International Recovery of Child Support: Are Central Authorities the way forward?

Ian Curry-Sumner[1]

I. Introduction

As Europe continues to develop and society continues to change, existing legal frameworks 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),[2] 136,332 in the UK (53%)[3] and approximately 87,000 in France (65%).[4]

With Europe witnessing a steadily increasing divorce rate,[5] these figures are only set to rise. Similar problems are equally manifest with respect to separating unmarried couples,[6] 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,[7] ensuring that child maintenance is increasingly the only surviving financial obligation of any intimate relationship post-separation.[8]

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1 UCERF, Molengraaff Institute for Private Law, Utrecht University, The Netherlands. This contribution was made possible by an imovational research grant from the Dutch Scientific Organisation.

2 Centraal Bureau voor Staistieken (CBS), online database, 2007.

3 Office of National Statistics (ONS), »Divorces: Couples and children of divorced couples, 1981, 1991 and 2001-2005«, *Population Trends*, 2005, No. 125.

4 Z. Belmokhtar, *Les divores 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.

5 Eurostat, *Europe in figures*, Luxembourg: European Commission, 2007, p. 70.

6 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.

7 J. Eekelaar, *Regulating Divorce*, Oxford: Clarendon Press, 1991, p. 90.

8 J. Teachman and K. Paasch, »Financial impact of divorce on children and their families«, *Future of Children*, 4/1994, p. 63-83.

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.[9] Furthermore, according to official statistics, the net migration to the EU in 2004 totalled more than 1.8 million.[10]

Alongside this migration, approximately 4% of those entering into marriage are of differing nationalities.[11] These two distinct, yet interrelated developments (on the one hand the increasing importance of child maintenance and the internalisation of families on the other), have coalesced to ensure that an ever-increasing number of child maintenance payments involve transnational elements.

After describing the various international and European instruments currently operating with respect to child maintenance (section III), attention will be devoted on the problems experienced in this field (section IV) that have led to the calls for change (section V).

In the two new instruments proposed, namely the Hague Maintenance Convention and the European Maintenance Regulation, both have chosen to introduce a system of Central Authorities. Section VI will focus on the experience of such a network from other international and European instruments.

II. Current Framework

Before dealing with these proposed instruments, attention will first be paid to the existing instruments in this field. These can be divided into two main categories:

- Those operating at the international level (section III.1) and
- those operating at the European level (section III.2).

9 Eurostat, *The social situation in the European Union 2004*, Luxembourg: European Commission, 2005.

10 Eurostat, *Europe in figures*, Luxembourg: European Commission, 2007, p. 76.

11 SEC (2005) 1629, p. 6.

1. International Framework[12]

1.1 1956 New York Convention[13]

64 States are at present party to the 1956 New York Convention.[14] Although work had originally been undertaken by UNIDROIT, the Convention was eventually drafted by the United Nations Economic and Social Council and signed on the 20th June 1956. Unlike other instruments in this field,[15] this 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 and/or receiving agency (in practice these are often referred to as the »contacts«). A maintenance creditor in a contracting state is, therefore, able to contact the transmitting agency in the state of his or her residence.[16] The transmitting agency must then communicate this claim to the receiving agency in the contracting state of the maintenance debtor's residence.[17] The receiving agency is then obliged to »take all appropriate steps for the recovery of maintenance, including the settlement of the claim, and, where necessary, the institution

12 Another important convention has also been concluded outside of Europe, namely Inter-American Convention on Support Obligations of 15th July 1989 (also known as the Montevideo Convention).

13 New York Convention of 20th June 1956 on the Recovery Abroad of Maintenance.

14 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 1956 New York Convention.

15 See sections III.1.a and III.2.

16 Article 2 (1), 1956 New York Convention.

17 Article 2 (2), 1956 New York Convention.

and prosecution of an action for maintenance and the execution of any order or other judicial act for the payment of maintenance.«[18]

On the surface, it would 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.[19] However, due to the nature of the Convention (i.e. its rather technical and organisational structure), it is generally only referred to in passing in case law.[20] The oft-heard complaint concerning the operational problems was the main reason for the Hague Conference to undertake steps to modernise the legislation in this field.[21] The effective functioning of the administrative co-operation established by the 1956 New York Convention is reliant upon the efficient operation of the legal procedures according to Article 6 of the Convention. However, the various national acts implementing this convention display enormous differences, leading to a vast array of diverse procedures.[22]

1.2 1958 Hague Convention[23] and 1973 Hague Convention[24]

19 States are at present party to the 1958 Hague Convention[25] and 22 States are party to the 1973 Hague Convention.[26] Although the 1973 Hague Con-

18 Article 6 (1), 1956 New York Convention.

19 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.

20 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 Rechtsprechund*, 1977, No. 140.

21 D. van Iterson, »Het functioneren van de Alimentatieverdragen«, *Tijdschrift voor Familie- en Jeugdrecht*, 6/1999, p. 127-130, at p. 127.

22 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, *ibid*, at p. 128.

23 Hague Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children.

24 Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations.

25 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.

26 Australia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece,

vention declares that it shall replace the 1958 Hague Convention, this only applies as regards those States Parties that are party to the 1973 Convention.[27] 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, including a maintenance obligation towards an infant who is not legitimate.«[28] 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.[29]

Italy, Lithuania, Luxembourg, The Netherlands, Norway, Poland Portugal, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine 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.

27 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. However, the latter group of nations has also ratified the 1973 Hague Convention. Therefore, for claims as between the latter group, the 1973 Convention is applicable. For Estonia, Greece, Lithuania, Poland, Ukraine and the United Kingdom, the 1973 Convention is only valid insofar as the other country has also ratified the 1973 Hague Convention.

28 Article 1, 1973 Hague Convention.

29 Article 5, 1973 Hague Convention.

2. *European Framework*[30]

2.1 1968 Brussels Convention[31]

Although in 2001, the Brussels I Regulation[32] came to replace the 1968 Brussels Convention for 14 Member States,[33] this was not the case for Denmark.[34] Consequently, questions of jurisdiction between Denmark and the other EU Member States continued to be governed by the Brussels Convention. However, on the 19th October 2005, the European Community concluded an agreement with Denmark ensuring that the Regulation is also to be applied in relation to Denmark.[35] The agreement entered into force on the 1st 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 1st July 2007.[36] Accordingly, this paper will not deal with the content of the 1968 Brussels Convention.

2.2 Lugano I Convention[37] and the Lugano II Convention

The 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).[38] The general Lugano regime is

30 This paper will not discuss the 1990 Rome Convention, which has not and more-than likely, will never come into force.

31 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.

32 See *infra* section 4.2.3.

33 The Brussels I Regulation has been extended to the new Member States that acceded in 2004 and 2007.

34 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.

35 K. Boele-Woelki, »Katern: Internationaal Privaatrecht«, *Ars Aequi*, 2005, p. 5370-5372.

36 The scope of the Brussels I Regulation is circumscribed by Article 299 EC, which defines the territorial scope of the Regulation. 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, 27th February 2006, Opinion 1/03, §15. These issues will, however, remain outside the scope of this paper.

37 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 IIbis Regulation.

38 That is to say Iceland, Norway and Switzerland.

almost identical to that of the original 1968 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.[39] In March 2007, a final text was agreed upon and the Convention was signed on the 30th October 2007. As soon as this convention enters into force,[40] 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 a State bound by this Convention shall be recognised in the other States bound by this Convention without any special procedure being required.«[41] 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 it would be contrary to public policy,[42] the decision was given in default of appearance, or the defendant was not served in sufficient time,[43] it would be irreconcilable with a previous judgment from the State in which recognition is sought,[44] 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,[45] or 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 domiciled or habitually resident in a third State where the judgment could only be founded on an exorbitant ground of jurisdiction.[46, 47]

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39 A. Markus, »Revidierte Übereinkommen von Brüssel und Lugano: Zu den Hauptpunkten«, *Schweizerische Zeitschrift für Wirtschaft- 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.

40 This is not expected until 1st January 2010, at the very earliest. See for press release, http://www.bj.admin.ch/bj/en/home/themen/wirtschaft/internationales_privatrecht/lugano_uebereinkommen/o.html.

41 Article 33, Lugano II Convention.

42 Article 34 (1), Lugano II Convention.

43 Article 34 (2), Lugano II Convention.

44 Article 34 (3), Lugano II Convention.

45 Article 34 (4), Lugano II Convention.

46 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.

47 A further ground for non-recognition is contained in Article 35 (1) with regards those

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.[48] The enforcement provisions according to the Lugano II Convention are almost identical to those set forth in the Brussels I Regulation.[49]

2.3 Brussels I Regulation[50]

Along identical lines to the Lugano II outlined above, according to the Brussels I Regulation a child maintenance judgment[51] granted or issued in one EU Member State will automatically be recognised[52] in all other Member States,[53] save for limited exceptions.[54] Nonetheless, even under

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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.

48 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 31st December 1999, and Article Ib, Protocol 1 has been removed altogether.

49 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.«.

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

51 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*, 17th November 1998, C-391/95 [1998] I ECR 7091 and ECJ, *Mietz/Internship*, 27th April 1999, C-99/96 [1999] I ECR 2277.

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

53 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.

54 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

the Brussels I regime, it is still necessary to obtain a declaration of enforceability in the country where enforcement is sought.[55] Articles 38 through 56, Brussels I Regulation contain a number of rather technical provisions, although nonetheless highly important, with regards this exequatur procedure.[56] The exequatur procedure is regulated by the law of the Member State is which enforcement is sought,[57] except for those issues dealt with expressly by the Brussels I Regulation.[58]

2.4 European Enforcement Order Regulation[59]

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 (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.[60]

This Regulation, which has been in force since the 21st October 2005, is based upon the principle of mutual trust in the administration of jus-

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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.

55 Article 38 (1), Brussels I.

56 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, *ibid*, p. 125-142.

57 Article 40 (1), Brussels I.

58 *Carron v. Germany*, C-198/95 [1986] ECR 2437.

59 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.

60 COM (2004) 173 final.

tice.[61] 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[62] to provide a requesting claimant[63] with a certificate indicating that all the conditions of the EEO Regulation have been satisfied.[64] 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 undertaken a jurisdictional test.[65]

III. Current Problematic Areas

According to both the Hague Conference and the European Union, the current system of maintenance enforcement is suffering from numerous problems. It is, nonetheless, possible to categorise the problems that have been identified by these supranational organisations. At the current stage of this research project, it is not possible to provide a complete inventory of **all** current problematic aspects. However, it is possible to provide a summary and categorisation of the most pressing issues.

Firstly, a recurring problem is that the creditor is often unaware of his or her rights with respect to transnational maintenance recovery. Many maintenance creditors believe, incorrectly, that they have no chance of receiving maintenance payments if their ex-partner has emigrated, or do not even wish to pursue the case. Secondly, from the extensive reports

61 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).

62 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 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)).

63 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*.

64 Article 5, EEO Regulation.

65 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.

compiled by the Hague Conference, it is clear that at present the national enforcement agencies do not transmit all the documents required by the foreign agency. This occurs for numerous reasons, not least of which because the transmitting agencies are often unaware of the documents that are required by the receiving agency.

Furthermore, as in every international case, translations are highly problematic. According to Article 17(5), 1973 Hague Convention, the party seeking enforcement of the decision must furnish a translation of various documents, including (a) the decision, (b) any document needed to prove that the decision is no longer subject to the ordinary forms of review, (c) if rendered by default, any document required to prove that the notice of the institution of proceedings was properly served, and (d) where appropriate, any document necessary to prove that he/she obtained legal aid or exemption from costs. As a result of this requirement, a lot of material, sometimes even unnecessarily, requires translation, causing delays in the transmission procedure.[66]

No system of administrative cooperation is provided for according to the Hague Conventions. Although the absence of such provisions is perhaps to be accounted for due to the existence of the 1956 New York Convention, the heterogeneous nature of these sources can and does indeed cause operational problems.[67] This is especially the case because the role of the transmitting agency can be very different in each contracting state. In some jurisdictions the agency is a department of a ministry, in others an independent governmental agency and in others simply a location to which documents and files must be sent.

Fourthly, each contracting state is under an obligation to ensure that the relevant authorities perform the tasks assigned to it. Although less relevant for transnational claims between European States, the operation of the 1956 New York Convention has been disrupted by the fact that many jurisdictions have failed to perform even the basic duties entrusted to them according to the Convention.[68] However, if when this occurs, no action is available for the maintenance creditor or the transmitting agency

66 General Conclusions, §14.

67 Hague Conference, »Maintenance Obligations. Note on the desirability of revising the Hague conventions on Maintenance Obligations and including in a new instrument rules on judicial and administrative co-operation«, (1999) Preliminary Document No. 2, p. 12, §15b.

68 Hague Conference, *Towards a new global instrument on the international recovery of child support and other forms of family maintenance*, (2003) Preliminary Document No. 3, p. 15.

to ensure that these tasks are in fact executed. Fifthly the current regulatory framework has caused certain issues in relation to the modification of maintenance decisions. Since the 1958 and 1973 Hague Conventions contain no rules on direct jurisdiction, it would appear that the question which authority (alongside the authority in the country of origin) is competent to modify a maintenance order is left unanswered. However, it has been suggested that Article 7 (1), 1973 Hague Convention, in providing rules indirectly recognising the competency of the authorities in the State where the debtor has his or her habitual residence, allows the authorities in this State to also modify an order.[69]

Finally, there is the recurring problem of the wandering debtor. Although obviously not really a problem **of** the debtor, one of the main problems in the effective enforcement of maintenance claims emanates from the inability of the authorities to locate the debtor. If the maintenance creditor lives not where the maintenance debtor has moved to, the whole recovery procedure could be severely delayed, and possibly even frustrated altogether.[70] The same also applies to gaining information regarding the debtor's assets and income.[71]

IV. Proposed instruments

1. European Maintenance Regulation (EMR)[72]

An investigation into the possibility of creating common procedural rules aimed at simplifying and accelerating the settlement of cross-border maintenance disputes was placed on the European agenda at the meeting of the European Council in Tampere on 15th and 16th October 1999.[73] This was reaffirmed in the Hague Programme[74] and led to the adoption

69 M. PELICHET, »Note on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance«, (1995) Preliminary Document No. 1, §95.

70 SEC (2005) 1629, p.4.

71 SEC (2005) 1629, p.4.

72 Council Regulation (EC) No. 4/2009 of 18th December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations.
This contribution was written before the publication of the European Maintenance Regulation. Although references have been amended, extensive discussion of the Chapter is not possible.

73 COM (2005) 649, p. 2.

74 3rd March 2005, Official Journal, C53.

by the European Council and European Commission of a common Action Plan.[75] 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 15th and 16th January 2007.[76]

At the same time, the European Commission commissioned a study on the recovery of maintenance claims, and on the 3rd 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 15th April 2004[77] and a public hearing scheduled for 2nd June 2004.[78] These developments culminated with the publication by the European Commission on the 15th December 2005 of a proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters relating to Maintenance Obligations.[79]

The Regulation was passed on the 18th December 2008 and will enter into force on the 18th June 2011. The Regulation will make important changes to the existing framework regarding the enforcement of child maintenance orders. When in force, the EMR will entirely revoke the existing regime as laid down by the Brussels I Regulation and the EEO Regulation, with regards **all** maintenance obligations.[80] 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 will abolish the exequatur procedure in relation to **all child maintenance claims**,[81] 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 re-

75 Document of the Council of the European Union, No. 9778/2/05 REV 2 JAI 207.

76 PRES/2007/77, 2794th Council Meeting, Luxembourg, 19th-20th April 2007.

77 COM (2004) 254.

78 The consultation is available at: http://europa.eu.int:8082/comm/justice_home/ejn/maintenance_claim

79 COM (2005) 649.

80 Article 68 (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 Unterhaltsverordung«, *Familie, Partnerschaft, Recht*, 6/2006, p. 252-255, at p. 254-255.

81 Article 17 (2) EMR. This is subject to that Member State having ratified the 2007 Hague Protocol.

quired.[82] This will also be the case, notwithstanding an appeal permitted by national law. Furthermore, any review as to the substance of the decision will not be permitted during the enforcement procedure.[83] 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.

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.[84] Consequently, **no translation** of the foreign decision will be required.[85] 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.

As stated in recital 31, 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.[86] 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.[87] Further comprehensive details regarding the proposed co-operation mechanisms are, however, absent, since it is hoped that this will be coordinated with the forthcoming Hague Maintenance Convention.

In the original proposal, these new central authorities, in providing access to information to facilitate the recovery of child maintenance could

82 Only extremely limited possibilities for refusal or suspension of enforcement exist according to Article 21, EMR. By virtue of the word »only«, this list of refusal grounds is also exclusive.

83 Article 42, EMR.

84 Article 20 (1), EMR.

85 Article 20 (2), EMR..

86 Proposed Article 50, EMR.

87 All services provided by the Central Authority will also need to be provided free of charge to the maintenance creditor: Article 44 (1), 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.

have been 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.[88] According to the final text, this list is not mentioned.

2. *Hague Maintenance Convention (HMC)*[89]

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 view that a major reform of these instruments was not necessary.[90] 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 1956 New York Convention, as well as the 1958 and 1973 Hague Conventions.[91] As a result of this special commission, work commenced on the drafting of a new international instrument to deal with the international recovery of child support and other forms of family maintenance.[92] The Convention was concluded in The Hague on the 23rd

88 Proposed Article 44 (2), EMR. This provision did 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. This issue would appear to have been solved with reference to Directive 95/46/EC.

89 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.

90 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, 15th July 1989). This 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 30th May 2001 and entered into force 1st May 2002.

91 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.

92 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

November 2007. At present, only the United States of America and Burkina Faso have signed.

According to the preparatory work conducted 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,[93] will only 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. the EU) that adhere to the creditor's jurisdictional principle and other states (e.g. the USA) 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.[94] Although the enforcement procedure itself is to be governed by national law,[95] a number of common enforcement measures have been proposed.[96]

Like the EMR, the HMC also opts for a centralised system of central authorities designated by each Contracting State.[97] 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.[98] 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 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

is scheduled to take place from the 5th–23rd 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.

93 Article 2, 3 and 55, HMC.

94 See, for example, the explicit reference to the creditor's jurisdictional principle in Article 17 (1), HMC and the explicit reference to the fact based approach in Article 17 (3), HMC.

95 Article 30 (1), HMC.

96 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).

97 Article 1 (a), HMC.

98 Articles 5–8, HMC.

and assisting in obtaining provisional measures, such as freezing a bank account.[99]

V. Experience with Central Authorities

Both instruments have laudable aims with respect to the proposed administrative co-operation system. Both instruments set forth a system whereby the formalities that need to be followed are simple and cost-effective, whereby the amount of money spent in attempting to enforce and recover a claim is proportionate to the amount of maintenance actually recovered. Furthermore, any procedures should be able to take account of the variety and diversity in national child maintenance systems, both with regard to the determination, as well as the enforcement of such claims. And finally, any system should attempt to ensure tat the maintenance creditor is provided with a rapid conclusion of their case. There are few us who would not wish to support these aims. The ultimate discussion is, however, how best to achieve these aims.

Although both proposals involve the creation of a network of Central Authorities, as yet little attention has been paid to the actual effectiveness of such a system. Will this network be sufficient to deal with the current problems? Is it actually the best possible administrative network or organisation for these problems? It has been assumed that because such a network has functioned successfully in other areas, such as international adoption and child abduction, it will, therefore, be suitable to this area too.[100] However, child maintenance cases are fundamentally different since they involve an ongoing, long-term relationship. Furthermore, the volume of cases in this field is very different the volume of cases in the field of adoption or abduction.

This organisational structure is, however, nothing new. It has been utilised in numerous international instruments. It would, therefore, seem expedient to investigate the experience of such an administrative system in other fields of law. At present, this research project has focused on the experience in six Hague conventions that have established a system of Central Authorities, as well as four Regulations at European level. These

99 A procedure that is available for example according to the proposed EMR: Article 35, EMR.

100 Hague Conference, *Hague Preliminary Draft Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, (2007) Preliminary Document 32, p.20, §71.

instruments can be divided into two main fields of law, namely family law and procedural law.[101]

With this track record and history with the organisational structure of central authorities, it is interesting to note that from examining the evaluative reports of all of these instruments, a system of Central Authorities has far from solved all of the issues of any given problem. The same may also be true of child maintenance, especially when one considers that child support recovery is characteised by the exceptionally high volume of cases and the long duration of maintenance claims, when compared to the other fields where central authorities have been utilised.

Since each central authority remains an operating organ within a national legal system, the discrepancy in the application of the rules will remain. Obviously, with a European regulation, the rules are to be applied uniformly, but procedural uniform application in practice will be very difficult to ensure when the organs themselves will have different legal positions in the national legal systems, as already explained. Although space restrictions prevent a full discussion of all of the issues that will remain with a system of central authorities, it is important to be aware of the crucial defect of such a system, that being in the location of the debtor and the ascertainment of the debtor's assets.

Even if each country in the EU has created a central authority responsible for incoming and outgoing maintenance claims, the transmitting agency will still need to transmit the claim to the relevant foreign agency

101 Convention of 15th November 1965 on the service abroad of judicial and extrajudicial document in civil or commercial matters, Convention of 18th March 1970 on the taking of evidence abroad in civil or commercial matters, Convention of 25th October 1980 on the civil aspects of international child abduction, Convention of 29th March 1993 on the protection of children and co-operation in respect of inter-country adoption, Convention of 19th October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children and the Convention of 13th January 2000 on the international protection of adults. In the European Union the four Regulations are Council Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13th November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters and repealing Council Regulation (EC) No. 1348/2000, Council Regulation (EC) No. 1206/2001 of 28th May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, Council Regulation Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 and Council Regulation (EC) No 2006/2004 on Consumer Protection Cooperation .

in order to ensure effective recovery. If the maintenance creditor has no idea where the debtor is residing, the fundamental problem of locating the debtor will remain. Bearing in mind the principle of free movement of persons in the EU, locating a wandering debtor is obviously an acute problem and is a problem that is only set to worsen.

VI. Conclusions

Over the coming years, it is this author's intention to investigate this issue further with respect to the other ways in which the current international recovery problems in the European Union can be solved using alternative organisational structures. One option to some of the problems that will remain after the introduction of central authorities would be to provide more guidance with respect to the legal status of the central authorities.

I personally feel that moving towards a central parent locator system would be advantageous to all. Obviously, any step would have to be made in close cooperation with the European Data Protection Supervisor, but is not outside the realms of possibilities, since Europol already operates according to these lines. The ultimate goal of a single European Maintenance Agency with branches in the various Member States is also a possible solution, although one which at present is perhaps too ambitious. Nonetheless, these options should not be disregarded prematurely.