

ARTICLE 7

SUPPORT PROCEEDING UNDER CONVENTION

Introductory Comment

This article contains provisions adapted from the Convention that could not be readily integrated into the existing body of Articles 1 through 6. For the most part, extending the coverage of UIFSA (2008) to foreign countries was a satisfactory solution to merge the appropriate Convention terms into this act. In understanding this process, it must be clearly stated that the terms of the Convention are not substantive law.

The Convention is a multilateral treaty which binds the United States and the other Convention countries to assure compliance. As such, it will be the law of the land; but the treaty is not self-executing. *See, Medellin v. Texas*, 552 U.S. 491, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008). Thus, the ultimate enforcement of the treaty in the United States is dependent on the key implementing federal law and the enactment of both federal and state legislation which provide the mechanism for enforcing the requirements of the Convention. This act is predicated on the principle that the enactment of UIFSA (2008) in all States and federal jurisdictions will effectively implement the Convention through state law by amending Articles 1 through 6, plus the addition of this article. The treaty, in essence, establishes the framework for a system of international cooperation by emulating the interstate effect of UIFSA for international cases, especially those affected by the Convention.

In relatively few instances, the provisions of the Convention are sufficiently specific that a choice was made between amending UIFSA accordingly, with a disproportionate effect on all support orders enforced under state law, or accommodating potential conflicts by creating a separate article to apply only to Convention support orders. The choice was to draft this article as state law to minimize disruption to interstate support orders, which constitute the vast majority of orders processed under UIFSA. Note that this act is the substantive and procedural state law for: (1) responding to an application for establishment, recognition and enforcement, or modification of a Convention support order; and, (2) initiating an application to a Convention country for similar action.

The four Hague maintenance conventions that preceded the 2007 Convention, and the three prior versions of UIFSA, have common goals. The distinctions between the jurisdictional rules in the common-law tradition in the United States, and the civil law systems in most of the countries that were parties to the earlier maintenance conventions, were obstacles to participation of the United States in any of the multilateral maintenance treaties. As the world has grown smaller and globalization has become the order of the day, reconciling the differences has become more and more important. Understanding the necessity for accommodation has made the task easier. This is not to say easy, as evidenced by the fact that the formal negotiations leading to the final text of the Convention spanned from May, 2003, to November, 2007.

The United States signed the Convention on November 23, 2007 and the Senate gave its advice and consent to ratification in 2010. Enabling federal legislation was enacted on September 29, 2014 which requires all states to enact UIFSA (2008) by the end of 2015. At that point the

United States will deposit its instrument of ratification and the Convention will enter into force in the United States.

UIFSA (2008) and the 2007 Convention have far more in common than did former uniform acts and maintenance conventions, and, in fact, many provisions of the Convention are modeled on UIFSA principles. The negotiations demonstrated that it is possible to draft an international convention, which incorporates core UIFSA principles into a system for the establishment and enforcement of child support and spousal-support orders across international borders, and creates an efficient, economical, and expeditious procedure to accomplish these goals. Matters in common, however, go far beyond identical goals. The negotiations provided an opportunity for an extended interchange of ideas about how to adapt legal mechanisms to facilitate child support enforcement between otherwise disparate legal systems.

International cross-border enforcement has been far more important in Western Europe, and more recently, throughout the countries of the European Union than has been the case in the United States. On the other hand, experience with establishment and enforcement of interstate child-support orders in the United States has been building since 1950, and accelerated rapidly with enactment of Title IV-D of the Social Security Act in 1975. Clearly, the issues are far easier to deal with nationally because of the common language, currency, and legal system, and, since 1996, with the Title IV-D requirement that all states enact the same version of UIFSA. In fact, since the advent of UIFSA and Title IV-D, millions of interstate cases have been processed through the child support enforcement system and thousands of support orders from other countries have also been registered and enforced in the United States because UIFSA treated such orders as if they had been entered by one of the states. In the future, in Convention countries, this country's orders will be entitled to similar treatment. The entry into force of the Convention is designed to further improve the process and will most certainly lead in a few years to a substantial increase in international cases, both incoming and outgoing.

To create UIFSA (2008), it was necessary to integrate the texts of UIFSA (2001) and the Convention. This did not present a significant drafting challenge for the most part. By far the most common amendment in Articles 1 through 6 is to substitute "state or foreign country" for the term "state." These simple amendments expanded a majority of this act to cover foreign support orders. In this article statutory directions are given to "a tribunal of this state," and also to a "governmental entity, individual petitioner, support enforcement agency, or a party."

~~**SECTION 701. PROCEEDING TO DETERMINE PARENTAGE.** A court of this State authorized to determine parentage of a child may serve as a responding tribunal in a proceeding to determine parentage brought under this [Act] or a law or procedure substantially similar to this [Act].~~

Comment

This provision with appropriate rewording, has been transferred to Section 402, *supra*.

SECTION 701. DEFINITIONS. In this [article]:

(1) “Application” means a request under the Convention by an obligee or obligor, or on behalf of a child, made through a central authority for assistance from another central authority.

(2) “Central authority” means the entity designated by the United States or a foreign country described in Section 102(5)(D) to perform the functions specified in the Convention.

(3) “Convention support order” means a support order of a tribunal of a foreign country described in Section 102(5)(D).

(4) “Direct request” means a [petition] filed by an individual in a tribunal of this state in a proceeding involving an obligee, obligor, or child residing outside the United States.

(5) “Foreign central authority” means the entity designated by a foreign country described in Section 102(5)(D) to perform the functions specified in the Convention.

(6) “Foreign support agreement”:

(A) means an agreement for support in a record that:

(i) is enforceable as a support order in the country of origin;

(ii) has been:

(I) formally drawn up or registered as an authentic instrument by a foreign tribunal; or

(II) authenticated by, or concluded, registered, or filed with a foreign tribunal; and

(iii) may be reviewed and modified by a foreign tribunal; and

(B) includes a maintenance arrangement or authentic instrument under the Convention.

(7) “United States central authority” means the Secretary of the United States Department

of Health and Human Services.

Comment

A readily apparent difference between UIFSA (2008) and the Convention is the perceived need for definitions in the former, and the very limited number of definitions in the latter. This act contains twenty-nine definitions in Section 102, and an additional seven for this article. In contrast, the Convention contains only seven official definitions. Some of these are synonyms for definitions in UIFSA, i.e., “creditor and debtor” for “obligor and obligee,” and “agreement in writing” for “record.”

Subsection (1), “application” refers to the process for an individual obligor or obligee to request assistance from a central authority under the Convention.

Subsections (2) and (5) identify the governmental entities, i.e., central authority, in each contracting country or political subdivisions thereof, that will function as the operating agencies to facilitate contacts between Convention countries. The Convention is a treaty between the countries in which it is in force thus creating mutual obligations. The duties assigned in the Convention to the central authority of each country will be performed according to the choice of each country. It is crucial to recognize that in the United States it will be the Title IV-D agency of each state that will be designated by the U.S. central authority to perform most of the functions specified in the Convention. It appears likely that in many foreign countries the central authority will serve in the role of a clearinghouse, rather than as the operative enforcement entity, while some countries may assign all central authority functions to one agency.

Subsection (3), “Convention support order” narrows the term “foreign support order,” as employed in Articles 1 through 6. The provisions in those articles also apply to Convention support orders, but when this act is not congruent with the Convention, support orders under the Convention are subject to this article. This article has no application to a support order from a non-Convention foreign country, as defined in Section 102(5)(A) and (B) or a support order entitled to comity, Section 102(5)(C), except to the extent that a Convention country may request enforcement of a non-Convention support order that has been recognized in the United States under some other procedure, *see* Section 704.

Subsection (4) integrates the “direct request” authorized by the Convention with the provisions for filing a petition in Articles 1 through 6.

The definition in the Convention for “maintenance arrangement” has been rephrased in Subsection (6), and must be read together with Section 710 to understand the process authorized in the Convention.

Convention source: art. 3. Definitions; art. 30. Maintenance arrangements.

Related to Convention: art. 4. Designation of Central Authorities; art. 37. Direct requests to competent authorities.

SECTION 702. APPLICABILITY. This [article] applies only to a support proceeding under the Convention. In such a proceeding, if a provision of this [article] is inconsistent with [Articles] 1 through 6, this [article] controls.

Comment

The first sentence definitively states that this article applies only to a proceeding involving a Convention country, as defined in Section 102(5)(D). This article does not generally apply to a support order from a non-Convention foreign country as defined in Section 102(5)(A) and (B) or to a support order entitled to comity. The second sentence resolves a situation in which there is a conflict between a section in this article and a provision in Articles 1 through 6, in which case this article controls.

Related to Convention: art. 1. Object; art. 2. Scope; art. 4. Designation of Central Authorities.

SECTION 703. RELATIONSHIP OF [GOVERNMENTAL ENTITY] TO UNITED STATES CENTRAL AUTHORITY. The [governmental entity] of this state is recognized as the agency designated by the United States central authority to perform specific functions under the Convention.

Comment

The Secretary of Health and Human Services has designated the state Title IV-D child support agencies as the governmental entities that will carry out many of the central authority's functions under the Convention. Each state determines which public office or administrative agency will perform the Title IV-D services for child support enforcement. Because the federal government provides a significant subsidy for this effort, the actions of the agency must comply with federal statutes and regulations and the state legislature must enact certain mandatory laws. The relationship is symbiotic in that states choose to participate in the Title IV-D program, and do so by following their own state procedures and legislative enactments that recognize and authorize the state officer or agency to function under these conditions.

Related to Convention: ch. II. Administrative co-operation, arts. 4-8; ch. III. Applications through central authorities, arts. 9-17.

SECTION 704. INITIATION BY [GOVERNMENTAL ENTITY] OF SUPPORT PROCEEDING UNDER CONVENTION.

(a) In a support proceeding under this [article], the [governmental entity] of this state

shall:

(1) transmit and receive applications; and

(2) initiate or facilitate the institution of a proceeding regarding an application in a tribunal of this state.

(b) The following support proceedings are available to an obligee under the Convention:

(1) recognition or recognition and enforcement of a foreign support order;

(2) enforcement of a support order issued or recognized in this state;

(3) establishment of a support order if there is no existing order, including, if necessary, determination of parentage of a child;

(4) establishment of a support order if recognition of a foreign support order is refused under Section 708(b)(2), (4), or (9);

(5) modification of a support order of a tribunal of this state; and

(6) modification of a support order of a tribunal of another state or a foreign country.

(c) The following support proceedings are available under the Convention to an obligor against which there is an existing support order:

(1) recognition of an order suspending or limiting enforcement of an existing support order of a tribunal of this state;

(2) modification of a support order of a tribunal of this state; and

(3) modification of a support order of a tribunal of another state or a foreign country.

(d) A tribunal of this state may not require security, bond, or deposit, however described, to guarantee the payment of costs and expenses in proceedings under the Convention.

Comment

This section is designed to enable lawyers and non-lawyers to better understand proceedings under the Convention, which itself is written in terminology unfamiliar to legal proceedings in the United States.

Subsection (a) lists the rights and duties of a support enforcement agency.

Subsection (b) lists what rights and duties are available to an obligee, whether the proceeding is inbound from a Convention country or outbound to a Convention country.

In contrast to the general rule in UIFSA, which attempts to maintain something of parity between the obligor and obligee, subsection (c) limits the rights and duties available to an obligor under the Convention. This reflects the equal treatment ideal espoused by UIFSA in Articles 1 through 6, and the pro-obligee philosophy of the Convention. In actual practice, the results may not be that different. Recall that until replaced by UIFSA, an informal subtitle given to URESA by its leading proponents was “The Runaway Pappy Act.”

Subsection (d) tracks Convention art. 14 (5).

Convention source: art. 6. Specific functions of Central Authorities; art. 10. Available applications; art. 14. Effective access to procedures.

Related to Convention: ch. II. Administrative co-operation, arts. 4-7; ch. III. Applications through central authorities, arts. 9-17.

SECTION 705. DIRECT REQUEST.

(a) A [petitioner] may file a direct request seeking establishment or modification of a support order or determination of parentage of a child. In the proceeding, the law of this state applies.

(b) A [petitioner] may file a direct request seeking recognition and enforcement of a support order or support agreement. In the proceeding, Sections 706 through 713 apply.

(c) In a direct request for recognition and enforcement of a Convention support order or foreign support agreement:

(1) a security, bond, or deposit is not required to guarantee the payment of costs and expenses; and

(2) an obligee or obligor that in the issuing country has benefited from free legal assistance is entitled to benefit, at least to the same extent, from any free legal assistance provided for by the law of this state under the same circumstances.

(d) A [petitioner] filing a direct request is not entitled to assistance from the [governmental entity].

(e) This [article] does not prevent the application of laws of this state that provide simplified, more expeditious rules regarding a direct request for recognition and enforcement of a foreign support order or foreign support agreement.

Comment

Given the long history of open courts in the United States, this section may seem axiomatic, redundant, or unnecessary. In fact, because this principle has not always been universal, it is important to recognize that the Convention confirms that an individual residing in a Convention country may file a petition directly in a tribunal of another Convention country without requesting the assistance of a central authority or a support enforcement agency. Given the variety of legal systems that may be involved under the Convention, this freedom of choice is explicitly protected. A person residing in a Convention country, whether a citizen or a noncitizen of the United States, may apply to a tribunal in the United States for establishment, recognition, and enforcement of a child-support order for enforcement of a spousal support order, for recognition and enforcement of a foreign support agreement, and in some situations, for modification of an existing support order. Of course, the freedom of an individual to petition for relief in a tribunal says nothing about the nature of legal representation, if any, implicit in the right of access to a tribunal, is that representation may be pro se or by private counsel. *See* Section 309.

Subsection (a) provides that an individual party may file a proceeding directly in a tribunal, thus submitting to the jurisdiction of the tribunal and to state law. The object of the proceeding may be establishment of a support order, determination of parentage of a child, or modification of an existing support order.

Subsection (b) recognizes that an individual party may file a proceeding in a tribunal requesting recognition and enforcement of a Convention support order, or a foreign support agreement as defined in Section 710. The party thereby chooses not to seek the services of a central authority or support enforcement agency. Nonetheless, the individual will be affected indirectly by the terms of the Convention because the proceeding is subject to Sections 706 through 713, which are drawn from the Convention. This effect applies to an individual residing in a Convention country and to an individual residing elsewhere who is seeking to enforce a Convention support order.

Subsection (c) contains two provisions drawn from the Convention specifically applicable to a petition for recognition and enforcement of a Convention support order. First, a guarantee of payment of costs may not be required. Second, if the individual has benefited from free legal assistance in a Convention country, that individual is entitled to free legal assistance if it is available in similar circumstances under the law of the responding state.

Under subsection (d) an individual party who files a direct request regarding a Convention support order in a tribunal is not entitled to assistance from the governmental entity, i.e. the support enforcement agency.

Subsection (e) echoes Article 52 of the Convention. An individual party who files a petition in a tribunal may take advantage of any “simplified, more expeditious procedures” which may be available in the requested state, so long as they are “compatible with the protection offered to the parties under articles 23 and 24” of the Convention.

Convention source: art. 14. Effective access to procedures; art. 17. Applications not qualifying under Article 15 or Article 16; art. 37. Direct requests to competent authorities; art.52, Most effective rule.

Related to Convention: ch. II. Administrative co-operation, arts.4-8; ch. III. Applications through central authorities, arts. 9-17; art. 20. Bases for recognition and enforcement; art. 25. Documents; art. 27. Findings of fact; art. 28. No review of the merits; art. 37. Direct requests to competent authorities; art. 56. Transitional provisions.

SECTION 706. REGISTRATION OF CONVENTION SUPPORT ORDER.

(a) Except as otherwise provided in this [article], a party who is an individual or a support enforcement agency seeking recognition of a Convention support order shall register the order in this state as provided in [Article] 6.

(b) Notwithstanding Sections 311 and 602(a), a request for registration of a Convention support order must be accompanied by:

(1) a complete text of the support order [or an abstract or extract of the support order drawn up by the issuing foreign tribunal, which may be in the form recommended by the Hague Conference on Private International Law];

(2) a record stating that the support order is enforceable in the issuing country;

(3) if the [respondent] did not appear and was not represented in the proceedings

in the issuing country, a record attesting, as appropriate, either that the [respondent] had proper notice of the proceedings and an opportunity to be heard or that the [respondent] had proper notice of the support order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal;

(4) a record showing the amount of arrears, if any, and the date the amount was calculated;

(5) a record showing a requirement for automatic adjustment of the amount of support, if any, and the information necessary to make the appropriate calculations; and

(6) if necessary, a record showing the extent to which the applicant received free legal assistance in the issuing country.

(c) A request for registration of a Convention support order may seek recognition and partial enforcement of the order.

(d) A tribunal of this state may vacate the registration of a Convention support order without the filing of a contest under Section 707 only if, acting on its own motion, the tribunal finds that recognition and enforcement of the order would be manifestly incompatible with public policy.

(e) The tribunal shall promptly notify the parties of the registration or the order vacating the registration of a Convention support order.

Comment

Subsection (a) integrates the Convention support order into the registration for enforcement procedure set forth in Sections 601 through 608. A state support enforcement agency and a tribunal will use basically the same procedures for a Convention order under this article as would be used in a non-Convention proceeding.

From inception, UIFSA contained detailed provisions for substantive procedures for interstate child-support orders. To facilitate expedited processing, detailed statutory instructions have encouraged uniformity of legal documents. The Convention follows this precedent. The list

of documents to be provided, however, is somewhat different than the documents described in Sections 311 and 602. In order to ensure that a document satisfying the requirements of the Convention will be accepted by a support enforcement agency or tribunal, subsection (a) identifies the documents required to accompany an application under the Convention.

Several of the required documents may be unfamiliar in the United States, e.g., the authority to provide an abstract or an extract of an order rather than the complete text of an order under paragraph (b)(1); the requirement for a statement of enforceability of the order under paragraph (b)(2); proof that the respondent had proper notice of the proceedings and an opportunity to be heard if the respondent did not appear and was not represented under (b)(3); and proof that the applicant received free legal assistance in the issuing country under paragraph (b)(6).

Subsection (c) provides that a petitioner may request only partial enforcement of a support order, *see* Section 709. *infra*, which speaks to partial enforcement by a tribunal.

Subsections (d) and (e) authorize action by a tribunal available under the Convention that may not be available under other state law. Subsection (d) permits the tribunal to vacate registration, acting on its own motion, under certain exceptional circumstances, and subsection (e) requires that notice be promptly provided of any such order vacating registration. Such *ex officio* review, if used to refuse recognition of an order, is in tension with the core UIFSA policy of requiring recognition. In any event, the subsections are not a vehicle for a review of the merits of the decision. An example would be useful here, but there is none in the Explanatory Report to the Convention, just the negative reference that a country could not use this to enforce a policy against ordering support for a child born out of wedlock. <http://www.hcch.net/upload/exp138.pdf>. Perhaps an example could be that the court might reject an application to establish support from a biological parent whose rights had been terminated and the child was subsequently adopted.

Convention source: art. 25. Documents; art. 21. Severability and partial recognition and enforcement; art. 22. Grounds for refusing recognition and enforcement; art. 23. Procedure on an application for recognition and enforcement; art. 25. Documents.

Related to Convention: art. 11. Application contents; art. 20. Bases for recognition and enforcement.

SECTION 707. CONTEST OF REGISTERED CONVENTION SUPPORT

ORDER.

(a) Except as otherwise provided in this [article], Sections 605 through 608 apply to a contest of a registered Convention support order.

(b) A party contesting a registered Convention support order shall file a contest not later than 30 days after notice of the registration, but if the contesting party does not reside in the

United States, the contest must be filed not later than 60 days after notice of the registration.

(c) If the nonregistering party fails to contest the registered Convention support order by the time specified in subsection (b), the order is enforceable.

(d) A contest of a registered Convention support order may be based only on grounds set forth in Section 708. The contesting party bears the burden of proof.

(e) In a contest of a registered Convention support order, a tribunal of this state:

(1) is bound by the findings of fact on which the foreign tribunal based its jurisdiction; and

(2) may not review the merits of the order.

(f) A tribunal of this state deciding a contest of a registered Convention support order shall promptly notify the parties of its decision.

(g) A challenge or appeal, if any, does not stay the enforcement of a Convention support order unless there are exceptional circumstances.

Comment

Subsection (a) states the general rule that a contest of a registration is generally governed by Sections 605 through 608, *supra*. Subsection (b), however, establishes separate, longer time frames to contest the registration of a Convention support order than for filing a contest as established in Section 605. If notice of contest is to be given in the United States, the time difference is relatively modest, i.e., 30 days instead of 20. A more significant difference is created for out-of-country notice, i.e., 60 days instead of 20. Arguably this takes into account that providing notice to a party in a foreign country may take longer than ordinarily expected. In any event, the longer time frames are specifically required in connection with a Convention order. Note that while the principle may always be true that notice to a party situated in a foreign country may take longer, the additional times for notice apply only to an order subject to the Convention.

Subsections (c)-(g) transform Convention language into UIFSA terminology. Subsection (g), which prohibits a stay in enforcement pending a challenge or appeal except in exceptional circumstances, is another substantive provision required by the Convention. It does not apply in non-Convention cases, in which domestic law determines whether a stay of enforcement should be granted pending an appeal or other challenge.

Convention source: art. 23. Procedure on an application for recognition and enforcement; art. 27. Findings of fact; art. 28. No review of the merits.

Related to Convention: art. 20. Bases for recognition and enforcement; art. 21. Severability and partial recognition and enforcement; art. 23. Procedure on an application for recognition and enforcement; art. 27. Findings of fact; art. 28. No review of the merits.

**SECTION 708. RECOGNITION AND ENFORCEMENT OF REGISTERED
CONVENTION SUPPORT ORDER.**

(a) Except as otherwise provided in subsection (b), a tribunal of this state shall recognize and enforce a registered Convention support order.

(b) The following grounds are the only grounds on which a tribunal of this state may refuse recognition and enforcement of a registered Convention support order:

(1) recognition and enforcement of the order is manifestly incompatible with public policy, including the failure of the issuing tribunal to observe minimum standards of due process, which include notice and an opportunity to be heard;

(2) the issuing tribunal lacked personal jurisdiction consistent with Section 201;

(3) the order is not enforceable in the issuing country;

(4) the order was obtained by fraud in connection with a matter of procedure;

(5) a record transmitted in accordance with Section 706 lacks authenticity or integrity;

(6) a proceeding between the same parties and having the same purpose is pending before a tribunal of this state and that proceeding was the first to be filed;

(7) the order is incompatible with a more recent support order involving the same parties and having the same purpose if the more recent support order is entitled to recognition and enforcement under this [act] in this state;

(8) payment, to the extent alleged arrears have been paid in whole or in part;

(9) in a case in which the [respondent] neither appeared nor was represented in the proceeding in the issuing foreign country:

(A) if the law of that country provides for prior notice of proceedings, the [respondent] did not have proper notice of the proceedings and an opportunity to be heard; or

(B) if the law of that country does not provide for prior notice of the proceedings, the [respondent] did not have proper notice of the order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal; or

(10) the order was made in violation of Section 711.

(c) If a tribunal of this state does not recognize a Convention support order under subsection (b)(2), (4), or (9):

(1) the tribunal may not dismiss the proceeding without allowing a reasonable time for a party to request the establishment of a new Convention support order; and

(2) the [governmental entity] shall take all appropriate measures to request a child-support order for the obligee if the application for recognition and enforcement was received under Section 704.

Comment

Enforceability; the general rule, with exceptions. Subsection (a) states the general proposition that if a child-support order is issued by a tribunal in a Convention country, except as otherwise provided in subsection (b), the order shall be recognized and enforced. In domestic cases UIFSA requires recognition of child-support order of a sister state, 28 U.S.C.A. § 1738B, Full Faith and Credit for Child Support Orders Act (FFCCSOA). Receipt of a child-support order from a sister state is routinely processed and enforced. Critical examination of the sister state order for defects is not called for; it is the responsibility of the respondent to assert any defenses available. Moreover, experience has shown that child-support orders are generally valid, for relatively modest amounts, and seldom subject to claims of fraud. The most common defect is one of mistake, rather than deliberate misconduct.

Subsection (b) combines provisions from four separate articles in the Convention. These articles provide an extensive number of specific reasons for a tribunal or support enforcement agency of one Convention country to refuse to recognize a child-support order from another

Convention country. For this act to be consistent with the Convention, it is necessary to identify the potential defects of a support order from a Convention country in which a defendant might raise a challenge based on lack of jurisdiction, due process, or enforceability of an order for arrearages. The majority of these defects arguably are self-explanatory, and almost all are subject to factual dispute to be resolved by the tribunal, to wit: (b)(1) “manifestly incompatible” with public policy, including violation of minimum standards of due process; (b)(2) issued without personal jurisdiction over the individual party (*discussed at length below*); (b)(3) unenforceable in the issuing country; (b)(4) obtained by fraud in connection with a matter of procedure; (b)(5) the record lacks authenticity or integrity, e.g., forged; (b)(6) a prior proceeding is pending; (b)(7) a more recent support order is controlling; (b)(8) full or partial payment; (b)(9)(A),(B), no appearance, notice, or opportunity to be heard (*discussed below*); and, (b)(10) exceeds limitations and restraints on modification. As with domestic cases, the norm will be to recognize and enforce a foreign order absent a challenge by the respondent. Three provisions most likely to trigger a tribunal to refuse to recognize and enforce a foreign support order require more attention, i.e., subsections (b)(2), (4) and (9)(A), (B).

Of particular note, subsection (c) applies to a refusal to recognize and enforce a Convention order under any of these grounds. From the perspective of the United States, subsection (b)(2) is likely to be the primary reason for a tribunal to refuse to recognize and enforce a registered Convention support order. Key to its participation in the negotiations leading to the Convention, the United States insisted that a support order may be refused recognition by a tribunal if the issuing foreign tribunal lacked personal jurisdiction over the respondent. The facts underlying the Convention support order must be measured by a tribunal as consistent with the long-arm jurisdictional provisions of UIFSA. *See* Sections 201-202. A potential problem occurs only if a Convention support order cannot be enforced by a tribunal because there was no appropriate nexus between the foreign country and the respondent,

Subsection (c) provides that any of the reasons enumerated for not recognizing and enforcing a registered Convention support order, i.e., (b)(2), (4) and (9), will trigger the obligation of the tribunal not to dismiss the proceeding before allowing a reasonable time for a party to seek the establishment of a new child-support order. Moreover, if the Title IV-D support enforcement agency is involved, it must “take all appropriate measures to request a child-support order;” i.e., file a petition seeking to establish an initial child-support order by the tribunal. In that case, the tribunal shall treat the request for recognition and enforcement as a petition for establishment of a new order.

Two systems; direct and indirect jurisdiction. In drafting the Convention, the subject of the requisite jurisdiction to issue a support order generated considerable discussion. The choice divided itself into two distinct categories; rules of direct and indirect jurisdiction. Direct jurisdiction provides explicit bases on which a tribunal is vested with the power to assert its authority and enter a support order. *See* Section 201.

The UIFSA long-arm provisions are paradigm rules of direct jurisdiction. Section 201 identifies the bases on which a tribunal may assert personal jurisdiction over a nonresident individual, obligor or obligee, without regard to the current residence of the individual or child. As discussed in the comment to Section 201, *supra*, these long-arm jurisdictional rules for child

support and spousal support orders were fashioned case-by-case by the Supreme Court, *see Estin v. Estin*, 334 U.S. 541, 68 S. Ct. 1213, 92 L.Ed. 1561 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360, 1 L.Ed.2d 1456 (1957) (spousal support); *Kulko v. Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978) (child support).

An initial difficulty arose because some authorities from foreign countries expressed concern about the UIFSA long-arm statute. This was especially true regarding Section 201(a)(1), i.e., service of legal process that creates personal jurisdiction, sometimes called “tag or ambush jurisdiction.” Some experts in civil law countries regard the claim that jurisdiction can be acquired merely by serving documents on an individual passing through, with no fundamental ties to the jurisdiction, as “exorbitant,” and fundamentally unfair. Another provision eliciting criticism was Section 201(a)(6), which literally reads that an allegation of engaging in sexual intercourse in the state that “may have” resulted in conception will suffice to support a basis for issuing a child support-order.

Similarly, rules of jurisdiction recognized by civil law countries are contrary to the principles that apply to proceedings in the United States. The fact that residence of a child or an obligee in a forum is sufficient basis in most foreign countries to support a child-support order, even though the obligor has no personal nexus with the forum, is generally viewed as wholly inconsistent with notions of due process in the United States. Assuming the obligor has never been physically present in the forum and has not participated in any of the acts described in Section 201, an assertion of jurisdiction to establish a support order based solely on the residence of the obligee or child in that forum is widely regarded in the United States as unconstitutional.

The Convention adopts a rule of indirect jurisdiction which requires a tribunal to register and enforce the order of another tribunal if certain basic jurisdictional requirements have been satisfied. The Convention does not actually prescribe the bases on which the tribunal may assert jurisdiction, as UIFSA does in Section 201. Most commonly, in countries other than the United States if a child is a “habitual resident” of a country, a support order of a tribunal of that country will be recognized in another country. As a practical matter, although “habitual residence” of the obligee provides no basis for assertion of personal jurisdiction over the obligor in the United States, the home tribunal is almost always the preferred forum if the obligee has any basis under Section 201 to obtain long-arm jurisdiction over a non-resident obligor. That is, the actual custodian of the child is almost always the person who seeks to establish and enforce child support and, if possible, chooses to bring a proceeding in the state of residence of the obligee and the child. A tribunal that recognizes “habitual residence” as a basis for indirect jurisdiction would, accordingly, register and enforce an order from a tribunal in the “habitual residence” of the obligee or child without concern about whether the obligor has a nexus with that tribunal. Thus, most foreign concerns about the tenuous reaches of long-arm jurisdiction in the United States are obviated in practice.

The Convention eschews rules of direct jurisdiction, choosing instead to rely on half-a-dozen indirect rules of jurisdiction, “habitual residence” of any of the parties (respondent, creditor or child) being the most common. The focus of the Convention is to identify the bases on which a tribunal of one Convention country will be required to recognize the assertion of jurisdiction by a tribunal of another Convention country. When the Convention is in force in both

countries, a support order issued by a tribunal of Country A will be enforced by a tribunal of Country B, provided that the order is enforceable in Country A, plus the host of other possible considerations discussed above. There are a limited number of exceptions, or “reservations,” to such rules permitted under the Convention, which give rise to additional procedures noted below. Once recognition is accorded to a support order, the normal procedures available to enforce the order come into play. The routes to arrive at enforcement by way of direct or indirect jurisdiction are different, but the destination is the same.

Virtually all foreign countries recognize and enforce a child-support order based on the residence of the obligee or the child. The U.S. requirement of personal jurisdiction over the obligor is often regarded abroad as idiosyncratic. Nonetheless, the new Convention requires recognition of U.S. orders based on long-arm jurisdiction asserted over the obligor, a.k.a. “debtor” if the forum state is also the state of residence of the obligee, a.k.a. “creditor.” From the perspective of a foreign tribunal, such an order should be considered valid, if only for creditor- or child-based jurisdictional reasons. The fact that the state tribunal requires a personal nexus between the parties and the tribunal is irrelevant to the foreign tribunal.

These distinct views of appropriate jurisdiction presented a genuine issue for resolution. The United States delegation took the position that, as a matter of constitutional law, its tribunals could not recognize and enforce creditor- or child-based support orders under certain factual circumstances accepted in other countries as providing appropriate jurisdiction. The conclusion of the delegation was that this approach conflicts with the *Kulko* decision, *supra*. The potential lack of nexus with the obligor, if jurisdiction was based solely on the “habitual residence” of the obligee, would present an impenetrable barrier to participation in the Convention by the United States.

Fairly early on in the Convention negotiations, a consensus developed that these different systems of jurisdiction could be accommodated. On the U.S. side, a challenge to a foreign child-support order will be rejected if the factual circumstances are sufficient to support an assertion of long-arm jurisdiction in the foreign tribunal. Rather obviously, the foreign tribunal need not, and almost certainly will not, consider whether there is a factual basis for establishing personal jurisdiction over the absent obligor based upon “minimum contacts” with the forum. This is not a part of the jurisprudence of the foreign tribunal. If a challenge to a support order is raised by the obligor when the order is sought for enforcement in a United States tribunal, however, that tribunal shall undertake a determination of whether the jurisdictional bases of Section 201 would have been applicable if that issue had been raised in the foreign tribunal. If so, the order is enforceable in this country, notwithstanding that the foreign tribunal based its decision on jurisdiction on the fact that the child or the obligee resided in that forum. *See* Convention art. 20(1)(c)-(d).

Asserting long-arm jurisdiction to establish a support order by a tribunal in a proceeding under UIFSA will be unaffected by the entry into force of the Convention. This will be true irrespective of whether the nonresident respondent resides in another state or in a foreign country, or even resides in a non-Convention foreign nation.

The term “habitually resident” is used in a number of private international law

conventions, including the 2007 Maintenance Convention. The term is not defined in any of them. Rather, in common law countries its meaning is determined on a case-by-case basis by the practice and case law of each country. In the United States and elsewhere there is no consistent interpretation of the term by the courts considering it in the context of the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The negotiators of the Convention from the United States made it clear that case law on the meaning of “habitually resident” in the child abduction context should not automatically be applied to child support cases. That is because the effect of the use of “habitual residence” in the 1980 Child Abduction Convention is intended to restrict the ability of a person to obtain a new custody order shortly after arriving in another country. In fact, one of the objects of the 1980 Convention is to limit the ability of a parent unhappy with the custody order of one court to “forum shop” by moving to another country and seeking a new order. In the 2007 Maintenance Convention, the object is to make it easier for an obligee to recover child support in an international case, not to restrict the ability of an obligee to apply for that support.

Due process under the Convention. Subsection (b) (9)(A) applies to a failure to give a party prior notice of the proceedings and an opportunity to be heard, which is the classic denial of due process in a proceeding in the United States.

Subsection (b)(9)(B) will be unfamiliar to practitioners in this country and requires some explanation. This provision recognizes the legitimacy of, and provides a method for challenge of, a support order which may be routinely entered in some administrative systems in an ex parte proceeding. The support order is issued without prior notice to the obligor or opportunity to be heard. The due process opportunity is provided after the ex parte decision. This system is currently in use in administrative proceedings in Australia and New Zealand. Because the respondent will not have participated in the original proceeding, the post facto due process allows the obligor an opportunity to challenge the decision on fact or law.

Convention source: art. 20. Bases for recognition and enforcement; art. 21. Severability and partial recognition and enforcement; art. 22. Grounds for refusing recognition and enforcement; art. 23. Procedure on an application for recognition and enforcement; art. 25. Documents.

Related to Convention: art. 11. Application contents.

SECTION 709. PARTIAL ENFORCEMENT. If a tribunal of this state does not recognize and enforce a Convention support order in its entirety, it shall enforce any severable part of the order. An application or direct request may seek recognition and partial enforcement of a Convention support order.

Comment

This section transforms Convention language into UIFSA terminology. If a responding

tribunal is unable to enforce the entirety of a Convention support order, it shall enforce a severable part of the order. For example, a mother of a child may have another woman as her registered partner in a Convention country. If a support order provides support for both the mother and child support for the child, that part of the order awarding support to the mother from the registered partner may not be enforceable in some states. Nonetheless, a tribunal is obligated to recognize and enforce that part of the order for support of the child. The second sentence authorizes the mother to request enforcement only of the child support portion, *see also* Section 706 (c), *supra*.

Convention source: art. 21. Severability and partial recognition and enforcement.

Related to Convention: art. 20. Bases for recognition and enforcement.

SECTION 710. FOREIGN SUPPORT AGREEMENT.

(a) Except as otherwise provided in subsections (c) and (d), a tribunal of this state shall recognize and enforce a foreign support agreement registered in this state.

(b) An application or direct request for recognition and enforcement of a foreign support agreement must be accompanied by:

(1) a complete text of the foreign support agreement; and

(2) a record stating that the foreign support agreement is enforceable as an order of support in the issuing country.

(c) A tribunal of this state may vacate the registration of a foreign support agreement only if, acting on its own motion, the tribunal finds that recognition and enforcement would be manifestly incompatible with public policy.

(d) In a contest of a foreign support agreement, a tribunal of this state may refuse recognition and enforcement of the agreement if it finds:

(1) recognition and enforcement of the agreement is manifestly incompatible with public policy;

(2) the agreement was obtained by fraud or falsification;

(3) the agreement is incompatible with a support order involving the same parties

and having the same purpose in this state, another state, or a foreign country if the support order is entitled to recognition and enforcement under this [act] in this state; or

(4) the record submitted under subsection (b) lacks authenticity or integrity.

(e) A proceeding for recognition and enforcement of a foreign support agreement must be suspended during the pendency of a challenge to or appeal of the agreement before a tribunal of another state or a foreign country.

Comment

Section 701(6) provides an extensive definition of a “foreign support agreement,” which is UIFSA terminology to make more readily understandable for U.S. bench and bar a process that is denominated as a "maintenance arrangement" in the Convention. Subsection (a) requires a state tribunal to recognize and enforce a foreign support agreement if the terms of this section are met. Most crucially, such an agreement must be accompanied by a document stating that the foreign support agreement is as enforceable as a support order would be in the country of origin.

This section basically translates into common parlance the procedure identified in Convention art. 30, which was the result of a very extended discussions about “authentic instruments and private agreements” during the negotiations on the Convention. In many countries, such an agreement is unknown insofar as enforcement by a tribunal is concerned. In the United States, a purely private agreement is treated as a form of contract, rather than as an order of a tribunal. Under the Convention, however, a foreign support agreement meeting the standards established in this section, and as defined in Section 701(6), is entitled to enforcement by the tribunal. Advantages for enforcement of child support binding on the parties in the country of origin stem from the inclusion of a foreign support agreement because there is a growing tendency internationally to promote amicable solutions and avoid contentious procedures. In view of the movement towards alternative methods of dispute resolution in the United States, this mechanism provides for recognition and enforcement of a dispute resolution system in some of the likely Convention countries. The absence of this provision would have been a loss for the Convention, and limited its usefulness for support agreements, particularly in the Scandinavian countries. Although the possibility of a reservation is available, the United States has not indicated that it intends to make such a reservation.

To reiterate, the key to enforcement is that the foreign support agreement must be “enforceable as a decision” in the foreign country of its origin (quoting the Convention). If such an agreement is enforceable only as a contract, it will not fall within the scope of this section. Another key provision is that under subsection (e) the enforcement proceeding will be suspended if the respondent challenges the underlying agreement in a tribunal that has jurisdiction to hear challenges to the agreement.

Convention source: art. 3. Definitions; art. 30. Maintenance arrangements.

SECTION 711. MODIFICATION OF CONVENTION CHILD-SUPPORT

ORDER.

(a) A tribunal of this state may not modify a Convention child-support order if the obligee remains a resident of the foreign country where the support order was issued unless:

(1) the obligee submits to the jurisdiction of a tribunal of this state, either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity; or

(2) the foreign tribunal lacks or refuses to exercise jurisdiction to modify its support order or issue a new support order.

(b) If a tribunal of this state does not modify a Convention child-support order because the order is not recognized in this state, Section 708(c) applies.

Comment

One goal of the Convention was to limit the number of multiple foreign orders with respect to the same parties to the extent possible. But, given differing laws and jurisdictional bases, consensus on limiting modification was reached only on the fact patterns presented by Section 711(a).

First, this section transforms Convention language into UIFSA terminology. The restriction identified on modification of a child-support order in subsection (a) strikes a familiar note. Similar to Section 611, *supra*, a restriction is placed on modification of a support order if the obligee remains in the issuing Convention country. Subsection (a)(1) provides an exception if, by failure to object, the obligee submits to the jurisdiction of another tribunal. Subsection (a)(2) is similar to Section 615, *supra*. From the perspective of the obligee, the restriction has virtually the same effect as found in Sections 205 and 611. That is, in effect the issuing foreign tribunal has a form of continuing, exclusive jurisdiction that it maintains over modification of the order so long as the obligee remains a resident of the country. The difference is that the protection against modification is accorded only to the obligee, and not to the obligor. Thus, under the Convention the obligee may be free to seek a modification in another forum notwithstanding the fact that the obligor remains in the issuing country but the obligee moves to another country, with the implicit requirement that the issuing foreign tribunal must have personal jurisdiction over the obligor to sustain the enforcement of modification by a state tribunal.

Subsection (b) requires a state tribunal to issue a new child-support order if the Convention order was founded on child-based jurisdiction, the foreign tribunal lacked personal jurisdiction over the obligor, and there is a request to establish an order in accordance with Section 708.

Convention source: art. 18. Limit on proceedings; art. 21. Severability and partial recognition and enforcement.

Related to Convention: art. 18. Limit on proceedings; art. 20. Bases for recognition and enforcement.

SECTION 712. PERSONAL INFORMATION; LIMIT ON USE. Personal information gathered or transmitted under this [article] may be used only for the purposes for which it was gathered or transmitted.

Comment

This section is an almost word-for-word tracking of the Convention provision, rephrased in UIFSA terminology. This single sentence is illustrative of the different drafting rules for a uniform act and an international treaty. Although certainly not always adhered to, cardinal rules for drafting a uniform act include writing in the active voice, identifying the intended actor, and specifying the consequences for failure to follow the directive or ignore the proscription. Convention provisions, such as this one, are generally written in passive voice, the actor is not identified, and no penalty is specified for noncompliance. Insofar as the admirable goals of the provision are concerned, ambiguity in the statute, or an exception to the rule, must be resolved case-by-case.

Confidentiality is highly prized in the United States in many circumstances, e.g., the attorney-client privilege is protected to the maximum extent possible. Under other circumstances, the opposite is true, e.g., records of litigation are generally available, and a judicial decision is ordinarily in open court or public record. Neither goal is absolute. Section 312, *supra*, adds another exception, i.e., nondisclosure of information is sometimes required to protect the health, safety, or liberty of a party or a child. In a case in which there is a risk of domestic violence or parental kidnapping, nondisclosure may be crucial.

The anticipated breadth of application of this provision is to constrain individuals and entities subject to a Convention support order. Protection of personal information in this computerized world is increasingly important, whatever the medium or means of communication. Both the sender and recipient of personal information transmitted electronically are expected to take appropriate measures vis-à-vis their service providers to meet the requirements of this section. The exact meaning of the statutory phrase “for the purpose for which it was gathered or transmitted” will necessarily remain ambiguous until elaborated by statute, caselaw, or regulation.

Convention source: art. 38. Protection of personal data.

SECTION 713. RECORD IN ORIGINAL LANGUAGE; ENGLISH

TRANSLATION. A record filed with a tribunal of this state under this [article] must be in the original language and, if not in English, must be accompanied by an English translation.

Comment

The United States will declare that English is the official language for transmittals to this country. Further, the United States will make a reservation objecting to the use of French, the other official language of the Convention, as a default translation. Of course, the original order may be in French. The cost of translation is borne by the issuing state or Convention country.

Convention source: art. 44. Language requirements; art. 62. Reservations; art. 63. *Declarations.*

Related to Convention: art. 45. Means and costs of translation.