

they are required to do.⁶⁰⁸ Added to this is the public's minimal knowledge on how to make an application for the recovery of maintenance, where to go, and who to approach to ensure that all the necessary documentation is attached to the application to avoid unnecessary delays in the recovery process.⁶⁰⁹ Particularly legal professionals and maintenance officers, need to be knowledgeable regarding cross border maintenance recovery law and legal principles to avoid adding to an already overburdened court system with incomplete and erroneous applications.

4.2.1.6 Termination of the Duty of Support

All of the above stated flaws in the legal system regarding maintenance disputes can be considered as legal loopholes. Another such loophole is the uncertainty regarding when the duty of support owing to children terminates. Within the South African legal system, one perceived option is when the child attains the age of majority, which in South Africa is 18 years old, though this has never been the true legal position.⁶¹⁰ The true legal position is more ambiguous in nature as it concerns when the child becomes self-supporting.⁶¹¹ The age of majority had no legal certainty in the past; however, debates do surround what it means to be self-supporting.

When a child reaches the age of 18, it is assumed that he or she is no longer dependent on his or her parents or guardians due to his or her adult status.⁶¹² This assumption is often incorrect as many children still require the financial support of their parents or guardians.⁶¹³ Reasons for the continued support include pursuing a tertiary level education, high unemployment rates (to be further discussed in 4.2.2.2 below) and a high cost of living.⁶¹⁴ Children often remain dependent on their parents to support them well into their early to mid-twenties, particularly if attending a tertiary level institution. With this in mind, it seems ill advised to continue to allow the perception that the duty of support to cease at the age of majority to

⁶⁰⁸ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.12.

⁶⁰⁹ De Jong (2009) 597-598.

⁶¹⁰ Van Schalkwyk N (2009) 54.

⁶¹¹ Mthethwa S 'Duties of Support' available at <http://www.jlesliesmith.com/articles/legal-articles/Duties-of-Support/default.aspx> (Accessed on 28 May 2016).

⁶¹² Mc Laren I 'The Reciprocal Duty of Support between Parents and their Children' available at <http://mclarens.co.za/reciprocal-duty-of-support-between-parents-and-their-children/> (Accessed on 17 July 2016).

⁶¹³ De Jong M 'A better way to deal with the maintenance claims of adult dependent children upon their parents' divorce' 2013 (76) *THRHR* 654-655; Clark B (1999) 264.

⁶¹⁴ Mc Laren I 'The Reciprocal Duty of Support between Parents and their Children' available at <http://mclarens.co.za/reciprocal-duty-of-support-between-parents-and-their-children/> (Accessed on 17 July 2016).

prevail. It is important to note that the maintenance order has to stipulate that the duty of support terminates at the child attaining the age of majority, for the duty to truly cease at this point.⁶¹⁵ If not stipulated then the default position will be that it terminates when the child becomes self-supporting.⁶¹⁶

Currently the uncertainty surrounding the legal meaning of ‘self-supporting’ in connection with maintaining a child past the age of majority causes unnecessary legal proceedings to take place when maintenance debtors refuse to continue maintenance payments for a child who has reached the age of 18 years.⁶¹⁷ The refusal to pay in the above circumstances occurs regardless of the wording of the maintenance order made against the debtor.⁶¹⁸ The wording of orders in most maintenance agreements or orders made against a debtor state that the debtor is obligated to pay maintenance for a child until said child becomes self-supporting.⁶¹⁹ Clarity in the meaning of the term ‘self-supporting’ is important to determine when the child is able to support himself or herself.⁶²⁰

At present, there is no legislation that gives meaning to the term ‘self-supporting’, yet the judiciary has defined the concept through case law. A child is considered to be self-supporting once he or she can make a living from his or her income without contributions towards their maintenance from either parent.⁶²¹ Until a child can be considered as able to make a living from her income alone, a maintenance order will remain in effect.⁶²² While there is some degree of clarity on the termination of the duty of support, it remains determined on a case by case basis.⁶²³

4.2.2 Socio Economic Contributors

Issues in establishing and maintaining an effective legal means of resolving maintenance disputes is a problem for many countries. Socio economic factors play a vital role in determining when a system will be effective in resolving disputes.⁶²⁴ High unemployment

⁶¹⁵ Skelton A and Carnelley M (2010) 148.

⁶¹⁶ Van Schalkwyk N (2009) 55.

⁶¹⁷ Van Zyl (2000) 10.

⁶¹⁸ Botha M F T ‘The Duration of the Duty to Maintain and of a Maintenance Order’ (2008) 125 *South African Law Journal* 718.

⁶¹⁹ Skelton A and Carnelley M (2010) 354.

⁶²⁰ *Bursey v Bursey* [1997] 4 All SA 580 (E); Clark B (1999) 247.

⁶²¹ Botha M F T (2008) 717.

⁶²² Botha M F T (2008) 721.

⁶²³ Van Schalkwyk N (2009) 55.

⁶²⁴ Clark B ‘Child Maintenance and the Role of the South African State’ (2000) 8 *International Journal of Children’s Rights* 307.

rates, poverty, and a limited number of state resources available for use are the main factors to be considered when considering South Africa's current issues in its maintenance recovery system for cross border disputes.

4.2.2.1 Poverty and its Alleviation: the Child Support Grant

Within South Africa, the levels of absolute poverty (referring to a lack of disposable income) within the population stand at just under 40 per cent.⁶²⁵ Poverty, when measured in absolute terms, is 'calculated on a minimum income for basic needs of survival.'⁶²⁶ Due to its nature, poverty denies persons their human rights, specifically children.⁶²⁷ The State has a legal obligation to assist parents in caring for a child.⁶²⁸ The South African State's obligation arises from both international instruments and national legislation, particularly the CRC, ACRWC, the Children's Act and the Constitution (discussed in 3.2.2).⁶²⁹

Parents have an obligation to provide financial support to their child proportionately according to their respective means.⁶³⁰ This being stated, when the parent's means are minimal at best, their ability to provide for their children's basic needs are limited exponentially. The State is then obligated to assist parents where they fall short in maintaining the child.⁶³¹ The State's responsibility is subject to the resources it has available at its disposal.⁶³²

In an effort to alleviate poverty in South Africa, the government has focused on improving the lives of people through social security i.e. in the form of monetary grants.⁶³³ The CSG is

⁶²⁵ United Nations development Programme 'Human Development Reports' available at <http://hdr.undp.org/en/countries/profiles/ZAF> (Accessed on 2 October 2016).

⁶²⁶ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 3.

⁶²⁷ Booth C *Human Rights and Child Poverty* (Speech given at launch of Child Poverty in the Developing World, 2003) 1.

⁶²⁸ Clark B 'The South African Child's Right to Maintenance – a Constitutionally Enforceable Socio-economic Right?' available at <https://archive.uea.ac.uk/swp/iccd2006/Presentations/Clark68.pdf> (Accessed on 14 August 2016).

⁶²⁹ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 7 and 15.

⁶³⁰ *Bursey v Bursey* 1999 (3) SA 33 (SCA) 36C-D; Carnelley M and Easthorpe J 'Judicial Discretion in the Determination of Post-Divorce Child Support: A Brief Overview of the Application of the South African Maintenance Act 99 of 1998 as Compared to the Canadian Federal Child Support Guidelines of 1997' (2009) *Obiter* 370.

⁶³¹ Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/enews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁶³² Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/enews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁶³³ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 5; Clark B (1999) 261.

offered by the State under the South African Social Security Agency (SASSA). Established in 1998, the CSG's 'sole purpose was to help children acquire basic sustenance.'⁶³⁴ Since its inception, the CSG has increased over the years to the amount of R350 per month due to inflation rates.⁶³⁵ Currently, the CSG is applicable to children under the age of 18 years.⁶³⁶

Under the requirements for eligibility, the CSG is available to the primary caregiver of a child who is over the age of 16 years.⁶³⁷ The limitation of six children to one caregiver fails to take into account that due to the high rates of poverty as well as the HIV/AIDS pandemic within South Africa (which is beyond the scope of this document), many households are headed by children under the age necessary to qualify as a primary caregiver and as such these vulnerable children are excluded from the CSG's benefit.⁶³⁸ The CSG's availability is no longer restricted to South African citizens only.⁶³⁹ Permanent residents and refugees may also qualify for the grant as a means of social relief of distress.⁶⁴⁰ Persons, who do not qualify for the grant due to the primary caregiver's income exceeding a low threshold of R3500, are left to suffer in hunger and continued poverty. In these instances the State fails in its obligation to maintain children when their parents are unable to do so.

The CSG is one of the methods the State uses to ensure that children are maintained financially. The State is still obligated to assist parents when they are unable to provide for their child's basic needs.⁶⁴¹ Unfortunately, with the amount received a month, the grant is limited in how it can truly assist those children who require it. The cost of living is much higher than the amount given by the grant. In cases where a maintenance debtor lacks

⁶³⁴ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 20.

⁶³⁵ Sello L '#Budget 2016: A little extra for pensioners, disabled and children' available at <https://www.enca.com/life/budget2016-little-extra-pensioners-disabled-and-children> (Accessed on 2 October 2016).

⁶³⁶ Kelly G 'Everything you need to know about social grants: For people who receive a grant or need to receive one' available at <http://www.groundup.org.za/article/everything-you-need-know-about-social-grants-820/> (Accessed on 3 October 2016).

⁶³⁷ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 20-21.

⁶³⁸ Rosa S *Counting on Children: Realising the right to social assistance for child headed households in South Africa* (2004) 34; Social Assistance Act 13 of 2004, s4, Reg 162.

⁶³⁹ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 21.

⁶⁴⁰ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 22.

⁶⁴¹ Clark B (1999) 260.

meeting his or her maintenance obligation, the CSG takes over that responsibility if the maintenance creditor complies with the abovementioned requirements for eligibility.⁶⁴²

4.2.2.2 High Unemployment Rates

At present, South Africa's unemployment rates stand at 26.6 per cent of the population.⁶⁴³ Due to this high number, many people are without a monthly income, thereby adding to the poverty problem found within the country.⁶⁴⁴ It is well documented in the South African legal system that parents who are unable to financially maintain their children due to a lack of means will not be expected to do so.⁶⁴⁵ Yet, unemployment is only considered as a reason for the lack of maintenance payments when the maintenance debtor is actively searching for employment but remains unsuccessful.⁶⁴⁶ The debtor's maintenance obligation will arise once more when he or she secures employment and the payments missed during the debtor's term of unemployment will be written off.⁶⁴⁷

If the maintenance debtor chooses to remain unemployed in order to avoid complying with his or her maintenance obligations, the maintenance creditor will approach the court for an order of enforcement.⁶⁴⁸ The courts in these circumstances have ordered that a lump sum accruing to the maintenance debtor from a provident fund be retained in order to make monthly payments to the maintenance creditor.⁶⁴⁹ Nicholson J in *Mngadi v Beacon Sweets and Chocolate Provident Fund*⁶⁵⁰ stated, in defence of his order for the provident fund to retain the payment owing to Mr Mngadi in respect of his children's future maintenance, that:

‘to refuse the present application would be to further undermine the rights of children and disempower women [while to] grant the application will be to thwart an unreasonable, intransigent father who has no respect for the provisions of the Maintenance Court order or his common-law duties to maintain his own kith or kin.’⁶⁵¹

⁶⁴² Leatt A and Rosa S ‘Securing the Means to Live: Children's Financial Security in South Africa’ available at www.ci.org.za/depts/ci/eneews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁶⁴³ Trading Economics ‘South African Unemployment Rate’ available at <http://www.tradingeconomics.com/south-africa/unemployment-rate> (Accessed on 30 September 2016).

⁶⁴⁴ Leatt A and Rosa S ‘Securing the Means to Live: Children's Financial Security in South Africa’ available at www.ci.org.za/depts/ci/eneews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁶⁴⁵ Skelton A and Carnelley M (2010) 348.

⁶⁴⁶ Clark B (1999) 245.

⁶⁴⁷ Heaton J (2010) 57

⁶⁴⁸ *Magewu v Zozo* [2004] 3 All SA 235 (C) para 11.

⁶⁴⁹ Heaton J (2010) 57.

⁶⁵⁰ 2004 (5) SA 388 (D).

⁶⁵¹ *Mngadi v Beacon Sweets and Chocolate Provident Fund* 2004 (5) SA 388 (D) at para 289B-C.

In the above stated case, the father resigned from his place of employment in order to escape paying maintenance for his children.⁶⁵² Due to his previous avoidance of making maintenance payments, the court stated that if permitted to withdraw his provident fund benefit he would most probably ‘either secrete it away, spend it on himself or otherwise dissipate it’ instead of ‘nurturing it carefully to preserve it’ for the payment of his future maintenance obligations.⁶⁵³

4.2.2.3 Limited State Resources

The State’s obligation in ensuring the children are maintained is secondary to that of the child’s parents.⁶⁵⁴ However, the State is obligated to provide the necessary resources for parents to be able to comply with their own obligations regarding the maintenance of a child.⁶⁵⁵ The resources provided by each State will differ depending on the monies available.⁶⁵⁶ For example, a State classed as a developing nation, such as South Africa, will have fewer resources available to comply with its maintenance obligations than a State classed as developed, such as the USA. In the many signed and ratified international instruments, including the CRC and ACRWC, to which South Africa is a member, the duty to provide the resources necessary for the maintenance of children is dependent on the country’s resources, which in South Africa is limited.⁶⁵⁷ In ensuring that children are well cared for by their parents or guardians, the State is obligated to indirectly provide for: employment opportunities for parents to earn incomes, housing options to comply with shelter obligations, medical treatment centres, schooling and assisting in providing food.⁶⁵⁸ Parents are then required to ensure that children are fed, housed, clothed, attend school, and seek medical help when necessary using the monies they earn through employment.

⁶⁵² Heaton J (2010) 57.

⁶⁵³ *Mngadi v Beacon Sweets and Chocolate Provident Fund* 2004 (5) SA 388 (D) at para 287D.

⁶⁵⁴ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.5.

⁶⁵⁵ CRC, Article 27(3).

⁶⁵⁶ Clark B (1999) 262.

⁶⁵⁷ Leatt A and Rosa S ‘Securing the Means to Live: Children’s Financial Security in South Africa’ available at www.ci.org.za/depts/ci/enews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁶⁵⁸ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 1-2.

4.3 Acknowledgement of Some Issues Plaguing the Maintenance Recovery System and the Improvements to be put into Operation

New developments have been included in the current legal system of maintenance recovery in South Africa. Yet, the progress is solely focused on domestic recovery.⁶⁵⁹ Development in the cross border discipline is necessary for achieving a well-rounded and up to date system of maintenance recovery. Current progress in the domestic maintenance recovery system shows promise in being effective when used and could be utilised in cross border disputes as well. Enforcement has been the focus of the new developments within the South African maintenance legal system.⁶⁶⁰ Extended sentences have been added to the criminal sanctions.⁶⁶¹ Credit bureau reporting is to be used under both criminal and civil sanctions, though not yet in operation.⁶⁶² Debtors will be unable to avoid legal proceedings due to the newest feature in aiding enforcement, namely mobile phone location, when its practical application is operational.⁶⁶³

4.3.1 Legal Amendments made regarding Enforcement Measures

Legal amendments to the current legislation governing domestic maintenance recovery disputes have added potential improvements to enforcement measures. Under the criminal sanction allocated to debtors who do not comply with a maintenance obligation order given against them, the debtor's non-compliance will now, if convicted under s31 of the Maintenance Act, be subjected to a term of imprisonment not exceeding three years as opposed to one year.⁶⁶⁴ Employers who have been served with the required documentation to pay the maintenance amount owing to the maintenance creditor on the debtor's behalf will be subject to a maximum of two years imprisonment for failing to make the debtor's payments on his or her behalf.⁶⁶⁵

Credit bureau reporting, though not a new measure of enforcement in the South African legal system, is no longer a discretionary measure to be used under criminal sanctions alone, when

⁶⁵⁹ Maintenance Amendment Act 9 of 2015.

⁶⁶⁰ Smuts J 'Amendments to the Maintenance Act' available at <http://www.abgross.co.za/amendments-to-the-maintenance-act/> (Accessed on 3 November 2016).

⁶⁶¹ RDM News Wire 'Zuma signs law that will allow maintenance defaulters to be blacklisted' available at <http://www.timeslive.co.za/politics/2015/09/09/Zuma-signs-law-that-will-allow-maintenance-defaulters-to-be-blacklisted/> (Accessed on 4 November 2016); Maintenance Amendment Act 9 of 2015, s13(a) and (b).

⁶⁶² Moodley P (2016) 19; Maintenance Amendment Act 9 of 2015, s19.

⁶⁶³ Maintenance Amendment Act 9 of 2015, s2; Moodley P (2016) 3-8.

⁶⁶⁴ Moodley P (2016) 20; Maintenance Amendment Act 9 of 2015, s13(a).

⁶⁶⁵ Maintenance Amendment Act 9 of 2015, s15.

implemented into the legal system and becoming functioning.⁶⁶⁶ The Amendment Act has removed the discretionary aspect which allowed a court to determine whether it was necessary to furnish any credit granting or credit tracking businesses with debtor's personal particulars.⁶⁶⁷ Credit bureau reporting is now mandatory for both criminal and civil sanctions as outstanding maintenance is seen as a debt.⁶⁶⁸ Though credit bureau reporting is mandatory in the recovery process, due to the newness of the Amendment Act, the regulations required to facilitate the procedure of turning over sensitive information, namely the debtor's personal particulars, have yet to be incorporated into the legal system.⁶⁶⁹ To be incorporated into the legal system, credit bureau reporting requires regulations to ensure it proper functioning and use. At present, no regulations have been determined and until such date as determined by the President in a proclamation in the Government Gazette regarding when and what regulations are to be used, credit bureau reporting remains discretionary for criminal sanctions and non-operational for civil sanctions.⁶⁷⁰

4.3.2 Locating Debtors within South Africa

Courts are now permitted under the Amendment Act to request mobile service providers to furnish the court with the contact information of the maintenance debtor.⁶⁷¹ However, a court may only request this of the mobile service provider if all other reasonable attempts to locate the maintenance debtor have been used and been unsuccessful.⁶⁷² This method to locate the debtor may therefore only be used as a last resort.⁶⁷³ It will also cost the State R80 to use this method, but the amount may be recovered from the debtor if the court orders the debtor to make the reimbursement.⁶⁷⁴ However, as no regulations have been determined as of yet for the practical implementation of this feature catered for in the Amendment Act, it has yet to come into operation.⁶⁷⁵

Using a mobile service provider as a means of locating a debtor, will aid in improving the settlement of maintenance enquiries and of criminal cases pending against debtors who

⁶⁶⁶ Moodley P (2016) 19.

⁶⁶⁷ Maintenance Amendment Act 9 of 2015, s13(b).

⁶⁶⁸ Smuts J 'Amendments to the Maintenance Act' available at <http://www.abgross.co.za/amendments-to-the-maintenance-act/> (Accessed on 3 November 2016).

⁶⁶⁹ Moodley P (2016) 21.

⁶⁷⁰ Maintenance Amendment Act 9 of 2015, s19.

⁶⁷¹ Maintenance Amendment Act 9 of 2015, s2.

⁶⁷² Moodley P (2016) 5.

⁶⁷³ Maintenance Amendment Act 9 of 2015, s2.

⁶⁷⁴ Moodley P (2016) 7.

⁶⁷⁵ Maintenance Amendment Act, s19.

contravene maintenance orders made against them, as debtors' non-availability at the enquiries and court proceedings delay their finalisation.⁶⁷⁶ Mobile service providers are permitted to apply for an extension of the time given by the court to furnish the debtor's information to the court.⁶⁷⁷ The extension must be requested in the prescribed manner and can only be requested on the grounds that 'the information cannot be provided timeously' or that the service provider does not provide a service to the person identified in the court's directive.⁶⁷⁸ If the information is not available on the mobile service provider's records then said provider may explain this to the court.⁶⁷⁹ Though the time extension application is necessary when making a request of a third party, the extension could be used as a stalling tactic, thereby delaying the conclusion of the maintenance enquiry.

4.4 Benefits to the Convention's Application in South Africa

When considering the many flaws in the current cross border recovery system in South Africa and the lack of development in cross border disputes for more than five decades, ratifying and implementing the Convention will be beneficial. The Convention will ensure South Africa's compliance with its international obligations, create procedural uniformity, and improve the enforcement of maintenance orders to ensure and track payments.⁶⁸⁰ Legal loopholes will be lessened and knowledge within the legal community will increase due to the Convention's inclusion in the maintenance recovery legal framework.⁶⁸¹ Money paid by the South African State, in fulfilment of its international obligation to provide resources for parents to maintain their children, will decrease as the need for the CSG will lessen with the Convention's implementation. The Convention will aid in amending the domestic legal system pertaining to maintenance recovery, as its provisions could be adapted to fix the flaws found in that system as well.

4.4.1 Ensures South Africa's Compliance with its International Obligations regarding Child Maintenance Recovery

South Africa has many international obligations concerning the duty of support which stem from ratifying international conventions including the CRC and the ACRWC (as discussed in

⁶⁷⁶ Moodley P (2016) 8.

⁶⁷⁷ Maintenance Amendment Act 9 of 2015, s2.

⁶⁷⁸ Moodley P (2016) 6.

⁶⁷⁹ Maintenance Amendment Act 9 of 2015, s2

⁶⁸⁰ Hammond D and Barnes M (2013) 256-257.

⁶⁸¹ Duncan W (2013) 317-319.

the previous chapter).⁶⁸² Ratifying the Convention will add to the assurance that South Africa continues to comply with its obligations concerning the duty of support and the understanding that it would be in the best interests of children to ensure that this duty is met.⁶⁸³ An added benefit to ratifying and implementing the Convention is its flexibility in how to deal with maintenance disputes as well as using its provisions dealing with cross border recovery to aid the domestic system of recovery.⁶⁸⁴

4.4.2 Recognition of Foreign Orders: Uniform Approach

South Africa's recognition of foreign orders lacks a structured uniform approach.⁶⁸⁵ The current approach to recognition is twofold.⁶⁸⁶ If the country's order which is to be recognised is a proclaimed or designated country listed in the Schedule's to the REMO and REMO Africa Act, the order will be sent through diplomatic channels to the Minister of Justice and the Director-General for recognition.⁶⁸⁷ When the maintenance order requiring recognition is not from a proclaimed country, the order needs to be recognised in a court of law.⁶⁸⁸ Unfortunately, for the order to be recognised in South Africa, formal legal proceedings have to be started in the country which made the maintenance order.⁶⁸⁹ Once proceedings have begun, the courts will preside over different aspects of the same dispute in order to come to a resolution.⁶⁹⁰ For example, Ms K has a maintenance order granted in Russia against Mr P, who now resides in South Africa. In order to claim maintenance from Mr P in South Africa, Ms K has to initiate proceedings in Russia. The Russian court will then liaise with the court in South Africa where Mr P now resides in order to have the Russian maintenance order recognised and made enforceable against Mr P, using the enforcement measures available in

⁶⁸² Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 7.

⁶⁸³ Clark B 'The South African Child's Right to Maintenance – a Constitutionally Enforceable Socio-economic Right?' available at <https://archive.uea.ac.uk/swp/iccd2006/Presentations/Clark68.pdf> (Accessed on 14 August 2016).

⁶⁸⁴ Doogue J – Chief District Court Judge of New Zealand, ChiefJudgeJan-Marie.Doogue@justice.govt.nz – 'The Vision and Flexibility of the 2007 Hague Convention' presented at the Hague Conference on the Global Recovery of Child Support and Family Maintenance in Asia Pacific and Worldwide 9 – 11 November 2015 in Hong Kong, presentation slides 3, 6, 11 and 14.

⁶⁸⁵ REMO, s3.

⁶⁸⁶ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁶⁸⁷ REMO, s3; REMO Africa Act, s4 and 6.

⁶⁸⁸ Maintenance Act 99 of 1998, s5 and 8.

⁶⁸⁹ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁶⁹⁰ Clark B (1999) 296.

the South African legal system. Once the Russian maintenance order has been recognised in a South African court, Ms K can apply for enforcement under South African law.

While the approach given in the above example seems simple enough to ensure the successful recognition of a foreign maintenance order, practically the approach most often renders unfavourable outcomes.⁶⁹¹ It is clear that the unsuccessful results stem from a lack of cooperation between countries as they have no legal obligation to assist each other and have the orders recognised.⁶⁹² In cases such as the example stated above, without a legally reciprocal binding obligation to recognise foreign maintenance orders i.e. a bilateral agreement, countries have shown to give limited assistance in resolving the dispute.⁶⁹³ The two approaches found in South African law concerning the recognition of foreign maintenance orders require uniformity. Yet, it would be a long and complex process to acquire a reciprocal recognition and enforcement agreement between the many countries across the globe, without a guarantee for success.

The Convention will give South Africa a more uniform approach to be used concerning the recognition and enforcement of foreign maintenance orders than the REMO and REMO Africa Act due to its growing number of Contracting States, which already exceeds the number of countries party to each of the Acts.⁶⁹⁴ Nevertheless, South Africa can adapt the approach, due to the Convention's flexibility in its implementation, for better integration into its legal system enabling the Convention to act as a guide to dealing with matters when the Convention cannot apply due to a party not being a Contracting State.⁶⁹⁵ While the Convention is new in its conception, its content stems from years of both success and failure concerning the cross border recovery of child maintenance.⁶⁹⁶ Should South Africa become a party to the Convention, it will join a rapidly expanding group of countries which have reformed their cross border maintenance recovery laws to better assist in resolving disputes.⁶⁹⁷ With this in mind, it is clear that becoming a member to the Convention will

⁶⁹¹ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁶⁹² Walker L (2015) 200-201.

⁶⁹³ Ditshego J 'SA Law Promotes Foreign Maintenance' available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016).

⁶⁹⁴ *Hague Convention 2007*, Chapters II, III and V.

⁶⁹⁵ Doogue J (2015) 14.

⁶⁹⁶ Long E (2008) 985.

⁶⁹⁷ Hague Conference on Private International Law 'Child Support Specialised Section: Status Table' available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131> (Accessed on 13 June 2016).

improve South Africa's current legal approach to maintenance recovery in cross border circumstances.

4.4.3 Comprehensive and Up to Date Means of Dealing with Cross Border Child Maintenance Disputes

The Convention is the most recent international instrument that governs cross border maintenance recovery disputes.⁶⁹⁸ In its negotiation stages, spanning over three years, negotiators considered the successful and unsuccessful aspects of previous conventions relating to the topic.⁶⁹⁹ Focus was placed on the failures of the previous Conventions and the issues found in the cross border recovery field through investigation.⁷⁰⁰ New ideas on how to resolve disputes that caused continued problems were considered, such as determining the most efficient means of enforcement.⁷⁰¹ This was achieved using information gathered from countries which have immense success in ensuring maintenance payments in their domestic and international recovery systems.⁷⁰²

Due to the Convention's inclusion of the successful requirements and exclusion of the unsuccessful provisions found in previous instruments concerning maintenance obligations, it is the most comprehensive instrument relating to cross border maintenance recovery worldwide.⁷⁰³ However, the Convention remains flexible enough in its application to allow for improvement and development when the circumstances call for it.⁷⁰⁴ Due to the nature of maintenance disputes being unique in circumstance and decided on a case-by-case basis, room for improvement and development is a necessary factor to ensure the Convention's success.⁷⁰⁵ Using this comprehensive Convention as an aid to the current legislative framework for cross border maintenance recovery in South Africa will not only be beneficial in improving the neglected cross border recovery system in South Africa by providing clarity and certainty within the field, but will also aid in fixing the many flaws found in the domestic recovery system.

⁶⁹⁸ Long E (2008) 985.

⁶⁹⁹ Duncan W (2004) 664 -666.

⁷⁰⁰ Duncan W (2004) 664.

⁷⁰¹ Duncan W (2008) 317.

⁷⁰² Long E (2008) 985.

⁷⁰³ Walker L (2015) 256.

⁷⁰⁴ Doogue J (2015) 14.

⁷⁰⁵ Walker L (2015) 257.

4.4.4 Improving Enforcement

Within South Africa, enforcing a maintenance order against a debtor is the greatest challenge given to the legislature and judiciary regardless of circumstance.⁷⁰⁶ Under domestic law, the South African legislature has increased the measures available to be used to ensure enforcement, yet the regulations surrounding the new measures have yet to be determined, resulting in a limited practical change in ensuring maintenance payments i.e. mobile service tracking, mandatory credit bureau reporting, both which have yet to be implemented, and increased imprisonment sentences (See the discussion of Domestic Recovery Measures in 3.6.1 in the previous chapter).⁷⁰⁷

While the abovementioned measures when combined with the current enforcement measures available for use i.e. the attachment of property, emoluments and debts as well as imprisonment, are certain to assist in resolving maintenance disputes domestically; ensuring that enforcement continues once the order has been made remains problematic.⁷⁰⁸ It has been stated in the previous chapters that, at present, the current measures available for enforcement under domestic law might be applied to cross border disputes. The lack of enforcement once the court has made its judgment remains a problem regardless of the measures used to enforce the owed debt.⁷⁰⁹ Resolving the initial dispute through ensuring compliance with a maintenance order against the debtor using one of the available measures will not break the continued cycle of non-payment as the debtor's non-compliance will in most cases reoccur.⁷¹⁰

The iSupport project is the way forward in resolving this reoccurring situation. As an extension of the Convention, the iSupport system keeps an electronic record of each dispute resolved when the countries involved in the dispute are members to the Convention.⁷¹¹ The system is accessible to each member State and will act as a means of continued enforcement, due to its up to date record of information, once the dispute has been resolved through a court.⁷¹² For example, Ms B has an existing maintenance order issued against Mr H. Both Ms

⁷⁰⁶ De Jong M (2009) 590.

⁷⁰⁷ Maintenance Amendment Act 9 of 2015, s2, 11, 12 and 13; Moodley P (2016) 21.

⁷⁰⁸ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.71 and 2.72.

⁷⁰⁹ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 2.47.

⁷¹⁰ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) 34.

⁷¹¹ Hague Conference on Private International Law 'iSupport: Cross-border recovery of maintenance obligations' available at <https://www.hcch.net/en/instruments/conventions/isupport/> (Accessed 13 June 2016).

⁷¹² Walker L (2015) 196.

B and Mr H live in different member states to the Convention. To ensure compliance with the maintenance order, both Ms B and Mr H's details are added to the iSupport system. The iSupport database then keeps record of when Mr H makes his maintenance payments and how much he pays to Ms B. The system will continue to keep track of Mr H's payments until his maintenance obligation ceases, allowing for a continued assurance of payment without the need to continually approach a court to resolve the same issue of non-compliance with a maintenance order. Having access to such a system will aid in decreasing the need for approaching a court to resolve the same or a similar dispute.⁷¹³ Perhaps giving thought to introducing such a system to the South African domestic law governing maintenance disputes will decrease the number of cases currently overloading the maintenance courts.

4.4.5 Efficient Procedural Aspects

Current procedure under South African law concerning cross border maintenance recovery disputes is out dated and riddled with flaws as a result. The flawed procedural aspects relate to the how to apply for recognition of an existing maintenance order, what documentation is necessary, where and to whom to send the application and the costs involved in the process.⁷¹⁴ The Convention, under Article 12, lists the procedure to be used when tasked with a cross border maintenance dispute.⁷¹⁵ The procedure includes how to start the application process using a Central Authority and which documents are required to be attached to the application to ensure its consideration.⁷¹⁶ The Central Authority is mandated to work expeditiously to aid the applicant in the future resolution of the current claim.⁷¹⁷

Time limitations are stated in the Convention to ensure efficiency.⁷¹⁸ An example would be that Central Authorities are required to respond to each other regarding applications within six weeks from receipt.⁷¹⁹ The addition of time constraints to the application process renders draw out court disputes obsolete. The costs of proceedings are absorbed by the State where the application was initiated.⁷²⁰ This aspect may not be removed by a reservation when a State becomes a member to the Convention.⁷²¹ When absorbing the costs of a dispute, the

⁷¹³ Lortie P (2008) 359.

⁷¹⁴ South African Law Reform Commission Issue Paper 28 (Project 100) *Review of the Maintenance Act 99 of 1998* (2014) para 1.3.

⁷¹⁵ *Hague Convention 2007*, Article 12.

⁷¹⁶ The Hague Conference on Private International Law Permanent Bureau (2013) 66-67.

⁷¹⁷ *Hague Convention 2007*, Article 12.

⁷¹⁸ Duncan W (2008) 322.

⁷¹⁹ *Hague Convention 2007*, Article 12(3).

⁷²⁰ Bariatti S (2011) 1191.

⁷²¹ *Hague Convention 2007*, Article 62.

State allows for the procedure to be beneficial to all persons, regardless of their socio economic standing. The persons relying on maintenance payments in South Africa are the more vulnerable persons in society, namely women and children.⁷²²

4.4.6 Certainty as to when the Duty of Support Terminates

As stated previously, there is uncertainty under South African law as to when the duty of support terminates, i.e. when the child becomes self-supporting.⁷²³ The Convention would provide clarity on the matter at an international level. Under Article 2, a maintenance obligation arises from a parent-child relationship where the child is under the age of 21 years.⁷²⁴ While the Convention gives an age limit to when child maintenance can be claimed at an international level, the South African legal position is that the child needs to be self-supporting as is the position stemming from the South African common law.⁷²⁵ As discussed previously regarding what is considered as self-supporting, it is evident that the concept has not received a specific or concrete meaning. The Convention could be helpful in making the determination of a specific meaning in that there is a perceived notion that the duty of support terminates at the age of majority, namely 18 years old, while the age limit stated in the Convention is three years longer.⁷²⁶ While the age of majority has no bearing on when the duty of support terminates, the perceived notion that the duty ends when the child turns 18 years old, could possibly be elevated to that of 21 years old. This could offer a possible advantage to the child and a longer period of support by the maintenance debtor before he or she looks to the perceived notion that age has a bearing on when the duty of support terminates.

4.4.7 Increased Knowledge in the Cross Border Maintenance Field

At present, many South African legal professionals, maintenance officers and court officials lack sufficient knowledge regarding cross border maintenance recovery disputes.⁷²⁷ Should South Africa ratify the Convention, the topic of cross border maintenance recovery will be placed in the public eye. The focus will be on gaining as much knowledge as possible on the Convention and how it will be implemented in South Africa, allowing for both legal

⁷²² *Bannatyne v Bannatyne* at para 30.

⁷²³ Botha MTF (2008) 716.

⁷²⁴ *Hague Convention 2007*, Article 2(1)(a).

⁷²⁵ Clark B (1999) 260.

⁷²⁶ *Hague Convention 2007*, Article 2(1)(a).

⁷²⁷ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

professionals and court officials to update their knowledge on the subject.⁷²⁸ Regarding the update, legal professionals, maintenance officers and court officials will be able to assist applicants more effectively than at present.⁷²⁹ As a result applicants will be assisted correctly initially allowing for fewer applications to be erroneous in nature. Applications which do not follow the correct guidelines will only increase the length of time for the dispute to be resolved as an incorrect application will continually be sent back to the applicant until it is corrected.⁷³⁰

4.4.8 State Expense to Decrease: the Child Support Grant

With the CSG applicable to just under twelve million persons in South Africa monthly, a vast amount of State funding is necessary to assist those persons.⁷³¹ While the number does not truly reflect the need for assistance regarding all children who should require it, the CSG is helpful to those who receive it.⁷³² The small stipend given each month of R350, does not factually consider the true financial needs of the primary caregiver in raising a child.⁷³³ The amount will not cover half of the necessities a child requires for a month, for example, schooling, educational supplies, clothing, shelter and food.⁷³⁴ Yet, the money received each month from the CSG is better than not receiving any assistance at all.

Concerning a maintenance debtor that stops making his or her payments, the CSG has assisted those children in fulfilling the role the debtor is neglecting.⁷³⁵ When the creditor is the child's mother and its residential parent, he or she often earns less than the maintenance paying parent due to the additional financial burden placed on him or her having children live with the creditor.⁷³⁶ It is clear that not all persons who require maintenance payments to assist

⁷²⁸ De Jong (2009) 597.

⁷²⁹ De Jong (2009) 601-602.

⁷³⁰ Clark B 'The South African Child's Right to Maintenance – a Constitutionally Enforceable Socio-Economic Right?' available at <https://archive.uea.ac.uk/swp/iccd2006/Presentations/Clark68.pdf> (Accessed on 14 August 2016).

⁷³¹ SASSA 'Current Statistics on Grants for Children' available at http://www.childrencount.org.za/social_grants.php (Accessed 3 October 2016).

⁷³² Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 20.

⁷³³ Sello L '#Budget 2016: A little extra for pensioners, disabled and children' available at <https://www.enca.com/life/budget2016-little-extra-pensioners-disabled-and-children> (Accessed on 2 October 2016).

⁷³⁴ Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/enews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁷³⁵ Clark B 'The South African Child's Right to Maintenance – a Constitutionally Enforceable Socio-Economic Right?' available at <https://archive.uea.ac.uk/swp/iccd2006/Presentations/Clark68.pdf> (Accessed on 14 August 2016).

⁷³⁶ Heaton J *Casebook on South African Family Law* 3ed (2010) 93.

in caring for children, will receive the payments. Inclusive in this reality is those maintenance creditors who wish to apply for the CSG. If a creditor does not qualify for the grant, he or she remains trapped in his or her struggle to survive financially on his or her own earnings.⁷³⁷

The mother has an additional financial burden placed upon her in having custody of the child and is limited in her ability to ‘obtain remunerative employment.’⁷³⁸ The debtor, being the child’s father, as the non-residential parent is able to focus more on employment thereby allowing him to further his earning potential in his ability to work more hours, becoming more economically enriched.⁷³⁹ With this in mind, it is clear that the residential parent, who is predominantly the mother, is at a ‘double disadvantage in being overburdened in terms of responsibilities and under-resourced in term of means.’⁷⁴⁰ The CSG will not truly aid a child when the possibility is high that the amount owed by the debtor will be of greater value.⁷⁴¹

The Convention can be of assistance in reducing the amount of State funds required to be paid out in place of claiming maintenance from the defaulting debtor.⁷⁴² When using the enforcement measures listed in the Convention, not only for cross border recovery cases, the need for the monthly CSG is likely to decrease. The funding no longer in use by the CSG can be allocated to the funds required to comply with the costs provision in the Convention.⁷⁴³ The funds could also be allocated to numerous other problem areas such as improving the domestic maintenance recovery system, setting up workshops to increase awareness on the cross border maintenance recovery legal system, or beginning a fund the will aid persons in resolving their cross border maintenance recovery disputes.

4.5 Conclusion

With South Africa’s ineffective domestic legal framework regarding maintenance recovery, it is unsurprising that the cross border recovery system is no different. As seen in this chapter, the many issues plaguing the maintenance system stem from both legislative *lacunae* as well socio economic factors. Out dated legislation and inconsistency in application methods are the most common flaws found in the cross border legal framework regarding maintenance recovery.⁷⁴⁴ The inconsistency in how to approach a cross border maintenance claim stems

⁷³⁷ Heaton J *Casebook on South African Family Law* 3ed (2010) 93.

⁷³⁸ *Bannatyne v Bannatyne* at para 29.

⁷³⁹ Heaton J *Casebook on South African Family Law* 3ed (2010) 93.

⁷⁴⁰ *Bannatyne v Bannatyne* at para 29.

⁷⁴¹ Clark B (1996) 84.

⁷⁴² *Hague Convention 2007*, Preamble.

⁷⁴³ *Hague Convention 2007*, Article 14.

⁷⁴⁴ De Jong (2009) 590.

from a lack of knowledge on the part of legal professionals, maintenance officers and court officials leading to an expensive and time consuming means of attempting to claim.⁷⁴⁵ At present, the enforcement measures available for maintenance recovery are those stated in the Maintenance Act and are discussed within this chapter in the hopes of showing their applicability to the cross border recovery system, as no specific measures are allocated for used in such circumstances.⁷⁴⁶ However, the measures used for domestic cases can and are used in cross border circumstances, though with little success.⁷⁴⁷ The additional measures listed in the Convention, particularly the deductions from social security payments, tax refund withholding and lien or forced sales of property will add to the current measures as these measures will rely on a third party to make the necessary payments, leaving the debtor with little choice in whether to make payments.⁷⁴⁸ The payments made using these measures will be annual payments. The termination of the duty of support was given consideration as the uncertainty as to when the duty ceases leads to an often unnecessary court case for determination.⁷⁴⁹

Socio economic factors must be considered when determining whether a current legal framework is operationally defective. While the factors are unique to each country, the socio economic factors found in South Africa include poverty, unemployment and limited State resources.⁷⁵⁰ High poverty levels indicate that access to legal services would be limited for those persons living in poverty stricken areas, often rural regions.⁷⁵¹ Unemployment levels remain elevated, limiting a creditor's opportunity to claim maintenance from a debtor when he or she is unemployed.⁷⁵² Yet, *Mngadi v Beacon Sweets and Chocolate Provident Fund*⁷⁵³ has shown that purposeful unemployment will not permit defaulting in maintenance payments.⁷⁵⁴ As the State has an obligation to provide for the means to recover maintenance

⁷⁴⁵ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁷⁴⁶ Maintenance Act 99 of 1998, s26-31 – *Attachment of property, emoluments, and debts, as well as imprisonment.*

⁷⁴⁷ REMO, s6.

⁷⁴⁸ *Hague Convention 2007*, Article 34.

⁷⁴⁹ Botha M F T (2008) 721.

⁷⁵⁰ Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/eneews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

⁷⁵¹ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 23-24.

⁷⁵² Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/eneews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016); Heaton J (2010) 57.

⁷⁵³ 2004 (5) SA 388 (D).

⁷⁵⁴ Heaton J (2010) 57.

payments in both domestic and cross border settings, the means of meeting this responsibility is diminished when the State has limited resources to do so.⁷⁵⁵

While it is clear that the South African government has acknowledged some of the vast discrepancies found in the maintenance recovery system, it has done so with its primary focus at a domestic level. Solutions stated in the Amendment Act include locating debtors through their mobile service provider and making it mandatory for a court to send the debtors personal particulars to all credit granting and reporting businesses when he or she defaults in payments.⁷⁵⁶ The South African government's recognition of cross border maintenance recovery since the REMO and REMO Africa Act is marginal and severely lacking in acknowledgement of the many aspects and issues found within this out dated system of recovery.

The Convention will assist immensely in its implementation into South African law, should the State choose to ratify it. A particular benefit to the cross border maintenance recovery system is the comprehensive and detailed approach to recovery, due to the insight gathered regarding successful and unsuccessful provisions to previous Conventions as well as information gathered from countries regarding the strengths and weaknesses of their cross border recovery systems.⁷⁵⁷ The uniform approach stated within the Convention in how to handle the application process and resolve issues of recognition, enforcement and inter-country cooperation will assist in resolving the uncertainty within the South African cross border recovery system.⁷⁵⁸ Expensive and time consuming processes disappear as a result of time limits imposed on the application process and the provision stating that costs are to be paid by the State initiating proceedings.⁷⁵⁹ However, as South Africa will not always be the country where a foreign maintenance order requires recognition, the cost to be paid by the South African State when it implements a claim will be vast and burdensome on an already limited in resources State.⁷⁶⁰ The limited knowledge of legal professionals and court officials in how to advise the public regarding cross border recovery will improve due to the awareness created through implementing the Convention.⁷⁶¹ The CSG will decrease in the

⁷⁵⁵ CRC, Article 27(4).

⁷⁵⁶ Maintenance Amendment Act 9 of 2015, s2,11 and 13.

⁷⁵⁷ Duncan W (2004) 664.

⁷⁵⁸ Hammond D and Barnes M (2013) 256-257.

⁷⁵⁹ *Hague Convention 2007*, Article 12 and 14.

⁷⁶⁰ *Hague Convention 2007*, Article 12 and 14.

⁷⁶¹ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

number of persons currently receiving it monthly, as the Convention will aid in ensuring that maintenance payments are made by the debtor instead of relying on limited State funds.⁷⁶² As a means of further benefitting the position of cross border maintenance recovery in South Africa, the provisions found in the Convention could be applied to the domestic recovery system allowing for further improvements to occur.

The following final chapter will conclude the document entirely. Recommendations will be given on the best approach for South Africa in resolving the many flaws found in its cross border maintenance recovery system. The chapter will affirm that South Africa should ratify and implement the Convention into its maintenance legal framework.



⁷⁶² Clark B (1999) 262.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This study has analysed the South Africa's legal position regarding the cross border recovery of child maintenance. Inclusive in this analysis is a detailed discussion on the new international instrument, the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, as well as consideration of aspects of the domestic legal system regarding maintenance in South Africa. Central to this study was focusing on the many flaws in South Africa's legal framework in resolving cross border child maintenance disputes as well as indication how the Convention would aid in removing or correcting the present and future faults. While the study's true focus was to determine whether there is a need for the Convention's application in South Africa, due weight was afforded to the legislative and judicial attempts at resolving the systemic failures of the domestic system. Based on the findings of this study, a detailed conclusion and recommendations follows.

5.2 Conclusion

Over more than the last five decades, cross border recovery of child maintenance as legal discipline has undergone few changes in South Africa, while internationally this field of law has been steadily improved. The principal improvement to the field of cross border maintenance recovery is the addition of the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.⁷⁶³ The aim of this study is to show the need for this Convention to be ratified and implemented into South African law.

The Convention is a well-researched and comprehensive international instrument.⁷⁶⁴ With the conscious effort of negotiator's when determining what to include in the Convention's provisions, their focus on the successes and failures of all previous conventions regarding the cross border recovery of child maintenance made for an up to date Convention with a definite propensity for future triumph.⁷⁶⁵ Included in the Convention is an approach on how to resolve

⁷⁶³ Duncan W (2004) 664.

⁷⁶⁴ Long E (2008) 985.

⁷⁶⁵ Duncan W (2004) 664.

disputes using either CAs or sending a direct request to the Requested State.⁷⁶⁶ It is clear from the analysis given in the second chapter that using the CA method will be of most benefit. Cost and time constraint provisions are included in the Convention when using the CA approach to cross border maintenance recovery.⁷⁶⁷ Certainty in how to address applications is shown using this uniform CA approach i.e. the Article 23 and Article 24 procedures.⁷⁶⁸

As seen in the study, the true problem lies in enforcing a maintenance order, whether at a national or international level.⁷⁶⁹ To this regard, the Convention offers signatories a choice as to which measures to implement within their legal framework.⁷⁷⁰ The flexibility shown throughout the provisions of the Convention allow for its implementation into any existing legal system, with few major changes needed for compliance.⁷⁷¹ South Africa has had minimal consideration for cross border maintenance recovery cases since the enactment of the REMO in 1963 aside from enacting the REMO Africa Act. Yet, its domestic legal framework has undergone a complete reform and further amendment.⁷⁷²

As shown in the study, South Africa has not only a national obligation to ensure that children are financially maintained but also an international obligation. The CRC and ACRWC are two instruments which expressly provide for a child's duty to support.⁷⁷³ Although, this duty is primarily placed on the child's parents in equal measures, the South African State is required to take over that duty when parents are unable to do so.⁷⁷⁴ The State is also required to provide necessary resources for parents to comply with their duty to maintain their children.⁷⁷⁵ With the international obligation in mind, South Africa also has a national legislative duty to maintain children as per the Constitution and Children's Act.⁷⁷⁶ In an attempt to comply with its national and international maintenance obligations, the South African State has used a social security measure, namely the CSG.⁷⁷⁷ While the CSG aids children in awarding a monthly stipend to all primary caregivers of children who meet the

⁷⁶⁶ *Hague Convention 2007*, Article 12 and 37.

⁷⁶⁷ Borrás A and Degeling J (2013)

⁷⁶⁸ Long E (2008) 990.

⁷⁶⁹ De Jong M (2009) 590; Duncan W (2008) 317.

⁷⁷⁰ *Hague Convention 2007*, Article 34.

⁷⁷¹ Doogue J (2015) 14.

⁷⁷² Maintenance Act 99 of 1998; Maintenance Amendment Act 9 of 2015.

⁷⁷³ CRC, Article 27; ACRWC, Articles 18 and 20(1).

⁷⁷⁴ Clark B (1999) 241.

⁷⁷⁵ CRC, Article 27(3); ACRWC, Article 20(1).

⁷⁷⁶ Constitution of the Republic of South Africa, 1996, s28(1)(b) and (c); Children's Act 38 of 2005, s18(2)(d).

⁷⁷⁷ Mirugi-Mukundi G – *Realising the Social Security Rights of Children in South Africa, with particular reference to the Child Support Grant* (2009) 5.

eligibility requirements, the amount given does not remotely resemble the amount to be received should the enforcement of a maintenance order be successful.⁷⁷⁸

One of the methods available for cross border maintenance recovery stems from the use of bilateral agreements. As stated in the study, the use of bilateral agreements limits the number of persons able to claim maintenance internationally.⁷⁷⁹ If the country where the debtor is resident does not have a bilateral agreement in place with South Africa, then the method used for recovery is lengthy, tedious, expensive and for the most part unsuccessful in attaining results.⁷⁸⁰ With a mere twenty-seven states having bilateral agreements with South Africa regarding cross border maintenance recovery, dating back to the REMO and REMO Africa Act, it is clear that the agreements are out dated and forgotten.⁷⁸¹ This is particularly the case in South Africa as many legal professionals, maintenance officers and court officials lack any knowledge of how to use bilateral agreements when the opportunity arises.⁷⁸²

Ensuring enforcement of maintenance orders appears to be the main issue plaguing any legal framework regarding maintenance recovery; South Africa is no different in this regard. While the domestic system has specific measures used for enforcement, the measures are ineffective in resolving disputes at present and are likely to continue in the future.⁷⁸³ It is clear that once a maintenance debtor defaults in payment, he or she is at a higher risk of repetition. With this consideration in mind, solving a present dispute without ensuring compliance with an order to continue payment will only lead to future disputes being brought to courts. The continuous cycle in defaulting in payment only leads to more expensive recovery attempts in future, harming the child's future growth and development.

As stated by the Constitutional Court in *Bannatyne v Bannatyne*⁷⁸⁴ the South African legal framework regarding maintenance recovery is riddled with operational and systemic flaws.⁷⁸⁵ Poor application of legislative provisions and a lack of consideration as to the true victims where there is a failure to ensure maintenance payments, has led to overburdened custodial

⁷⁷⁸ Morei N (2014) 762.

⁷⁷⁹ Keith R (2014) 38 and 108.

⁷⁸⁰ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁷⁸¹ Ditshego J 'SA Law Promotes Foreign Maintenance' available at http://www.justice.gov.za/docs/articles/2009_foreign-maintenance.html (Accessed on 6 August 2016).

⁷⁸² Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁷⁸³ Skelton A and Carnelley M (2010) 358-359.

⁷⁸⁴ 2003 (2) SA 363 (CC).

⁷⁸⁵ *Magewu v Zozo* [2004] ZAWCHC 18 at para 19; *Bannatyne v Bannatyne* at para 26.

parents who have little lucrative employment opportunities afforded to them as a result of their responsibilities towards their children.⁷⁸⁶ Repetitive court proceedings to ensure enforcement of a maintenance order against a debtor only adds to the creditor's already overburdened situation. Measures for enforcement need to be effective in any maintenance recovery dispute regardless of whether they are cross border in nature. In South Africa, the domestic recovery measures discussed in this study are ineffective in practical application, while cross border recovery has no specific measures allocated to its resolution of disputes.⁷⁸⁷ However, it is possible to apply the domestic enforcement measures to cross border maintenance recovery disputes.

At present, there are many shortfalls to the cross border maintenance recovery system in South Africa. The main cause of these shortfalls is the out of date legislation governing the matter.⁷⁸⁸ Spiralling from the out dated legislation is a lack of knowledge on that particular method of recovery, i.e. the use of REMO or the REMO Africa Act when a proclaimed or designated country is one of the parties to the dispute.⁷⁸⁹ Unfortunately, a direct result of REMO's and REMO Africa Act's limited application in cross border disputes increases the time and money needed to resolve the dispute when instituting formal proceedings in the country where the maintenance order was made. The expensive method of formal proceedings most often leads to unfavourable results for the creditor or applicant.⁷⁹⁰ Attempted improvements to the domestic recovery process in South Africa are continuing, while cross border recovery process is wholly forgotten. As a result, any possible improvements to the domestic system fail to take into account how these new features will impact cross border recovery disputes.

Socio economic factors cannot be ignored in considering the maintenance recovery legal framework in South Africa. Factors include high poverty levels, high unemployment rates and limited State funding, all of which contribute to the success of a legal system.⁷⁹¹ Maintenance recovery is no different. With a system that is required to assist persons living in

⁷⁸⁶ *Bannatyne v Bannatyne* at para 29.

⁷⁸⁷ Parliament of the Republic of South Africa *Briefing Note: Maintenance System in South Africa and Main Portfolio Committee Amendments to the Maintenance Amendment Bill [B16-2014]* (2015) 7.

⁷⁸⁸ De Jong (2009) 590.

⁷⁸⁹ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁷⁹⁰ Palmeira N 'Maintenance of Children in Foreign Countries' available at <http://mclarens.co.za/maintenance-children-foreign-countries/> (Accessed on 25 May 2016).

⁷⁹¹ Leatt A and Rosa S 'Securing the Means to Live: Children's Financial Security in South Africa' available at www.ci.org.za/depts/ci/enews/June2005/SecuringM2L.pdf (Accessed on 17 August 2016).

complex and unique circumstances, it is impossible to fully aid all persons affected by a lack of maintenance payments, whether there is a cross border element or not. In South Africa, where poverty levels are high, leaving many persons affected by maintenance issues unable to seek legal means of recovery due to traveling long distances, or a lack of money as a result of high unemployment rates, socio economic factors are important to include when considering legislative reform.

5.3 Recommendations

For private international law to be effective in protecting the rights of children regarding their maintenance, the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance needs to be ratified and implemented worldwide. Due to its current and comprehensive considerations of both previous success and failures in the field of cross border maintenance recovery, adding the Convention to South Africa's limited legal framework on the topic will be beneficial.

South Africa's legal framework relating to cross border maintenance recovery is severely outmoded as it dates back to 1963 and 1989 respectively.⁷⁹² With minimal to no changes in the discipline since the commencement of the REMO in 1965 aside for the 1989 REMO Act which specifically focuses on countries in Africa, the Convention will update South Africa's legal position without the need for additional instruments, though enacting new legislation will be necessary to clarify the full nature of application to South African law. Including the Convention's provisions into South Africa's maintenance laws will aid in discovering and improving flaws found in the domestic framework.

While, at first, the implementation of the Convention will be costly, mostly due to limited updates being made to the South African legal system regarding cross border maintenance recovery, the amount of State funding saved from decreases in social security payments and resources needed to ensure that the country adheres to its international maintenance obligations will contribute greatly to outweigh the necessary spending for the enactment.⁷⁹³ Long term savings can then be allocated to other State ventures. For example, the State could use the additional funds to pay for any disputes brought under the Convention, or in an attempt to solve a domestic issue regarding maintenance recovery, or establish its own domestic iSupport modelled system to ensure that maintenance recovery continues after the

⁷⁹² REMO Act 80 of 1963; REMO Africa Act 6 of 1989.

⁷⁹³ *Hague Convention 2007*, Preamble.

initial court dispute. For the Convention to truly benefit the South African people affected by cross border maintenance claims, the State needs to absolve all costs involved in proceedings, or initiate a system whereby a person qualifies for full or part state funding based on means.⁷⁹⁴ However, should this be considered as a potential option, the amount to qualify needs to be reasonable when considering both factual circumstances of each case and socio economic factors when the cost of living is raised frequently.

Adding the Convention to South Africa's legal framework will clarify many issues found in both the domestic and cross border maintenance situations. For domestic legal issues, for which provisions in the Convention may be adapted, the determination for when the duty of support terminates may be clarified.⁷⁹⁵ At present, the duty terminates when the child becomes self-supporting.⁷⁹⁶ Yet, the age of majority is often taken to indicate the termination of the duty by maintenance debtors as in most cases the child will reach 18 years old before he or she becomes self-supporting, meaning their payments might cease.⁷⁹⁷ A clearer indication of when the duty ceases is found in the Convention, namely the age of 21 years.⁷⁹⁸ In South Africa, the age of majority is the age most children finish secondary school, meaning they are most likely to remain dependent on the maintenance received from both parents.⁷⁹⁹ By the age of 21 years, most children will either have employment, thereby earning an income or will have completed a full or at least half of a degree at a tertiary level institute, improving their chances of future employment. Implementing the Convention will aid in increasing the age for the perceived notion that maintenance debtors as to when their duty of support terminates, thereby catering for a greater number of children and lessening the burden on the State in dealing with maintenance defaulters.

It is clear from this study that South Africa should ratify and implement the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. Including the Convention in South Africa's legal framework for cross border maintenance recovery will allow for a comprehensive upgrade to a severely out dated system while its uniform approach to the recovery process will aid applicants effectively in initiating

⁷⁹⁴ *Hague Convention 2007*, Article 14 and 15.

⁷⁹⁵ Borrás A and Degeling J (2013) 5; *Hague Convention 2007*, Article 2(1).

⁷⁹⁶ Botha M F T (2008) 717.

⁷⁹⁷ Clark B (1999) 247.

⁷⁹⁸ *Hague Convention 2007*, Article 2(1).

⁷⁹⁹ Mc Laren I 'The Reciprocal Duty of Support between Parents and their Children' available at <http://mclarens.co.za/reciprocal-duty-of-support-between-parents-and-their-children/> (Accessed on 17 July 2016).

their claims. Maintenance debtors will no longer be able to escape their duty of support to their children by fleeing to a country with which South Africa has no reciprocal enforcement agreement. Ensuring that maintenance payments are made will aid children in their growth and development while protecting their right to be maintained by each parent in proportion to the parents' financial means. Improving enforcement within South Africa will decrease the State's burden to support children when the debtor fails to do so. Benefits to the domestic recovery system cannot be ignored, as the Convention's flexibility in its application will allow for its provisions to be adapted as a means of closing gaps found in the current legal system as well as give insight in to effective improvements.

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