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Explanatory Report
to the European Agreement on the Transmission of Applications for Legal Aid

Strasbourg, 27.I.1977

I. The European Agreement on the Transmission of Applications for Legal Aid was drawn up within the Council of Europe by the Committee of Experts on Economic and other Obstacles to Civil Proceedings, Inter Alia Abroad, set up under the authority of the European Committee on Legal Co-operation (CCJ). It was opened to signature by the member States of the Council of Europe on 27 January 1977.

II. The text of the explanatory report prepared by the committee of experts, as revised and completed by the CCJ, does not constitute an instrument providing an authoritative interpretation of the text of the Agreement although it may facilitate the understanding of the provisions of the Agreement.

Introduction

1. The Conference of European Ministers of Justice held in Vienna on 30 and 31 May 1974 adopted a resolution which constitutes the origin of the work undertaken by the Council of Europe to remove obstacles to civil proceedings abroad. This has already resulted in Resolution (76) 5 on legal aid in civil, commercial and administrative matters, adopted by the Committee of Ministers of the Council of Europe on 18 February 1976.

In his report to the 9th Conference the Austrian Minister of Justice urged, in particular, that in order to facilitate civil proceedings abroad the possibility be examined of granting a person who has his habitual residence in the territory of a Council of Europe member State and wishes to obtain legal aid in another member State the right to apply to the authorities of his country of residence who will thereupon transmit the request to the authorities of the other State.

2. Machinery of this kind which implies the designation in each State of transmitting and receiving authorities is already provided for in respect of persons entitled to maintenance by the New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance to which many Council of Europe member States are Parties. Direct communication between authorities is also provided for in the European Convention on Information on Foreign Law, done in London on 9 June 1968 and subsequently ratified by a large number of member States.

3. The present Agreement is in pursuance of the suggestion made by the Austrian Minister of Justice at the Vienna Conference and is based on the precedents constituted by the New York and London Conventions.

4. The Agreement simplifies the procedure which already exists for the transmission of applications for legal aid in relations among the States which are Parties to the Hague Convention of 1 March 1954 relating to Civil Procedure which provides that in principle such transmission shall take place through consular channels (Article 23). The Hague Convention provides, however, that Contracting States may agree to allow direct transmission of requests for legal aid between their respective authorities (Article 23, second paragraph, and Article 9).

5. The two instruments are consequently not in any way incompatible with each other. The Strasbourg Agreement ensures, in relations between the States Parties to the two Agreements, common implementation of the Hague Convention. Further more, the machinery instituted by the Strasbourg Agreement does not supersede consular channels, which may always be used as well as any other existing channel, but it offers the applicant an additional possibility.

6. It is also important to note that the Strasbourg Agreement is limited to the transmission of applications and does not lay down, as does the Hague Convention, the conditions which the applicant must fulfil in order to receive the benefit of legal aid nor the extent of that aid.

7. Despite its limited purpose, the Agreement is very useful since it is intended to facilitate the steps which must be taken by a person of limited means in order to obtain legal aid in a Contracting State other than that of his residence It suffices for that person to apply to the transmitting authority designated in the country in which the applicant resides without his being obliged to apply to foreign authorities. That authority will be able to give him any information he may require for the presentation of the request. It may also be expected that the competent authorities shall in most cases be the same as those designated in pursuance of the New York Convention, which would, it seems, in view of the contacts already established among those authorities and the experience they have acquired facilitate the transmission of the requests and help to overcome any difficulties which might arise in connection therewith.

8. The articles of the Agreement do not appear to call for any lengthy comments.

9. Article 1 relates to any person having his habitual residence in the territory of a Contracting State, without regard to nationality.

It is clear that the Agreement does not lay down any new substantive roles concerning the granting of legal aid.

10. Under the terms of Article 2, each Contracting State must designate a transmitting authority and a receiving authority. In order to take, account of the decentralisation of the administration in certain countries, a State may designate several transmitting authorities. On the other hand, in order to facilitate transmission of the requests, a State may designate only one receiving authority. This rule may be waived only in respect of federal States or States with a non-unified legal system.

11. Article 3 authorises, *inter alia*, the transmitting authority to refuse to transmit documents. First of all, this authority is not obliged to take any action on the request if it does not comply with the conditions of the Agreement. It can equally refuse to transmit the request if this appears manifestly not to have been made in good faith. In this respect the Agreement uses the terminology in the New York Convention on the Recovery Abroad of Maintenance (see Article 4). It is clear that such a refusal can only be made on the basis of a consideration of the formal requirements of the documents, particularly those concerning the applicant's financial situation... It should also be emphasised that, in case of refusal by the transmitting authority, the applicant can always use the other existing means of submitting his request, e.g. consular channels or by addressing himself directly to the authorities of the other State. In other words, the refusal to transmit the request should not be treated as a refusal of legal aid.

According to the very terms of the Agreement the transmitting authority shall assist the applicant. This duty to render assistance implies first of all that the transmitting authority shall ensure that the request is properly constituted and contains the necessary documents. It also implies that this authority shall assist the applicant in obtaining translations without this obligation of assistance requiring the authority itself to prepare the translations or to bear their cost. It is nevertheless hoped that, as far as possible, the authority will make the translations itself or have them prepared at its cost so that the applicant is able to claim his rights.

12. In the light of the current trend of practice Article 4 provides that the documents transmitted need not be legalised which constitutes a simplification compared with the Hague Convention (Article 21, second paragraph). The term "an equivalent formality" covers, *inter alia*, those used in the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. Recourse to the service of the transmitting and receiving authorities appears to provide a sufficient guarantee of authenticity of the documents produced.

13. The question of the languages to be used gave rise to a few difficulties, which have been resolved in the following way :

> 1. Two Contracting Parties may, at their own option, agree among themselves with regard to the use of given languages
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> 2. In the absence of an agreement of this kind, the documents and appendices shall, in principle, be drawn up in the language of the requested State or be accompanied by a translation in that language. The question was raised of whether it would not have been preferable to provide for the use of the language of the State in which the applicant has his residence. This solution was not adopted since it was likely to give rise to practical difficulties, such as that of finding in certain cases a qualified translator in the requested State;
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> 3. In the absence of an agreement the requested State shall be bound to accept the requests and appendices drafted in English or French or accompanied by a translation in one of these languages ; in this connection, consideration was given not only to the fact that English and French are the official languages of the Council of Europe, but also and above all that it is comparatively easy to obtain translations in these languages and that this solution was accordingly likely to facilitate the applicant's task and reduce the costs of translation,
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> 4. States which have more than one official language have the possibility of making the declaration provided for in Article 14 (cf. also Article 4, paragraph 3, first sentence, of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters).

14. Countries may, however, as requested States refuse to accept documents drawn up in English or French and may demand that requests be drafted or translated in their official language(s). To this end, they should avail themselves of the reservation provided for in Article 13. This article also provides, very logically but also to preclude making too extensive use of the reservation, that another State may demand that the documents transmitted to it be drawn up or accompanied by a translation in its own language.