

# **TRANSNATIONAL RECOVERY OF CHILD MAINTENANCE IN EUROPE: THE FUTURE IS BRIGHT, THE FUTURE IS CENTRAL AUTHORITIES**

**IAN CURRY-SUMNER**

UCERF, Molengraaff Institute for Private Law, Utrecht University

## **Abstract**

The recovery of international child maintenance is a growing social concern. At present Europe suffers from an ineffective recovery system, contributing to many children not receiving the payments which are due to them. Initiatives at both the international and the European level profess to be able to change this situation by creating a network of Central Authorities. Whether this network will be sufficient to tackle the inadequacies of the current deficiencies has, however, yet to be investigated. This paper hopes to provide an overview to the current and future international instruments in the field of child maintenance. Only once this has been done, can those involved appreciate the changes to come.

## **Keywords**

International recovery child maintenance

## **I. INTRODUCTION**

The social fabric of Europe is changing. Every new strand added to the patchwork not only adds more colour and vibrance to the whole, but also increases the complexity of the design. As these developments continue and society continues to change, the existing legal frameworks will need to be adapted to deal with legal and social problems of the future. One such field is child maintenance. In 2005, 33,890 children were involved in divorce proceedings in The Netherlands (in 57% of all divorces),<sup>1</sup> 136,332 in the UK (53%)<sup>2</sup> and

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<sup>1</sup> Centraal Bureau voor Staistieken (CBS), online database, 2007.

<sup>2</sup> Office of National Statistics (ONS), "Divorces: Couples and children of divorced couples, 1981, 1991 and 2001-2005", *Population Trends*, 2005, No. 125.

approximately 87,000 in France (65%).<sup>3</sup> With Europe witnessing a rapidly increasing divorce rate,<sup>4</sup> these figures are only set to rise. Similar problems are equally manifest with respect to separating unmarried couples,<sup>5</sup> to whom an ever increasing number of children are born. Furthermore, European countries have been witness to a shift in focus from ex-spousal maintenance to child maintenance,<sup>6</sup> ensuring that child maintenance is increasingly the only surviving financial obligation of any intimate relationship post-separation.<sup>7</sup> These trends have culminated to ensure that child maintenance has become one of the top governmental topics in recent years.

Another important and associated trend is the proliferation of international families. More than 5% of persons in the EU (c. 19 million) do not possess the citizenship of the state in which they live.<sup>8</sup> Furthermore, according to official statistics, the net migration to the EU in 2004 totalled more than 1.8 million.<sup>9</sup> Alongside this migration, approximately 4% of those entering into marriage are of differing nationalities.<sup>10</sup> These two distinct, yet interrelated developments, have coalesced to ensure that an ever-increasing number of child maintenance payments involve transnational elements.

The importance of child maintenance recovery has also been recognised by European and international legislatures. Since the turn of last century, a number of new proposals, reports and draft instruments have been developed, aimed at creating a more efficient and effective recovery system for all forms of maintenance obligations, including child maintenance. Although these legislatures should be commended on the increased focus their efforts have brought to this worthy topic, it is nonetheless important not to lose sight of the old English proverb that “too many cooks may spoil the broth”.<sup>11</sup>

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<sup>3</sup> Z. Belmokhtar, *Les divorces en 1996. Une analyse statistique des jugements prononcés. Etudes et statistique Justice*, 1999, Ministère de la Justice, No. 14; C. Martin and A. Math, “A comparative study of child maintenance regimes: French report”, London: Department of Work and Pensions, 2006.

<sup>4</sup> Eurostat, *Europe in figures*, Luxembourg: European Commission, 2007, p. 70.

<sup>5</sup> K. Kiernan, “European perspectives on union formation”, in: L. Waite, C. Barhrach, M. Hindin, E. Thomson and A. Thorton (eds.), *Ties that bind: Perspectives on marriage and cohabitation*, Hawthorn: Aldine de Gruyter, p. 40-88.

<sup>6</sup> J. Eekelaar, *Regulating Divorce*, Oxford: Clarendon Press, 1991, p. 90.

<sup>7</sup> J. Teachman and K. Paasch, “Financial impact of divorce on children and their families”, *Future of Children*, 4/1994, p. 63-83.

<sup>8</sup> Eurostat, *The social situation in the European Union 2004*, Luxembourg: European Commission, 2005.

<sup>9</sup> Eurostat, *Europe in figures*, Luxembourg: European Commission, 2007, p. 76.

<sup>10</sup> SEC (2005) 1629, p. 6.

<sup>11</sup> In French: *Trop de cuisiniers gâtent la sauce*, in Dutch: *Teveel koks bederven de brij*, or German: *Zu viele Köche verderben den Brei*.

The objective of this paper is grounded in the belief that more attention must be paid to the work currently taking place at the Hague Conference and in the European Union with regards the new international instruments to be implemented in this field.<sup>12</sup> Both these new instruments, which are expected to enter into force within two years, have the potential to revolutionise the recovery mechanisms in transnational child maintenance cases. It is, therefore, of the utmost importance that lawyers and academics in the field of family law and private international law are aware of their implications and the changes they will bring.

This paper consists of three main sections. The first section is devoted to a comprehensive overview of the current international instruments in force in European jurisdictions with respect to the recognition and enforcement of child maintenance awards, as well as in relation to administrative co-operation. The second section outlines the main developments concerning child maintenance obligations in both the European Union, as well as at the Hague Conference. One of the most important administrative developments signalled in both instruments is the creation of a network of Central Authorities. This development will also be dealt with in the second section. The third and final section of this paper concludes with a number of critical remarks regarding the manner in which the current instruments are being developed, as well as a number of observations with regards the network of Central Authorities.

## II. THE CURRENT SITUATION

Although both these future instruments propose to deal with jurisdictional, applicable law, recognition, enforcement and administrative co-operation issues, this paper is restricted to a discussion of the provisions with respect to the international recognition and enforcement of judgments, as well as the system for administrative co-operation.

### **Recognition and enforcement of judgments**

At this moment in time, the recognition and enforcement of child maintenance awards is regulated by a plethora of diverse international, European and bilateral agreements.<sup>13</sup> This

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<sup>12</sup> **EU level:** Proposed Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations; **Hague Conference:** Proposed Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

<sup>13</sup> This paper does not deal with the multitude of bilateral agreements signed by individual States.

section provides a brief overview of those international instruments in relation to their impact with respect to the recognition and enforcement of transnational child maintenance awards.

### *1968 Brussels Convention*<sup>14</sup>

Prior to the entry into force of the Brussels I Regulation, the 1968 Brussels Convention was the most important supranational instrument in Europe with regards the recognition and enforcement of child maintenance awards abroad. Although in 2001, the Brussels I Regulation<sup>15</sup> came to replace the 1968 Brussels Convention for 14 Member States, this was not the case for Denmark.<sup>16</sup> Consequently, questions of jurisdiction between Denmark and the other EU Member States continued to be governed by the Brussels Convention. However, on the 19<sup>th</sup> October 2005, the European Community concluded an agreement with Denmark, ensuring that the Regulation is also to be applied in relation to Denmark.<sup>17</sup> The agreement was approved on the 27<sup>th</sup> April 2006 and entered into force on the 1<sup>st</sup> July 2007. Accordingly, the 1968 Brussels Convention has for all intents and purposes been replaced by the Brussels I Regulation for all intracommunity cases subsequent to 1<sup>st</sup> July 2007.<sup>18</sup> Accordingly, this paper will not deal with the content of the 1968 Brussels Convention.

### *Lugano I Convention*<sup>19</sup> and the *Lugano II Convention*

This Lugano I Convention is currently in force as between all EU Member States (including Denmark) and the members of the European Free Trade Association (excluding Liechtenstein).<sup>20</sup> The general Lugano regime is almost identical to that of the original 1968

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<sup>14</sup> Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.

<sup>15</sup> See *infra* section 2.1.3.

<sup>16</sup> This Danish opt-out was based on the 1997 Protocol No 5 on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, OJ C340, 10.11.1997.

<sup>17</sup> K. Boele-Woelki, "Katern: Internationaal Privaatrecht", *Ars Aequi*, 2005, p. 5370-5372.

<sup>18</sup> The scope of the Brussels I Regulation is circumscribed by Article 299 EC, which defines the territorial scope of the Treaty. The 1968 Brussels Convention, on the other hand, as an international convention extends to certain overseas territories belonging to various Member States, including certain French overseas territories, as well as the Dutch territory of Aruba. Since those territories are not part of the European Union, the Brussels I Regulation does not apply to them and the Brussels Convention continues to apply to them: ECJ Opinion, 27<sup>th</sup> February 2006, Opinion 1/03, §15.

<sup>19</sup> Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988. The terms Lugano I and Lugano II have been coined for ease of reading. One should be careful not to confuse these terms with those publications in which Lugano II is used to refer to the draft convention to mirror the current provisions of the Brussels Ibis Regulation.

<sup>20</sup> That is to say Iceland, Norway and Switzerland.

Brussels Convention. However, with the coming into force of the Brussels I Regulation, the two regimes have become slightly divergent. As a result, discussions were opened to revise the Lugano I Convention.<sup>21</sup> In March 2007, a final text was agreed upon and it is hoped that the Convention will be open for ratification by the end of 2007. As soon as this draft text is signed and enters into force, the differences between the “Lugano II Convention” and the Brussels I Regulation will be minor, especially with regards the recognition and enforcement of child maintenance awards.

According to the Lugano II Convention, a “judgment given in State bound by this Convention shall be recognised in the other States bound by this Convention without any special procedure being required”.<sup>22</sup> The only exceptions to this principle are those listed in Articles 34 and 35. The grounds are extremely restrictive and non-recognition is only permitted if:<sup>23</sup>

- it would be contrary to public policy;<sup>24</sup>
- the decision was given in default of appearance, or the defendant was not served in sufficient time;<sup>25</sup>
- it would be irreconcilable with a previous judgment from the State in which recognition is sought;<sup>26</sup>
- it would be irreconcilable with a previous judgment from a different State bound by the Lugano Convention or a third State, provided the earlier judgment is recognised in the State addressed.<sup>27</sup>
- the State (bound by the Lugano II Convention) where recognition is sought has, prior to the entry into force of the Lugano II Convention undertaken not to recognise judgments given in other states bound by the Lugano II Convention against defendants

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<sup>21</sup> A. Markus, “Revidierte Übereinkommen von Brüssel und Lugano: Zu den Hauptpunkten”, *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht*, 5/1999, p. 205; M. Jametti Greiner, “Neues Lugano-Übereinkommen:” Stand der Arbeiten”, *Internationales Zivil- und Verfahrensrecht*, 2/2003, p. 113; K. Boele-Woelki, “Katern: Internationaal Privaatrecht”, *Ars Aequi*, 2006, p. 5502-5505.

<sup>22</sup> Article 33, Lugano II Convention.

<sup>23</sup> A further ground for non-recognition is contained in Article 35(1) with regards those decisions that conflict with the jurisdictional rules laid down in Sections 3, 4 or 6 of Title II, Lugano II Convention. However, these provisions do not affect child maintenance claims and therefore have not been dealt with here.

<sup>24</sup> Article 34(1), Lugano II Convention.

<sup>25</sup> Article 34(2), Lugano II Convention.

<sup>26</sup> Article 34(3), Lugano II Convention.

<sup>27</sup> Article 34(4), Lugano II Convention.

domiciled or habitually resident in a third State where the judgment could only be founded on an exorbitant ground of jurisdiction.<sup>28</sup>

Like its earlier counterpart, the Lugano II Convention aims to ensure that the court seized shall not undertake a review of the original court's grounds of jurisdiction, except in extremely rare and clearly defined cases.<sup>29</sup> The enforcement provisions according to the Lugano II Convention are identical to those set forth in the Brussels I Regulation, and are for that reason dealt with in the proceeding section.<sup>30</sup>

### *Brussels I Regulation*<sup>31</sup>

Along identical lines to the Lugano II outlined above, according to the Brussels I Regulation a child maintenance judgment<sup>32</sup> granted or issued in one EU Member State will automatically be recognised<sup>33</sup> in all other Member States,<sup>34</sup> save for limited exceptions.<sup>35</sup> Nonetheless, even under the Brussels I regime, it is still necessary to obtain a declaration of enforceability in the

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<sup>28</sup> Article 35(1), Lugano II Convention, in conjunction with Articles 3(2) and 68, future Lugano II Convention. The exorbitant grounds of jurisdiction referred to in Article 3(2) are subsequently listed in Annex I to the Lugano II Convention.

<sup>29</sup> Although the Lugano I Convention also permits non-recognition on four jurisdictional based grounds not found in the Brussels I Regulation (Article 54B(3) and 57(4), as well as Art. Ia and Ib, Protocol 1), these are generally not relevant for the recognition of child maintenance awards, and have therefore been excluded from the scope of this paper. Moreover, only two of these grounds will remain under the Lugano II Convention (Art. 54B(3), Lugano I is to be found in Art. 64(3), Lugano II, and Art. 57(4), Lugano I in Art. 67(4), Lugano II). Art. Ia, Protocol 1 ceased to have effect on the 31<sup>st</sup> December 1999, and Article Ib, Protocol 1 has been removed altogether.

<sup>30</sup> The only difference relates to Article 50(2), Lugano II Convention which provides that “an applicant who requests the enforcement of a decision given by an administrative authority in Denmark, in Iceland or in Norway in respect of maintenance may, in the State addressed, claim the benefits referred to in [Article 50] paragraph 1 if he presents a statement from the Danish, the Icelandic or the Norwegian Ministry of Justice to the effect that he fulfills the economic requirements to qualify for the grant of complete or partial legal aid or exemption from costs or expenses.”

<sup>31</sup> Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>32</sup> A judgment is defined in Article 32 as “any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court”. This has also been held to include provisional decisions (which is obviously important with respect to child maintenance claims). See, for example, ECJ, *Van Uden/Deco-Line*, 17<sup>th</sup> November 1998, C-391/95 [1998] I ECR 7091 and ECJ, *Mietz/Internship*, 27<sup>th</sup> April 1999, C-99/96 [1999] I ECR 2277.

<sup>33</sup> This normally means that a decision will be granted the same effects of *res judicata* as a domestic judgment: ECJ, *Hoffmann v. Krieg*, 4<sup>th</sup> February 1988, C-145/86 [1988] ECR 645. See also the Jenard Report, Art. 26.

<sup>34</sup> Article 33, Brussels I. Article 53(1) does impose a requirement that a copy of the judgment is delivered by the party seeking recognition in order for the receiving authority to confirm its authenticity.

<sup>35</sup> Article 34 and 35, Brussels I. See N. Bala, J. Oldham and A. Perry, “Regulating cross-border child support within federated systems: The United States, Canada and the European Union”, *Transnational Law and Contemporary Problems*, 15/2005, p. 87-107 at p. 102. For a detailed explanation of the grounds for refusing recognition, see M. Zilinsky, *De Europese Executoriale Titel*, Kluwer: Deventer, 2005, p. 92-123.

country where enforcement is sought.<sup>36</sup> Articles 38 through 56, Brussels I Regulation contain a number of rather technical provisions, although nonetheless highly important, with regards this exequatur procedure.<sup>37</sup> The exequatur procedure is regulated by the law of the Member State in which enforcement is sought,<sup>38</sup> except for those issues dealt with expressly by the Brussels I Regulation.<sup>39</sup>

### *EEO Regulation*<sup>40</sup>

One crucial shortcoming of the regime laid down by the Brussels I Regulation and Lugano II Convention, is the need for a separate enforcement procedure (also known as an *exequatur procedure*). Especially with regards child maintenance claims, where the sums of money to be paid although relatively small can be of enormous importance to the maintenance creditor, this procedure is regarded as a great obstacle to the proper functioning of the recovery and enforcement system. As a result, the European Commission put forward proposals to create an easier and more efficient system for non-contentious claims.<sup>41</sup>

This Regulation, which has been in force since the 21<sup>st</sup> October 2005, is based upon the principle of mutual trust in the administration of justice.<sup>42</sup> Operating alongside Brussels I by providing a speedier and more efficient mechanism for the enforcement non-contentious claims, the EEO Regulation authorises the court making the original judgment<sup>43</sup> to provide a

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<sup>36</sup> Article 38(1), Brussels I.

<sup>37</sup> These rules include, for example, the competent authority to which the enforcement application should be submitted (Article 39(1), in conjunction with Annex II, Brussels I), the competent authority to which an appeal against the declaration of enforceability may be lodged (Article 43(2), in conjunction with Annex III, Brussels I) and the appeal procedure for a subsequent appeal (Article 44, in conjunction with Annex IV, Brussels I). The party wishing to enforce must produce a standard form completed by the issuing competent authority, alongside the judgment itself (as provided for in Article 54, in conjunction with Annex V, Brussels I). For a more detailed discussion of the *exequatur* procedure, see M. Zilinsky, *De Europese Executoriale Titel*, Kluwer: Deventer, 2005, p. 125-142.

<sup>38</sup> Article 40(1), Brussels I.

<sup>39</sup> *Carron v. Germany*, C-198/95 [1986] ECR 2437.

<sup>40</sup> Council Regulation (EC) No. 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims. For general information regarding the EEO Regulation, see T. Rauscher, *Der Europäische Vollstreckungstitel für unbestrittene Forderungen*, GPR Praxis Schriften zum Gemeinschaftsprivatrecht: Munich, 2004; A. Stadler, "Kritische Anmerkungen zum Europäischen Vollstreckungstitel", *Recht der Internationalen Wirtschaft*, 11/2004, p.801-808; M. Zilinsky, *De Europese executoriale titel*, Kluwer, Deventer, 2005.

<sup>41</sup> COM (2004) 173 final.

<sup>42</sup> Since it is based on Title IV, EC Treaty, the EEO Regulation does not apply to judgments, decisions and authentic instruments from Denmark (Article 2(3), EEO Regulation).

<sup>43</sup> Article 6, EEO Regulation. A relevant judgment is one that satisfies the conditions as laid down in Articles 2 (i.e. in the field of civil and commercial matters, including child maintenance) and Article 3 (i.e. an

requesting claimant<sup>44</sup> with a certificate indicating that all the conditions of the EEO Regulation have been satisfied.<sup>45</sup> This EEO certificate then ensures that the judgment may be enforced in all other EU Member States without the need for an *exequatur procedure*. Only in extremely limited circumstances is a judge confronted with an EEO certified judgment permitted to undertake a jurisdictional test.<sup>46</sup>

*1958 Hague Convention<sup>47</sup> and 1973 Hague Convention<sup>48</sup>*

Nineteen States are at present party to the 1958 Hague Convention<sup>49</sup> and twenty States are party to the 1973 Hague Convention.<sup>50</sup> Although the 1973 Hague Convention declares that it shall replace the 1958 Hague Convention, this only applies as regards those States Parties that are party to the 1973 Convention.<sup>51</sup> According to both Hague Conventions, a maintenance decision or settlement made in one contracting State may be recognised and subsequently enforced in another contracting State. However, unlike the 1958 Hague Convention, the 1973 Hague Convention is not restricted to child maintenance claims but instead extends to maintenance obligations arising from “a family relationship, parentage, marriage or affinity,

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uncontested claim). A claim is regarded as uncontested if the debtor has expressly agreed to it (Article 3(1)(a) and (d)), if the debtor has refrained from objecting to it (Article 3(1)(b)), or if the debtor has neither appeared nor been represented at the court hearing, provided that such conduct amounts to a tacit admission under the law of the State of origin (Article 3(1)(c)).

<sup>44</sup> It is explicitly stated in both in COM (2002) 159, as well as COM (2003) 341 that the EEO certificate must be *requested* by the *maintenance creditor*. The judge is not permitted to provide this certificate *ex officio*.

<sup>45</sup> Article 5, EEO Regulation.

<sup>46</sup> Article 6(1)(b), EEO Regulation. This is only permitted if the jurisdiction of the original judge conflicts with sections 3 (matters relating to insurance) or 6 (exclusive jurisdiction), Brussels I Regulation).

<sup>47</sup> Hague Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children

<sup>48</sup> Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations.

<sup>49</sup> Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Liechtenstein, Norway, The Netherlands, Portugal, Slovakia, Spain, Sweden, Switzerland, Suriname and Turkey. Furthermore, Greece and Luxembourg have both signed the Convention without subsequent ratification. For up-to-date ratifications visit: <http://www.hcch.net>.

<sup>50</sup> Australia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Lithuania, Luxembourg, The Netherlands, Norway, Portugal, Slovakia, Spain, Sweden, Switzerland, Turkey and the United Kingdom. Furthermore, Belgium has signed the Convention without subsequent ratification and the Ukraine has acceded without it having entered into force. For up-to-date ratifications visit: <http://www.hcch.net>.

<sup>51</sup> As a result a complex situation has arisen with the 1958 Convention being applicable with regards relations between Austria, Belgium, Hungary, Liechtenstein and Suriname, on the one hand, and the Czech Republic, Denmark, Finland, France, Germany, Italy, The Netherlands, Portugal, Slovakia, Spain and Sweden, on the other, despite the fact that these latter group of countries has also ratified the 1973 Hague Convention. For Estonia, Lithuania and the United Kingdom, the 1973 Convention is only valid insofar as the other country has also ratified the 1973 Hague Convention.



including a maintenance obligation towards an infant who is not legitimate.”<sup>52</sup> According to Articles 4, 7 and 8, 1973 Hague Convention, an indirect jurisdictional test is imposed as a prerequisite to recognition of a child maintenance award. Moreover, even if an award has been made by a judge in accordance with these provisions, recognition may nonetheless be refused if recognition would be manifestly incompatible with the public policy of the State addressed, the decision was obtained by procedural fraud, the proceedings between the same parties and having the same purpose are pending before an authority in the state addressed, or that the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another state.<sup>53</sup>

### **Administrative co-operation**

#### *1956 New York Convention*<sup>54</sup>

Sixty-four States are at present parties to the 1956 New York Convention.<sup>55</sup> Although work had originally been undertaken by UNIDROIT, the Convention was actually drafted by the United Nations Economic and Social Council and signed on the 20<sup>th</sup> June 1956. Unlike the Hague Conventions and the instruments at European Union level, the New York Convention does not contain any substantive rules relating to the recognition and enforcement of maintenance determinations. Instead, the convention establishes a global network of agencies aimed at regulating the administrative aspects of the recovery of transnational maintenance obligations.

The system established by the 1956 New York Convention is, at first glance, relatively straightforward. Each States Parties must designate a body (or bodies) to act as a Transmitting

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<sup>52</sup> Article 1, Hague 1973 Convention.

<sup>53</sup> Article 5, 1973 Hague Convention.

<sup>54</sup> New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance.

<sup>55</sup> Algeria, Argentina, Australia, Austria, Barbados, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Burkina Faso, Cape Verde Islands, Central African Republic, Chile, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Germany, Greece, Guatemala, Haiti, Holy See, Hungary, Ireland, Israel, Italy, Kazakhstan, Kyrgyzstan, Liberia, Luxembourg, Mexico, Moldova, Monaco, Montenegro, Morocco, The Netherlands, New Zealand, Niger, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Serbia, Seychelles, Slovakia, Slovenia, Spain, Sri Lanka, Suriname, Sweden, Switzerland, FYR Macedonia, Tunisia, Turkey, Ukraine, United Kingdom and Uruguay. Furthermore, the following States have signed the Convention, yet not subsequently ratified it: Bolivia, Cambodia, China, Cuba, Dominican Republic and El Salvador. For up-to-date information regarding ratifications visit: <http://untreaty.un.org/English/access.asp>. It is therefore worth noting that Bulgaria, Latvia, Lithuania and Malta are the only EU Member states currently not participating in the 1958 New York Convention.

and Receiving Agencies. A maintenance creditor in a contracting state is therefore able to contact the transmitting agency in the state of his or her residence.<sup>56</sup> The transmitting agency must then communicate this claim to the receiving agency in the contracting state of the maintenance debtor's residence.<sup>57</sup>

Due to the nature of the Convention, it is generally referred to only in passing in case law.<sup>58</sup> On the surface, it would therefore appear that this Convention bestows Contracting States with a smooth-running, well-oiled machine. Yet, upon closer inspection, it would appear that a large number of States Parties do not even fulfil their basic obligations under the Convention, leading to severe operational problems.<sup>59</sup> This oft heard complaint has been the main reason for the Hague Conference to undertake steps to modernise the legislation in this field.<sup>60</sup> The effective functioning of the administrative co-operation established by the New York Convention is reliant upon the efficient operation of the legal procedures according to Article 9 of the Convention. However, the various national acts implementing this convention display enormous differences, leading to a vast array of diverse procedures.<sup>61</sup>

### *1990 Rome Convention*<sup>62</sup>

The 1990 Rome Convention, which was finalised during the Irish Presidency of the Council of Ministers in 1990, is intended to address the problem of administrative assistance as it affects European Union Member States. The main feature of the convention is the establishment of central authorities in each Member State which, in co-operation with each other, are to assist maintenance creditors. These Central Authorities can deal with both incoming and outgoing applications, help with documentation, ascertain the whereabouts of debtors and ensure that moneys due are paid over. In order for the Rome Convention to come

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<sup>56</sup> Article 2(1), 1956 New York Convention.

<sup>57</sup> Article 2(2), 1956 New York Convention.

<sup>58</sup> D. Katanou, "Übereinkommen über die Geltendmachung von Unterhaltsansprüchen im Ausland – „New Yorker-Unterhaltsübereinkommen“, *Familie, Partnerschaft, Recht*, 6/2006, p. 255-258, at p. 256. For example, OLG Schleswig, 14th May 1975, *Die deutsche Rechtsprechung*, 1977, No. 140.

<sup>59</sup> W. Duncan, "The Development of the New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance", *Family Law Quarterly*, 38/2004, p. 663-687, at p. 666.

<sup>60</sup> D. van Iterson, "Het functioneren van de Alimentatieverdragen", *Tijdschrift voor Familie- en Jeugdrecht*, 6/1999, p. 127-130, at p. 127.

<sup>61</sup> Further operational problems in relation to the 1956 New York Convention arise in relation to the substantive scope of the Convention. Different States Parties have interpreted the Convention differently with regards the applicability of the Convention to legal aid cases: D. van Iterson, "Het functioneren van de Alimentatieverdragen", *Tijdschrift voor Familie- en Jeugdrecht*, 6/1999, p. 127-130, at p. 128.

<sup>62</sup> European Convention on the Simplification of Procedures for the Recovery of Maintenance.

into force, the then 12 EU Member States<sup>63</sup> need to ratify the Convention. However, at present only Greece, Ireland, Italy, Spain and the United Kingdom have ratified. With efforts now having turned to a future European Maintenance Regulation and the Hague Maintenance Convention, it is more than likely that this project will never see the light of day.

### III. THE FUTURE SITUATION

#### *European Maintenance Regulation (EMR)*<sup>64</sup>

##### *3.1.1 History*

An investigation into the possibility of creating common procedural rules aimed at simplifying the accelerating the settlement of cross-border maintenance disputes was placed on the European agenda at the meeting of the European Council in Tampere on 15<sup>th</sup> and 16<sup>th</sup> October 1999.<sup>65</sup> This was reaffirmed in the Hague Programme<sup>66</sup> and led to the adoption by the European Council and European Commission of a common Action Plan.<sup>67</sup> Most recently, the shared will to move forward in such an important area as maintenance obligations was highlighted at the informal meeting of Justice and Home Affairs Ministers in Dresden on 15<sup>th</sup> and 16<sup>th</sup> January 2007.<sup>68</sup>

At the same time, the European Commission commissioned a study on the recovery of maintenance claims, and on the 3<sup>rd</sup> November 2003, a first expert meeting took place aimed at identifying the principal aspects for inclusion in a future Green Paper. The Green Paper was published on the 15<sup>th</sup> April 2004<sup>69</sup> and a public hearing scheduled for 2<sup>nd</sup> June 2004.<sup>70</sup> These developments culminated with the publication by the European Commission on the 15<sup>th</sup> December 2005 of a proposal for a Council Regulation on Jurisdiction, Applicable Law,

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<sup>63</sup> That is to say, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom.

<sup>64</sup> Proposed Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations.

<sup>65</sup> COM (2005) 649, p. 2.

<sup>66</sup> 3<sup>rd</sup> March 2005, Official Journal, C53.

<sup>67</sup> Document of the Council of the European Union, No. 9778/2/05 REV 2 JAI 207.

<sup>68</sup> PRES/2007/77, 2794<sup>th</sup> Council Meeting, Luxembourg, 19<sup>th</sup>-20<sup>th</sup> April 2007.

<sup>69</sup> COM (2004) 254.

<sup>70</sup> The consultation is available at: [http://europa.eu.int:8082/comm/justice\\_home/ejn/maintenance\\_claim](http://europa.eu.int:8082/comm/justice_home/ejn/maintenance_claim)

Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations.<sup>71</sup>

### 3.1.2 *Aims*

In drafting this new proposal, the European Union has,

“...[t]he ambition of the proposal is to eliminate all obstacles which still today prevent the recovery of maintenance within the European Union. It will certainly not abolish the economic and social precariousness which afflicts certain debtors and deprives them of employment and of regular income, preventing them from fulfilling their obligations, but it will enable the creation of a legal environment adapted to the legitimate expectations of the maintenance creditors.”<sup>72</sup>

### 3.1.3 *Substantive provisions*

At present, it would appear that political disagreement is the main stumbling block to be overcome in relation to the progression of the proposal. According to the European Commission, this Regulation should be “adopted according to the procedure provided for in Article 67(2) of the Treaty, under the terms of which the Council acts unanimously after consulting the European Parliament”. The European Parliament, on the other hand, and after having consulted the Committee on Civil Liberties, Justice and Home Affairs, is of the opinion that the Regulation should be adopted according to the co-decision procedure laid down in Article 251, EC Treaty.<sup>73</sup> How this dispute will finally be resolved is, as yet, unknown.

The draft Regulation will make important changes to the existing framework regarding the enforcement of child maintenance orders. If enacted, the EMR will entirely revoke the existing regime as laid down by the Brussels I Regulation and the EEO Regulation, with

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<sup>71</sup> COM (2005) 649.

<sup>72</sup> COM (2005) 649, p. 3, §1.2.

<sup>73</sup> As provided for in Article 67(5), EC Treaty.

regards *all* maintenance obligations.<sup>74</sup> Perhaps the greatest change is with respect to the current *exequatur* procedure as required for contentious claims and non-contentious claims not falling within the scope of the EEO Regulation. Although, as stated above, the EEO Regulation has abolished the *exequatur* procedure for uncontested child maintenance claims, the EMR would abolish the *exequatur* procedure in relation to *all child maintenance claims*,<sup>75</sup> Subject to the condition that the judgment is enforceable in the Member State where it was issued, it will be recognised *and enforced* without an intermediate measure being required.<sup>76</sup> This will also be the case, notwithstanding an appeal permitted by national law.<sup>77</sup> Furthermore, any review as to the substance of the decision will not be permitted during the enforcement procedure.<sup>78</sup> Nonetheless, the enforcing Member State will be able to limit the impact of the order to those assets which are deemed to be attachable in that State.<sup>79</sup>

Moreover, as a result of the EMR, a future maintenance creditor will only need produce a copy of the decision to be enforced, as well as a standardised extract as listed in Annex I to the Regulation.<sup>80</sup> Consequently, *no translation* of the foreign decision will be required.<sup>81</sup> At this moment in time, no indication is provided with regards to whom the enforcement procedure should be addressed. Since enforcement of a foreign maintenance claim in The Netherlands, for example, can be executed by the *Landelijk Bureau Inning Onderhoudsgelden* (LBIO), the question remains whether the choice of execution form lies with the maintenance creditor or whether the EMR will provide a list of authorised competent authorities for the execution of the judgment.

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<sup>74</sup> Proposed Article 48(1), EMR. See further, G. Smith, “The EU Commission’s Draft Regulation on Maintenance Obligations”, *International Family Law*, 2006, p. 72-76, at p. 73; K. Boele-Woelki, “Katern 98: Internationaal Privaatrecht”, *Ars Aequi*, 2006, p. 5440-5441; K. Gebauer, “Vollstreckung von Unterhaltstiteln nach der EuVTVO und der geplanten Unterhaltsverordnung”, *Familie, Partnerschaft, Recht*, 6/2006, p. 252-255, at p. 254-255.

<sup>75</sup> Proposed Article 25, EMR.

<sup>76</sup> Only extremely limited possibilities for refusal or suspension of enforcement exist according to Proposed Article 33, EMR. By virtue of the word “only”, this list of refusal grounds is also exclusive.

<sup>77</sup> Proposed Article 26, EMR.

<sup>78</sup> Proposed Article 32(1), EMR.

<sup>79</sup> Proposed Article 32(2), EMR.

<sup>80</sup> Proposed Article 28, 1<sup>st</sup> sentence, EMR.

<sup>81</sup> Proposed Article 28, 2<sup>nd</sup> sentence, EMR.

### 3.1.4 Central Authorities

As stated in recital 21, the EMR provides for the creation of a network of Central Authorities in all Member States. These “new” authorities are to provide for the exchange of information to ensure that debtors are located and their assets properly evaluated and assessed.<sup>82</sup> According to Article 41(2), EMR a maintenance creditor will be provided with the possibility of being represented by the central authority of the Member State on the territory of which the court seised in a matter relating to maintenance is located or the central authority of the Member State of enforcement.<sup>83</sup> Further comprehensive details regarding the proposed co-operation mechanisms are however absent in this proposal, since it is hoped that this will be coordinated with the forthcoming Hague Maintenance Convention.

These new central authorities, in providing access to the information will can facilitate the recovery of the child maintenance will be required to provide, at least, the administration and authorities in other Member States access to the following areas: tax and duties, social security, population registers, land registers, motor vehicle registrations and central banks.<sup>84</sup>

### *Hague Maintenance Convention (HMC)*<sup>85</sup>

#### 3.2.1 History

In 1995, a Special Commission was established to identify the problems associated with the working of the international instruments in the field of maintenance obligations. Although, a number of clear, identifiable problems were uncovered, the Special Commission took the

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<sup>82</sup> Proposed Article 41(1), EMR.

<sup>83</sup> All services provided by the Central Authority will also need to be provided free of charge to the maintenance creditor: Proposed Article 42(3), EMR. To aid the process by which these claims may be processed, the maintenance creditor will also be provided with the opportunity to proceed through the court of the place of his or her habitual residence, which will assist in ensuring that the co-operation operates properly: Proposed Article 42(1), EMR

<sup>84</sup> Proposed Article 44(2), EMR. This provision does not, however, require Member States to create new records: Proposed Article 44(3), EMR. However, the simple fact that access to these records may be required in transnational cases has already raised questions of privacy. A number of safeguards are already in place, see Proposed Articles 45-47, EMR. However, this has not silenced all calls for review: Opinion of the European Data Protection Supervisor on the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *Official Journal*, 2006, C-242/14.

<sup>85</sup> Proposed Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

view that a major reform of these instruments was not necessary.<sup>86</sup> Nonetheless, discontent with the functioning of the current international instruments did not subside and in April 1999 a special commission was held to examine the practical operation of the 1958 New York Convention, as well as the 1958 and 1973 Hague Conventions.<sup>87</sup> As a result of this special commission, work commended on the drafting of a new international instrument to deal with the international recovery of child support and other forms of family maintenance.<sup>88</sup>

### 3.2.2 Aims

According to the explanatory preparatory documents accompanying the draft Convention, the Hague Maintenance Convention aims to create:

- A system capable of processing request swiftly, in particular making full use of the new communication technologies;
- A cost effective system. The costs involved should not be disproportionate, having regard to the relatively modest level of most maintenance orders. It should be seen to give good value for money when comparing administrative costs against the amounts of maintenance recovered;
- A system whereby the obligations imposed on co-operating States are not be too burdensome and take into account the differing levels of development and resource capabilities. Although, no purpose is served by devising a cheap, yet ineffective system;
- A system flexible enough to provide effective links between diverse national systems, administrative or judicial, for the collection, assessment and enforcement of maintenance;

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<sup>86</sup> In general it was felt that this area suffers from a certain degree of *overkill*. Alongside the global instruments mentioned in this paper, many regional international conventions also exist, such as the Inter-American Convention on Support Obligations (Done at Montevideo, 15<sup>th</sup> July 1989). The 1989 Montevideo Convention has been ratified by Argentina, Belize, Bolivia, Brazil, Costa Rica, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, Uruguay (and further signed, but not ratified by Colombia, Haiti and Venezuela). There are furthermore hundreds of bilateral agreements between States, e.g. the United States of America and The Netherlands Bilateral Agreement for the Enforcement of Maintenance (Support) Obligations, signed at Washington 30<sup>th</sup> May 2001 and entered into force 1<sup>st</sup> May 2002.

<sup>87</sup> The Commission also investigated the operation of the 1956 and 1973 Hague Conventions with regards the applicable law in maintenance obligations. These Conventions fall outside the scope of this paper.

<sup>88</sup> The first round of talks commenced in May 2003, the second in June 2004, the third in April 2005, the fourth in June 2006, the fifth in May 2007. A diplomatic session is scheduled to take place from the 5<sup>th</sup> – 23<sup>rd</sup> November 2007. For information regarding the initial developments, see W. Duncan, “The development of the new Hague Convention on the international recovery of child support and other forms of family maintenance”, *Family Law Quarterly*, 38/2004, p. 663-687.

- A efficient system, in the sense that unnecessary and over complex formalities and procedures are avoided;
- A user-friendly, easy to understand and transparent system.<sup>89</sup>

### 3.3.3 *Substantive Provisions*

According to the preparatory work done by the Hague Conference, it was clear that in order for a future Convention to be successful, Contracting States must have confidence in the enforcement mechanisms in place in reciprocating States. Unlike the EMR, a child maintenance order falling within the substantive, geographical and temporal scope of the HMC,<sup>90</sup> will be recognised if it satisfies the indirect jurisdictional test conditions laid down in proposed Article 17, HMC. This Article provides for a compromise between those jurisdictions (e.g. European Union Member States) that adhere to the creditor’s jurisdictional principle and other states (e.g. the United States of America) that adhere to a fact based approach, whereby the jurisdiction of the court of origin is tested according to the jurisdictional rules of the requested court.<sup>91</sup> Although the enforcement procedure itself is to be governed by national law,<sup>92</sup> a number of common enforcement measures have been proposed.<sup>93</sup> These measures are, however, still regarded as tentative, any may still be removed from the final version of the convention.

Like the proposed EMR, the HMC also opts for a centralised system of “central authorities” designated by each Contracting State.<sup>94</sup> The exact delineation of the functions, duties and obligations of these Central Authorities has been crucial to the ongoing discussions during the meetings of the Special Commission.<sup>95</sup> The concept of Central Authorities emanates from the existing system of central authorities established under the auspices of the 1980 Hague Convention on the Civil Aspects of International Child Abduction. A number of discussions

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<sup>89</sup> Preliminary Document No. 1 of June 2002, Information Note and Questionnaire concerning a New Global Instrument on the International Recovery of Child Support and Other forms of Family Maintenance.

<sup>90</sup> Proposed Article 2, 3 and 55, HMC.

<sup>91</sup> See , for example, the explicit reference to the creditor’s jurisdictional principle in proposed Article 17(1), HMC and the explicit reference to the fact based approach in proposed Article 17(3), HMC.

<sup>92</sup> Proposed Article 30(1), HMC.

<sup>93</sup> Proposed Article 30(2), HMC: (a) wage withholding, (b) garnishment from bank accounts and other sources, (c) deductions from social security payments, (d) lien on or forced sale of property, (e) tax refund withholding, (f) withholding or attachment of pension benefits, (g) credit bureau reporting and (h) denial, suspension or revocation of various licenses (for example, driving licenses).

<sup>94</sup> Proposed Article 1(a), HMC.

<sup>95</sup> Proposed Articles 5-8, HMC.



have already presented serious problems in relation, for example, to the role the Central Authority will play in relation to the facilitation and monitoring of enforcement procedures and assisting in obtaining provisional measures, such as freezing a bank account.<sup>96</sup>

#### IV. CONCLUSIONS

The international recovery of child maintenance payments is of crucial importance to all those concerned. American studies indicate, for example, that more than 60% of non-compliant maintenance debtors assert reasons other than insufficient financial resources for non-compliance with the maintenance order.<sup>97</sup> In addition to financial hardship, non-receipt of payment may also be attributable to an ineffective recovery system. The current mechanisms for the international recovery of child maintenance in Europe have consistently been identified as unsatisfactory.<sup>98</sup> Two major developments purport to change this situation: the Hague Maintenance Convention and the European Maintenance Regulation. Although the European Union states its intent to cooperate closely with the work currently being undertaken at the Hague Conference, it is clear that both organisations are working independently of each other.

Although it is important to commend these organisation on the vital contribution that their work will have to improve the enforcement rate in transnational child maintenance cases, it is nonetheless crucial that any initiative taken is done so on the basis of extensive comparative legal and practical research. In this perspective, the question must be posed whether sufficient research has been conducted into *how* this network if Central Authorities is to operate in practice. The fact that a similar network has been successful in fields such as international child abduction and international adoption does not necessarily mean that a similar network will be equally successful with respect transnational child maintenance recovery. The continuing nature of child maintenance payments, the fluid nature of decisions as a result of changing circumstances and the small amounts of money often involved are just three concerns that could be raised against the huge financial impact such a network will have on the enforcement apparatus of European Union Member States and Hague Convention Contracting States.

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<sup>96</sup> A procedure that is available for example according to the proposed EMR: proposed Article 35, EMR.

<sup>97</sup> S. Dubey, "A study of reasons for non-payment of child support by non-custodial parents", *Journal of Sociology and Social Welfare*, Spring 1996.

<sup>98</sup> COM (2004) 254.

In a field already burdened with overzealous international legislatures, it is important to ensure that any attempt to “simplify the procedure” and “accelerate payment” does not turn into a hollow promise and lead to an overly bureaucratic and time-consuming paperwork trail. For in this field more than most, it is ultimately the “financially vulnerable”<sup>99</sup> how will suffer.

**Contact:**     **I.Curry-Sumner@law.uu.nl**  
Dr. Ian Curry-Sumner,  
University Lecturer and Researcher,  
Molengraaff Institute for Private Law,  
Nobelstraat 2a,  
3512 EN Utrecht  
The Netherlands  
Tel: +31 30 253 7184  
Fax: +31 30 253 7203

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<sup>99</sup> H. Stalford, “Old Problems, New Solutions?” EU Regulation of cross-national child maintenance”, *Child and Family Law Quarterly*, 3/2003, p. 269.

