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RECOVERY OF MAINTENANCE IN SOUTH AMERICA AND MERCOSUR AREA

William Duncan, on the Hague decision to pursue a new document:

Recovery of Maintenance in the European Union and Worldwide
Heidelberg Conference 5 – 8 March 2013

* disquiet at the chronic nature of many of the problems associated with some of the existing conventions;

* a perception that the number of cases being processed through the international machinery was very small in comparison with real needs;



The South American and Mercosur Perspective

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Assessment of the situation

- **Work of the existing conventions**
 - The New York Convention and the Interamerican Convention on Maintenance Obligation, 1989.
 - The need for a common rule: The Hague Convention
- **New topics on substantive law**
 - Recovery for unborns and children out of wedlock
 - Support for women on partnerships (unmarried couples)

Latin America's concept

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Latin America is a term that encompasses all the countries of Central and South America.

The distinguished feature is that most countries are Spanish, Portuguese and French speaking and this gives them a common heritage.

We will concentrate our analysis in the South American Countries, with a special view to the Mercosur Area.

Mercosur Situation

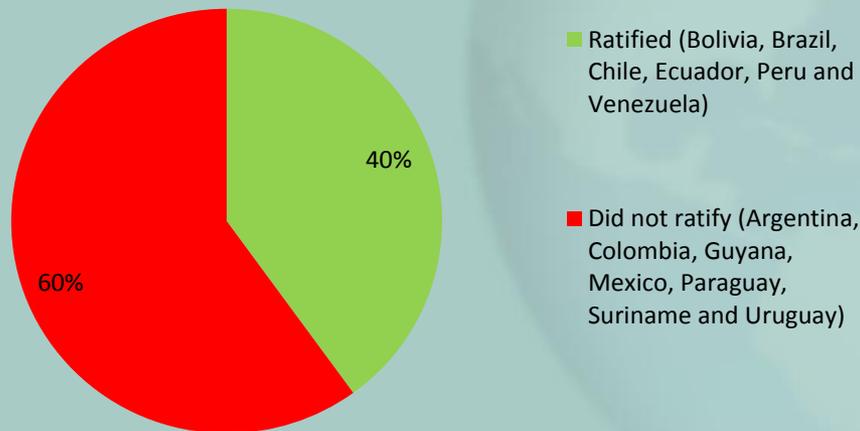


- Mercosur is composed of 5 members.
 - Founding countries: Argentina, Brasil, Paraguay and Uruguay.
 - Venezuela is a recent member.
 - Bolivia is in the process of admission, since 2012.

Historic International conventions and the recovery of maintenance

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Bustamante Code



The Bustamante Code was the first International treaty that had an specific provision on recovery of maintenance. It was made in 1928 and is still in force in many countries.

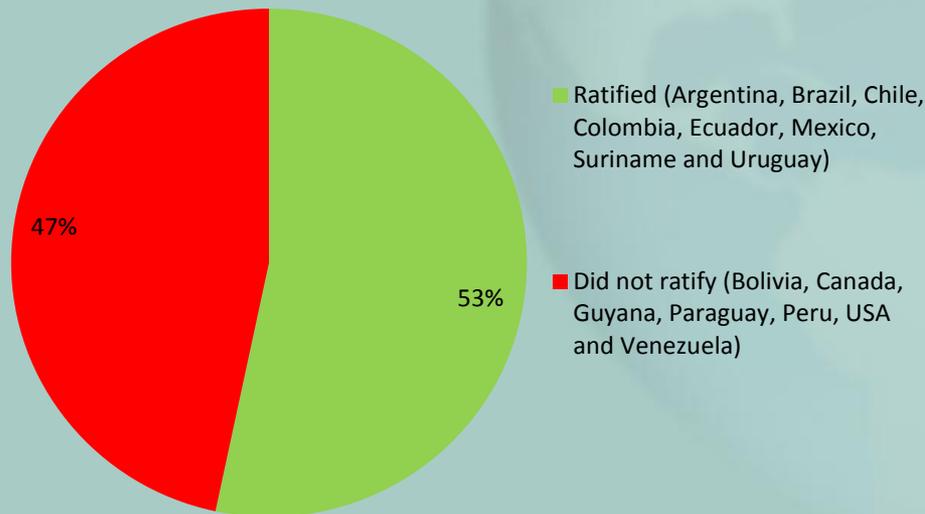
Its provisions on the matter are on articles 67 and 68:

- The personal law of the creditor is the main connecting factor.
- The public order is considered as a mandatory rule to prevent the applicable law not favorable to the creditor.

Global and Regional Documents

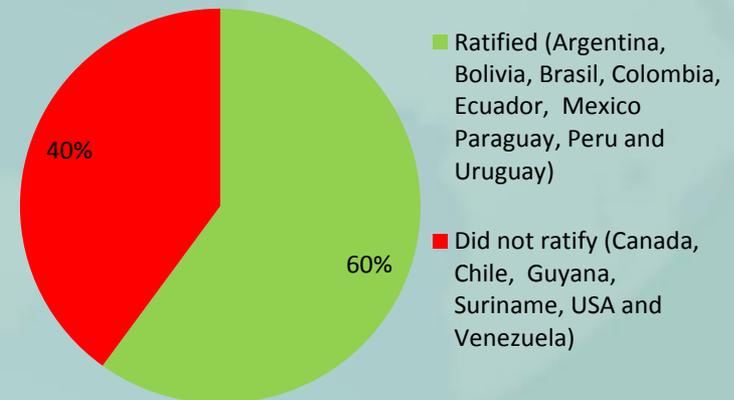
- New York Convention

New York Convention of 1956 - North America and South America



- Interamerican Conventions

Interamerican Convention - North America and South America



The situation in South America: 4 scenarios

- Parties to **both New York Convention and Interamerican Convention**:
 - Argentina, Brasil, Colombia, Equador, Uruguai,
- **Not Parties** to any convention
 - Guyana,
- Parties **only** to the **New York Convention**
 - Chile, Suriname
- Parties **only** to the **Interamerican Convention**
 - Bolivia, Paraguay, Peru, Venezuela,

Some characteristics of the Interamerican Convention

- **Maintenance only to minors and spouses.** Other creditors have to be spelled out separately. Thus it does not apply to unmarried couples. Article 1.
- The convention's **age** for maintenance is **18 years old**. (longer period, if the country of the creditor or debtor agrees to make a declaration).
- **Non discriminatory clause** of Article 4, according to human rights regulation.
- **Autonomous character of the maintenance** obligation (article 5)
- **Rules on applicable law: the most favorable connection to the creditor**, according to the competent authority, between the law of the habitual residence of the creditor, or of the debtor. Article 6.
- **Rules on jurisdiction:** (i) the habitual residence of the creditor; (ii) the habitual residence of the debtor; (iii) the place where the debtor has ties or assets. (article 8)
- Mandatory rule prohibiting any interpretation of the convention that would limited the rights of the creditor at the forum where the action is brought. Article 21.

New York and Interamerican Conventions'situation in South America

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- Absence of common ground for rules of Private International Law and International Cooperation.
- The New York Convention does not have rules on jurisdiction and on applicable law.
- The Interamerican Convention has rules on jurisdiction and applicable law. But, it is only applicable if the creditor and the debtor have their habitual residence in one of the State Parties. It is into force in all Mercosur countries. However, it is **seldom used**. No case law was found.
- There is a strong need for a common document that would bring uniformity to the treatment of the subject in the region, hence the adoption of the Hague Convention of 2007 is imperative.

Mercosur´s situation regarding recovery of maintenance

- There is no specific document for the recovery of maintenance.
 - **New Protocol of 2012 on Applicable law and jurisdiction on family matters just signed.**
- The subject is dealt with under the theme of international cooperation:
- Protocol on international cooperation (Las Lenas)
- Protocol on provisional measures

Substantive Law on maintenance in South America Countries

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- All countries of Mercosur share a civil law heritage.
- Private International law connecting factor for family matters are usually domicile and changing to habitual residence.
- There are provisions for maintenance for spouses and children.

Some features of comparative law on maintenance

- Maintenance for unmarried coupled
 - Bolivia, Brazil, Chile (Law Project), Colombia (Sentencia C-1033-02, 27/11/2002, Constitutional Court), Mexico, Paraguay, Peru, Uruguay, Venezuela
 - Argentina does not have a specific law on the matter and there is no provision for maintenance in these relations.
- Maintenance for unborn
 - Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico (some States), Paraguay, Peru, Uruguay, Venezuela (Sentencia N° 1340-11-1237)
 - Argentina does not have this feature, but it recognised its necessity and it has provided for it in the Civil Code Reform Project.

Mercosur's Proposed Protocol on applicable law and jurisdiction for family law

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- The first main feature of the Protocol is to include unmarried couples in the definition of its scope.
- Article 2 brings a definition of domicile as being the habitual residence or the center of its business, as a subsidiary notion.
- The Protocol is centered in issues relating to jurisdiction and applicable law to marriage and partnerships, personal relations and matrimonial regimes, and divorce.
- There is no specific provision for maintenance, but it could be dealt with in divorce matters.
- There is no provision on children.

(I) The Brazilian case: examples on international maintenance

- New York Convention
 - Central Authority is the Federal Public Prosecutor
 - Many cases with Chile and Argentina
 - Difficulties: translation, documentation, transfer of money
 - Majority of cases are with Europe, Chile and Argentina.
- Interamerican Convention
 - It has never been used by courts. No case law.
 - The Central Authority is the Ministry of Justice.
- Traditional channels of International cooperation
 - Ministry of Justice handles all cases that are covered by bilateral treaties or reciprocity

(I) The Brazilian situation in courts: examples on international maintenance

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- New York Convention's cases: requests from abroad are filled in Brazil by the Public Prosecutor's office in Federal Court. Cases filled by private parties are in State Courts.
- Cases not covered by the New York Convention will be dealt with by the Ministry of Justice as Central Authority.
- When there is an action for recovery of maintenance in a Brazilian State Court and there is need for International Cooperation the Ministry of Justice will ask for international cooperation.

Recognition and enforcement of foreign maintenance decisions

- **All foreign decisions** need to pass through the **process of recognition** and enforcement in the **Superior Court of Justice (STJ)**.
- **Maintenance Requests in the STJ:** (i) New York Convention case are filed by the Public Prosecutor; (ii) Cases from Mercosur and bilateral treaties are filed by Ministry of Justice; (iii) private parties can file directly in the STJ.
- **Resolution n. 9**, from 2005, finally allowed interim measures before the final decision on recognition of foreign decisions. In 2006, case n. SEC 746, an **interim measure for payment of maintenance** before the foreign decision was recognized **was granted**.
- The STJ has recognized many cases where maintenance was granted in a divorce decree.
- **Decisions from Mercosur's countries**, due to Protocol of Las Lenas regulation can be directly sent to the STJ. The foreign Judge of the other country may send it **through a letter rogatory** or the Ministry of Justice may file the case.

The Brazilian Position on the Hague Convention

- The Ministry of Justice has set up a Working Group to discuss and report on declarations and reservations, the convention's translation and the country profile, as well as issuing the report to be presented to Congress to approve the Hague Convention.
- The group has meet regularly since August 2012 and it is presently reviewing the translation. A Glossary of terms in 4 languages (english, french, spanish, portugues (with a column to Portugal) was prepared based on the official translation to guide the WG.

Conclusions

- William Duncan, while explaining the Hague decision to pursue a new document clarified its motifs, among others as:
 - * disquiet at the chronic nature of many of the problems associated with some of the existing conventions;
 - * a perception that the number of cases being processed through the international machinery was very small in comparison with real needs;
- My conclusions after studying the situation in South America is the same:
 - The lack of uniformity in the regulation, the difficulties of obtaining needed information and accessing the process, the impression that only few people use the system, the maintenance of the classical system of recognition and enforcement of foreign decisions.