Annex

"Access to justice, as well as recognition and enforcement"

Ladies and Gentlemen,

Negotiations were conducted in The Hague on the worldwide Convention on the International Recovery of Child Support and Other Forms of Family Maintenance from 2003 until November 2007. No one who, like myself, attended these negotiations will ever forget what it was like. The sober and yet very friendly atmosphere of the venues, the openness of the discussions between the delegations and the spirit of goodwill which the Permanent Bureau constantly strove to uphold were vital to the successful conclusion of the Convention in November 2007.

We commenced the parallel negotiations on the EC Maintenance Regulation in Brussels in 2005. They were largely attended by the same people who were also negotiating in The Hague, which guaranteed the continuity and parallel nature of the negotiations from the outset. If today one compares the EC Regulation with the Hague Convention on which it is based, it is strikingly clear that both texts – and also the associated Hague Protocol on the Law Applicable to Maintenance Obligations of November 2007 – were cast in the same mould.

I would like to go on to briefly illustrate two areas which were focal to the negotiations carried out in The Hague and in Brussels from the start: firstly, access to justice and, secondly, recognition and enforcement.

From the very beginning, "freedom of access to justice" was a central element in the negotiations on the Convention, and later also in those on the EC Regulation. the USA insisted right from the start of the negotiations in The Hague that the maintenance creditor must have such freedom of access to the courts. This soon conveyed the impression that such unconditional legal assistance for maintenance creditors was the deal-maker *sine qua non* for the USA.

Most participating EU nationals – including myself – remained quite unable to understand this position until the very end. Legal assistance for all, regardless of their income and assets, was an alien concept to me.

The rift between the USA and some EU States, once again including Germany, was also rather deep with regard to recognition and enforcement. As far as these issues were concerned, the USA began negotiations by demanding the establishment of minimum standards that would be binding on all Contracting States. Incidentally, the Commission would later make similar attempts during the negotiations on the EC Regulation in Brussels. The Commission too wished to establish binding regulations for enforcement for all EU Member States regarding the enforcement of these maintenance claims abroad.

The outcome was the same in both cases. It was impossible to assert such minimum standards either in The Hague or in Brussels. The outcome of the deliberations which took place in The Hague had a decisive impact on those that were held in Brussels in this respect also.

1. Access to justice

The wording, the image conjured up by "access to justice" reveals a strong Anglo-Saxon influence. If you use the German term "*Zugang zum Recht*", the associations will be of access to a court building. Legal assistance, which is what the Anglo Saxons are concerned with here, tends to be understood in Germany, as the obsolete term "*Armenrecht*" – the "law for the poor" - illustrates, as a special case covered by social assistance.

It became clear quite early on in the negotiations in The Hague that free access to a court was going to constitute a central element of the entire work, this being the case for the USA in particular. The 50-year-old New York UN Convention from 1956 says nothing at all about the question of legal assistance. That Convention has since then formed the basis for recovering maintenance abroad in relations with many states, albeit not with the USA and Canada. The inclusion of the provisions that we find in Articles 14 et seq. can hence be referred to as one of the essential amendments brought about by the 2007 Hague Maintenance Convention vis-à-vis the law previously applicable.

Up to the end of the deliberations in The Hague, Europeans were unable to understand this insistence by the USA to ensure that the maintenance creditor would always have free access to a court. The US went so far as to argue that, even in the theoretical case of a divorce between Brad Pitt and Angelina Jolie, access to the courts abroad should be

made available free of charge. Articles 14 to 17 of the Convention now reflect this far-reaching freedom from charges. Its real significance admittedly goes far beyond cases involving actors.

This position can only be understood if one takes a step back from civil law concepts when analysing this Convention. The USA viewed the Hague Convention more as relating to social law. There were several reasons for this:

- The Convention deals not with regulations on maintenance claims, but with enforcing the State's rights of redress under social law.
- The USA would presumably also face domestic problems with negotiating on a Convention on maintenance law. In the USA, the individual States are responsible for maintenance law. This is likely to make it very difficult for the USA to negotiate conventions on maintenance-related questions.
- Ultimately, fiscal reasoning in the law on maintenance is however not a US speciality. German maintenance law certainly also has a fiscal aspect, and this applies not only when taking recourse against maintenance debtors. Maintenance claims reduce the burden on the State and defer the primary obligation of livelihood protection to a private individual. Hence the State has a vital interest in such claims being enforced. This is seen in Germany amongst other things by virtue of the fact that ceilings regarding unseizability are reduced in favour of the creditors only for claims that fall under maintenance law, and that merely persistently not paying maintenance claims as such, that is without requiring deception, is punishable by law.

Particularly these days, when constrictions in state budgets are rife, it is only natural that this fiscal reasoning is becoming more and more important in the enforcement of maintenance claims abroad. Under these conditions it is only consistent to make the enforcement of maintenance claims abroad free of charge. This is purely and simply a direct state interest in the assertion of rights. The EC Regulation too has adopted these results. Legal aid is also granted here regardless of the parties' income. This is just as unique in the EC context as it is in Germany, and it expresses a specific circumstance pertaining to maintenance law, namely the latter's fiscal correlations.

2. Recognition and enforcement

It is also necessary to start this part by clarifying some terms. The English term "enforcement" is multi-tiered in this context, particularly when it comes to the declaration

of enforceability and to enforcement itself. The Hague Convention and the EC Regulation however ultimately only regulate recognition and the declaration of enforceability. Actual enforcement, that is the possibilities available to the State to recover claims, remains the preserve of national law.

Some countries, the USA included, were initially rather more ambitious in this regard in the negotiations on the Hague Maintenance Convention. They wished to assert specific minimum standards for the actual enforcement proceedings. Remnants of these attempts can be made out in the provision contained in the Article 34 § 2, which admittedly is only optional. It was not possible to agree on a binding list of enforcement measures because the countries' individual enforcement systems are too diverse. So far, not even the European Union has a legal act regulating enforcement in all its Member States. We are currently in the process of a first attempt in Brussels at the provisional seizure of bank accounts. Enforcement law is, firstly, based so directly on the provisions of property law, and, secondly, is characterised to such a degree by elementary concepts of equity, that any attempt to standardise it will prove difficult. For instance, under German law the repossession of goods is governed by the principle that the "early bird gets the worm". In other countries such cases are quoted from the outset according to the claim to which the respective creditor is entitled.

It was hence not considered to be suitable to include worldwide rules on enforcement in the Hague Maintenance Convention.

The Commission attempted to achieve something similar in the EC Regulation. Articles 27 to 36 of the original draft contained provisions on enforcement. However, the Commission ultimately had to acknowledge that such regulations on enforcement in all Member States cannot be asserted. Article 41 § 1 sentence 1 refers in this respect to the national law that is material.

3. Recognition and declaration of enforceability in the stricter sense of the word

The greatest divergence between the Hague Convention and the EC Maintenance Regulation probably lies in this area of the enforcement proceedings. The Convention regulates the recognition and the declaration of enforceability of foreign maintenance decisions in a traditional manner, and thus draws its inspiration from the Hague Convention of 1973. Moreover, it includes time-limits and provisions for appeals in its

Articles 23 and 30, these ultimately being reminiscent of the EU system that is embodied in the Brussels I Regulation. Still, here too there are alternative provisions in Articles 24 and 30.

The EC Regulation takes an entirely different approach, having completely abolished exequatur for maintenance titles.

In accordance with recital No. 24[*] to the Regulation, the underlying feature of this path-breaking abolition of exequatur within the EU is uniform private international law. It is true that maintenance creditors may go to the court of their choice. Because however international private law is applied according to the same rules throughout the European Union, they will not be able to manipulate the law to be applied by choosing a particular court. Every judge in the European Union will draw the same conclusions when establishing the applicable law, and will apply the law of a particular state. Against this background, it is possible to dispense with a repeated verification, known as exequatur, in the Member State of enforcement. Moreover, private international law is regulated within the European Union by the Hague Protocol, which was likewise ratified in November 2007. The European Union is so far the only party to have ratified this Protocol, so that the Protocol is not yet effective in terms of international law. The Union has nonetheless decided to already start applying it within the European Union.

It should furthermore be pointed out that the United Kingdom has opted out of this regulation. Given its different understanding of private international law, the United Kingdom was unable to accept the abolition of exequatur in this regard. The curious consequence of this is that, whilst German decisions are enforceable in the UK without exequatur, this does not apply vice versa. This does appear to be logical if one studies the underlying provisions of private international law, but the outcome is nonetheless surprising.

The EC Maintenance Regulation furthermore does not justify abolishing exequatur by invoking “mutual trust” between the EU Member States. This “mutual trust” will not be invoked as the basis for abolishing exequatur until subsequent EU legal acts are ratified. Somewhat greater reserve still was exercised when drafting the EC Maintenance Regulation.

[*] Translator’s note: Recital 21 would appear to be meant here.

If you believe that exequatur was abolished for maintenance cases within the European Union without a replacement, you will be overlooking the fact that not all boundaries were dropped and that verification in terms of public policy has not in fact become completely obsolete.

A case recently ruled on by the Federal Court of Justice between Germany and another EU State will serve to illustrate this point. A German citizen had been sentenced to pay child maintenance although he had not been a party to the proceedings, which had been held abroad, and had always denied being the father of the child. It was however apparently possible in accordance with the foreign procedural law to determine paternity on the basis of mere witness testimony. The witness in this case was the mother of the child's mother, the latter having lodged the action. This ruling was then not declared enforceable in Germany. It was considered that a breach of German public policy had been committed. As is shown by this case, a mechanism remains in the EU that facilitates the invocation of a potential breach of public policy in the Member State of enforcement, even though exequatur no longer applies.

4. Details contained in the Foreign Maintenance Act (*Auslandsunterhaltsgesetz*)

The Foreign Maintenance Act has been in force in Germany since June 2011 in order to provide comprehensive statutory regulations and to implement all maintenance cases in relations with foreign states. This serves to implement all bilateral and multilateral international agreements to which Germany belongs, as well as the EC Regulation of 2009. These national provisions are essentially restricted to determining the court which has jurisdiction and to stipulating individual provisions on enforcement. I should refer to the application for aversion of enforcement in accordance with section 66 of the Act with regard to the assertion of German public policy, so that, as it has emerged from the example from another EU State, a final check remains possible prior to the enforcement of a foreign judgment in Germany.

5. Summary

The Hague Maintenance Convention and the EC Maintenance Regulation pursue different approaches in some aspects. It was only within the EU that it was possible to abolish exequatur in the enforcement proceedings altogether. There are however

important shared features in other respects, and these indeed are not surprising given their common history.

On the basis of a fiscal approach, both legal texts grant free legal aid or legal assistance to all. The issue is not the neediness of the individual party, but rather the State's abstract interest in asserting maintenance claims, particularly abroad. Moreover, the texts conserve enforcement in the stricter sense within the domain of national law. The national concepts of equity thus remain intact in this regard.

The EC Regulation is already applicable in the European Union. Given that the EU is to accede to the Hague Convention, the latter will also be applicable in Germany soon. The 2007 Hague Maintenance Convention and the EC Maintenance Regulation have taken great strides towards modern mutual assistance, particularly when it comes to access to justice and the enforcement of foreign maintenance decisions. Solely the Hague Convention of 2007 and the EC Maintenance Regulation of 2009 are to be applicable in future. The plethora of earlier agreements and provisions has been reduced. Central Authorities have been established, whilst at the same time a modern understanding of legal aid and contemporary rules on enforcement have become the norm. These two legal texts will hence be valid for quite some time, and will help modernise our law. What is more, they will also enhance the enforceability of maintenance claims abroad in highly practical terms, and therefore do better justice to the individual interests of the children who rely on these maintenance payments.

Thank you for your attention!