



Universiteit
Leiden
The Netherlands

Something old, something new, something international and something askew

Curry-Sumner, I.; Vonk, M.J.; Atkin, B

Citation

Curry-Sumner, I., & Vonk, M. J. (2012). Something old, something new, something international and something askew. In B. Atkin (Ed.), *International Survey of Family Law*. Bristol: Jordan Publishing. Retrieved from <https://hdl.handle.net/1887/33466>

Version: Not Applicable (or Unknown)

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/33466>

Note: To cite this publication please use the final published version (if applicable).

Something old, something new, something international and something askew

Ian Curry-Sumner¹ and Machteld Vonk²

1. Introduction

It has been a rather uneventful year in Dutch family law. There have been new developments, but nothing on a large scale. Nevertheless, it is interesting to provide a short overview of the important case law and (proposed) legislative changes relating to family law. New legislative proposals were introduced in the Dutch Parliament, including a Bill to vest both female spouses parents *ex lege* with parentage rights over any child conceived with the sperm of an unknown donor born during their marriage, and old legislative proposals were finally adopted, including a Bill relating to the rights and responsibility of spouses regarding their marital property.

At the international level the international recovery of maintenance has undergone enormous changes, with three new instruments having been drafted in the past few years. Two of these new instruments, the European Maintenance Regulation and the Hague Maintenance Protocol entered into force in the Netherlands on the 18th June 2011. In this contribution, the major changes for Dutch law will be reviewed. Furthermore, the European Court of Human Rights held that the Dutch Supreme Court had not been efficient when hearing a case brought by a minor who had been placed in a confined institution on a custodial placement. This led to an immediate change in the Supreme Court approach to this issue.

This contribution will, therefore, review some of these judicial and legislative developments providing a brief overview of the major changes to Dutch family law. The *Amsterdam Stories* by Nescio (1882-1961) one of the treasures of Dutch literature, which has finally been translated into English is a perhaps the best example of something old, new, and something quite possibly askew.³

2. Old things

2.1 Surrogacy arrangements

With respect to surrogacy arrangements the Parliamentary State Secretary to the Minister of Justice has considered the matter in 2011 on the basis of the report

¹ Freelance Lecturer, Researcher and Legal Consultant, *Voorts Legal Services* (www.voorts.com). Previously Senior Lecturer and Researcher, Utrecht Centre for European Research into Family Law, Molengraaff Institute for Private Law, Utrecht University.

² University Lecturer and Researcher, Utrecht Centre for European Research into Family Law, Molengraaff Institute for Private Law, Utrecht University.

³ 'No one has written more feelingly and more beautifully than Nescio about the madness and sadness, courage and vulnerability of youth: its big plans and vague longings, not to mention the binges, crashes, and marathon walks and talks. No one, for that matter, has written with such pristine clarity about the radiating canals of Amsterdam and the cloud-swept landscape of the Netherlands.' See: <http://www.nybooks.com/books/imprints/classics/amsterdam-stories/>

discussed in last years issue, as well as other information gathered. In December 2011, he informed parliament of his intentions regarding the issues of domestic and cross-border surrogacy.⁴ Regarding cross-border surrogacy the intention is to accept the Dutch intentional parents as legal parents if one of the intentional parents is genetically related to the child (one of them has either contributed the egg or the sperm). The State Secretary stressed that the rights of the child to know his or her origins as expressed in article 7 of the *International Convention on the Rights of the Child* also need to be taken into account in cases of surrogacy. In practice, this would mean that the identity of the egg and/or sperm donors involved in the surrogacy will need to be traceable for the child. Presumably, this would also apply to the surrogate mother who does not supply the egg.

Regarding the domestic surrogacy situation, the Minister of Health has promised to review the guidelines for IVF surrogacy that were drawn up in 1999 by the Dutch Society for Obstetrics and Gynecology, and report back to parliament answering the question whether there are possibilities to expand the eligibility criteria for IVF surrogacy treatment.⁵ These guidelines limit the accessibility to surrogacy service in Dutch hospitals to a very specific group, which may result in prospective parents going abroad to access legal or illegal surrogacy service.⁶

2.2 Child protection

On 18th July 2009 a Bill was introduced in Parliament to improve the present Child Protection System.⁷ There has been a lot of discussion on the question at what point the authorities are allowed/compelled to intervene in order to protect the child from harm. In the original version of the proposal, the threshold for intervention was substantially lowered, but after intensive discussion a middle road was chosen and the main aim is to clarify when authorities can intervene (Moreover, the Bill also aims to introduce a new 'lighter' measure of child protection 'growing-up support' (*opgroeiondersteuning*). On 15th March 2011 the amended version of the Bill was accepted with general acclaim in the Dutch Second Chamber and sent to the Dutch First Chamber for approval. Again questions were raised with respect to these provisions. Very recently members of the First Chamber sent a letter to the Minister of Justice complaining that their questions have as yet remained unanswered (it has almost been a year since their report was submitted to the Minister of Justice).

⁴ Letter to the Dutch Second Chamber of 16th December 2011 concerning surrogacy, Dutch Second Chamber, 2011-2012, 33 000 VI, no. 69.

⁵ *Hoogtechnologisch draagmoederschap* Richtlijn Nederlands Vereniging voor Obstetrie en Gynaecologie, no. 18, January 1999, available online in Dutch at http://www.nvog-documenten.nl/uploaded/docs/richtlijnen_pdf/18_hoog_draagmoeder.pdf

⁶ For more information on surrogacy in the Netherlands see our contribution to the 2011 Edition of the Survey: 'National and International Surrogacy: an Odyssey' (I. Curry-Sumner and M. Vonk) and our chapter 'Surrogacy according to Dutch law' (I. Curry-Sumner and M. Vonk) in: K. Trimmings and P. Beaumont (eds.) *International Surrogacy Arrangements: Legal Regulation at the International Level*, Hart Publishers (forthcoming November 2012).

⁷ Second Chamber 2009-2010, 32015 no. 1-3

2.3 Matrimonial property reform

2.3.1 Legislative amendments

The Bill on the reform of the matrimonial property system was accepted in 2011 and was implemented on the 1st January 2012. Despite grander ideas at the first submission of the Bill on 7th May 2003,⁸ the structure of the Dutch matrimonial property regime remains largely in place. The ultimate changes concern issues within the system and not the system as such. The main change concerns the fact that reimbursements between the various assets (*vermogens*) in the property regime no longer occur on a nominal basis, but the increase or decrease in value of the object that was financed with the money needs to be taken into account. Parties can have communal assets and private assets along side each other. If the wife finances part of the house out of her private assets, but the ownership of the house falls into the community of assets, she needs to be reimbursed. Until 1st January 2012, this occurred on a nominal basis, even where the value of the house had increased over time. However, as of 1st January 2012, the increase of the house's value will be taken into account.

2.2.2 Absolute separation of property⁹

On 3rd March 2011 the research report on the consequences of unfair marital property agreements after the dissolution of marriage and the problems of distributing property after factual separation was presented to the Dutch Second Chamber.¹⁰ 'The general conclusion of this research is that total separation of property does lead to financial problems and unfair effects – both in cases where total separation results from a contract between the partners in a formal relationship and from the absence of the legal regulation of the property relationship of partners in informal relationships.'¹¹ The report contains a number of suggestions to remedy the unfair effect of the described (lack) of regulation, for instance 'to extrapolate partner maintenance to all informal marriage like-relationships. This instrument would allow the temporarily mitigation of the reduction of the earning capacity of the child-caring partner, taking into consideration both the needs of the receiving partner and the financial capacity of the paying partner.'¹² The Parliamentary State Secretary to the Minister of Justice has discussed this proposal with various interested parties working in the field, and has concluded that bringing co-habiting couples into the partner maintenance scheme is not broadly supported in practice.¹³

⁸ See for instance the Chapter in the Netherlands in the 2004 Edition of the Survey by I. Curry-Sumner and C. Forder.

⁹ Absolute separation of property (*koude uitsluiting*) refers to a marital agreement where there is no community of property during the marriage and no system is in place to amend the possible unfair consequences of such an agreement.

¹⁰ See <http://www.wodc.nl/onderzoeksdatabase/koude-uitsluiting.aspx?cp=44&cs=6780> for an English summary of the report.

¹¹ Summary of the report p. 4. <http://www.wodc.nl/onderzoeksdatabase/koude-uitsluiting.aspx?cp=44&cs=6780>

¹² Summary of the report p. 7 <http://www.wodc.nl/onderzoeksdatabase/koude-uitsluiting.aspx?cp=44&cs=6780>

¹³ Dutch Second Chamber 2001-2012, 28867, no. 29.

3. New Things

3.1 Lesbian Motherhood

On 13th October 2011 a Bill to regulate the parenthood of female same-sex couples was introduced in the Dutch Parliament.¹⁴ There has been ongoing discussion on this topic since the introduction of registered partnership in 1998, and now finally a Bill to regulate the legal status of the birth mother's partner other than through adoption has been introduced.¹⁵ The Bill proposes to attribute parenthood to the female partner on the basis of a combination of two criteria. On the one hand the Bill makes a distinction between female couples that are married and female couples that are unmarried or have entered into a registered partnership. And on the other hand the Bill makes a distinction between couples who have used a known donor and couples who have used an unknown donor.¹⁶ Together these criteria result in the following:

1. both spouses in a female marriage will be granted the status of parent *ex lege* with regard to any child born during marriage, provided the couple have used the sperm of an 'unknown' donor. To prove that they have used sperm from an unknown donor but not an anonymous donor, they need to submit a declaration to this end issued by the *Donor Registration Foundation (Stichting donorregistratie kunstmatige voortplanting)*.
2. female couples that have used a *known donor* (friend, brother, neighbor, internet contact etc) or have entered into a registered partnership, are cohabiting or living apart will not fall under this scheme. The female partner who has not given birth to the child, will be given the opportunity to register her parenthood with the birthmother's consent (recognition).¹⁷

If the birth mother refuses to give consent for the registration of her female partner's parenthood, the female partner will not be protected by the law as proposed in the Bill. This is and should be a point of discussion in parliament. If the government chooses not to grant the female partner the option to become a parent without the consent of the birthmother, this choice should be based on clear and convincing arguments.¹⁸ The known donor (friend, brother, neighbor, internet contact etc.) however, will be given the possibility to apply for fatherhood without the birthmother's consent, provided the child has only one parent and there is family life between the known donor and the child. This

¹⁴ Dutch Second Chamber 2011-2012, 33032, no. 1-3.

¹⁵ For an extensive discussion of what came before see the chapter in the Netherlands in the 2009 Edition of the Survey by I. Curry-Sumner and M. Vonk.

¹⁶ An unknown donor is not an anonymous donor. The distinction is made on the question whether the woman acquired sperm through a clinic, or whether the woman herself procured sperm. Dutch clinics must register donor data with the *donor data foundation*, so the child can have access to this information at a later stage. For more information see M. Vonk, *Children and their parent: A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law*, Intersentia - Antwerp, 2007.

¹⁷ This possibility is currently only open to unmarried males (art. 1:203 and 204 Dutch Civil Code).

¹⁸ Dutch Second Chamber 2011-2012, 33032 no. 5.

suggests a preference for the genetic father over the social mother on the part of the government in cases where conflicts over legal parenthood arise.

4. Something international

4.1 Introduction

Since the 18th June 2011, the international maintenance landscape has changed drastically. Two international organizations, namely the European Union and the Hague Conference for Private International Law have been working hard over the last decade to draft new instruments to better regulate the international recovery of maintenance payments. These endeavours have culminated in three new instruments, the European Maintenance Regulation (emanating from the European Union), the Hague Maintenance Protocol and the Hague Maintenance Convention (both stemming from the Hague Conference). At present, only the Hague Maintenance Protocol and the European Maintenance Regulation are in force in the Netherlands. Accordingly, four major areas within international maintenance law have been affected, namely jurisdiction, applicable law, recognition and enforcement, and the system of administrative co-operation.

4.2 Jurisdiction

Of the new instruments, only the European Maintenance Regulation contains direct rules of jurisdiction. The rules themselves closely resemble those of the Brussels I Regulation. There, however, a number of salient differences.¹⁹ Firstly, the Regulation is universally applicable. This means that reference to national rules of jurisdiction is no longer possible. In the Netherlands this thus means that references to articles 1-14 of the Dutch Code of Civil Procedure are banished to the past. The Regulation also introduces a number of interesting novelties with respect to the ability for parties to choose the competent forum. Parties have always had the ability to choose the competent forum in maintenance cases on the basis of art. 23 Brussels I Regulation. That ability is continued in art. 4 Maintenance Regulation. However, instead of an unfettered ability to choose the competent forum, parties are now restricted in the courts they are able to choose. Although in theory this would appear to be a huge restriction in party autonomy, in practice this will often not pose much a restriction. The vast majority of choices made still fall within the boundaries of art. 4(1) Maintenance Regulation.

Together Articles 6 and 7 Maintenance Regulation form the result of a political compromise made in June 2008. Since the Regulation is universally applicable and thus excludes reference to national rules of jurisdiction, it was agreed that subsidiary rules of jurisdiction would need to be included in the Regulation. Reference is first made to the common nationality of the parties (article 6), and in the absence of such a factor to a *forum necessitatis* (article 7). Article 7 can only be consulted if no court is competent on the basis of the articles 3, 4, 5 or 6. Accordingly, this provision should be applied with great restraint. In the Netherlands, such a ground for jurisdiction is not entirely new, since art. 9 Dutch Code of Civil Procedure contains a similar provision.

¹⁹ For a good overview of the interaction of the various instruments in this field, see T. de Boer, "Nieuwe regels voor de internationale alimentatie" *FJR* 2011, p. 356-362 and P. Vlas, "Alimentatie uit Brussel met een Haags randje" *WPNR* 2009, p. 293-295.

4.3 Applicable Law

Both the European Maintenance Regulation and the Hague Maintenance Protocol contain provisions with regard to the applicable law in maintenance cases. It is with respect to the creation of uniform choice of law rules that the common law, civil law divide is perhaps easiest to witness.²⁰ From the outset of international negotiations, it was clear that common law countries would not participate in any form of international instrument containing uniform choice of law rules. The application of the law of the forum, or the *lex fori*, is so ingrained in the fabric of these countries, that participation in such a instrument was excluded. As a result, a novel method was creating to ensure that these countries were provided the flexibility required to ensure that they were not obliged to participate, whilst at the same time providing them with the possibility to adopt the other rules with respect to jurisdiction, recognition and enforcement and most importantly administrative cooperation.

Consequently, the European Maintenance Regulation does not contain any independent choice of law rules. Instead reference is made to the Hague Maintenance Protocol.²¹ In turn, the Hague Maintenance Protocol is a separate instrument to the Hague Maintenance Convention, therefore allowing countries to ratify these instruments independently of each other (the Netherlands has signed both instruments). As a result, the United Kingdom has been able to participate in both the European Maintenance Regulation and the Hague Maintenance Convention, without being obliged to adopt uniform choice of law rules. However, this ingenious way of ensuring that common law countries are able to sign up to the individual international instruments has complicated the European Maintenance Regulation with respect to the recognition and enforcement rules (see §4.4).

The Hague Maintenance Protocol introduces a number of new approaches in comparison to the Hague Maintenance Conventions of 1956 and 1973. Firstly, the Protocol allows for parties to choose the law applicable to their maintenance obligations. Article 7 provides for a choice of law in specific proceedings, even in the case of child maintenance. Article 8 provides for a more general option, but is not permitted in child maintenance cases. A second departure from the previous maintenance conventions arises with respect to the choice of law rules with respect to spousal maintenance. According to article 8 of the Hague Maintenance Convention 1973, the law applicable to spousal maintenance was coupled to the law applicable to the divorce proceedings. This link caused many unjust results in practice and led in the Netherlands to the judicial acceptance of a choice of law possibility.²²

4.4 Recognition and enforcement

Since the Hague Maintenance Convention has not yet entered into force, this

²⁰ For a good overview of the applicable law provisions, see D. van Iterson, "IPR-aspecten van de nieuwe mondiale en Europese regelgeving op het gebied van alimentatie" *FJR* 2009. P. 246-263.

²¹ For information regarding the interaction between these two provisions see. I. Curry-Sumner, "... Acht, Negen, Tien! Ik kom! Boek 10 BW is in werking getreden", *REP* 2012, p. 81-84.

²² Dutch Supreme Court 27th February 1997, *RvdW* 1997, 56.

section will only discuss the recognition and enforcement rules originating from the European Maintenance Regulation.²³ The main goal of the European Union in this field was to ensure a more efficient and effective recognition procedure. The rules in this field should therefore be seen in light of the trend towards abolition of exequatur procedures. After the simplification of the exequatur procedure under the Brussels I Regulation, the European Enforcement Order Regulation ensured the total abolition of exequatur proceedings for non-contentious decisions. The Maintenance Regulation takes this trend one step further by ensuring the abolition of exequatur for all maintenance decisions, whether contentious or non-contentious.

As already stated, these rules have been strongly affected by the fact that the common law countries required the option of not adopting uniform choice of law rules. During the European negotiations, it was strongly felt (although not by the Dutch delegation) that the abolition of exequatur had to be dependent upon the application of uniform choice of law rules. As a result, a compromise solution was adopted leading to the rather cumbersome rules relating to recognition and enforcement of maintenance decisions. According to Article 16 Maintenance Regulation, a distinction is drawn between decisions originating from states that have implemented the Hague Maintenance Protocol (Section 1) and those decisions originating from states that have not implemented the Hague Maintenance Protocol (Section 2). In effect this provision means that all decisions from EU Member States will fall within Section 1, with the exception of decisions from the United Kingdom and Denmark, which will squarely fall within the ambit of Section 2.

This difference is crucial, since the abolition of exequatur is restricted to those decisions falling within the scope of Section 1. The distinction is also crucial when trying to understand the practical operation of these provisions. Section 1 is predominantly based upon similar provisions in the European Enforcement Order Regulation, which had already abolished exequatur proceedings for non-contentious monetary claims. Section 2, on the other hand, is based upon the recognition and enforcement provisions of Brussels I.

4.5 Administrative co-operation

During the negotiations to the Hague Maintenance Convention and the European Maintenance Regulation, all parties recognised the necessity of an effective and efficient system of administrative co-operation. The fact that the provisions on administrative co-operation form the cornerstone of the new rules is reflected in art. 1(a) Hague Maintenance Convention; one of the aims of the Convention is to establish “a comprehensive system of co-operation between the authorities of the Contracting States”.²⁴ Space restrictions negate an extensive discussion of the functions of these central authorities. In this contribution attention will therefore

²³ In the forthcoming edition of M.J.C. Koens and A.P.J. Vonken, *Tekst en Commentaar Personen en Familierecht*, Kluwer: Deventer 2012, commentary has been provided on each article of the European Maintenance Regulation. Each analysis begins with a reference to the corresponding provisions of the 1968 Brussels Convention, Brussels I Regulation or the European Enforcement Order Regulation.

²⁴ This is supported in Preamble 10, Maintenance Regulation.

only be paid to the designation of the authorities (§4.5.1) and the functions of these authorities (§4.5.2).

4.5.1 Designation of Central Authorities

Both the Hague Maintenance Convention and the Maintenance Regulation presume that an efficient and effective administrative cooperation system could be best achieved by establishing a network of Central Authorities.²⁵ A system of Central Authorities has proven to be successful in the field of adoption (1993 Hague Adoption Convention) and child abduction (1980 Hague Abduction Convention).²⁶ Furthermore, such a network has also been used in four other Hague Conventions, as well as four European Regulations.²⁷ Whether the unique nature of maintenance cases, *i.e.* the large volume of cases, the ongoing nature of the claims and the constant need for modification of the claim, will be factors that necessitate a different administrative co-operation system will only be answered over the course of time.²⁸

A Central Authority is a public authority designated by a Contracting or Member State to discharge or carry out the duties of administrative co-operation and assistance under the international instruments.²⁹ Every Contracting or Member State is, however, free to determine the designation of its Central Authority. As a result, the current variety in transmitting and receiving authorities under the 1956 New York Convention will more-than-likely continue under these new instruments.³⁰ The variety of these agencies, bureaus and departments is as numerous as the number of agencies themselves. It could take the form of:

- a social insurance agency as in Sweden (*Försäkringskassan*);³¹
- an independent public maintenance enforcing organ as in The Netherlands (*Landelijk Bureau Inning Onderhoudsbijdragen*);³²
- a specially dedicated Ministerial department as in the Czech Republic (*Úřad pro mezinárodně právní ochranu dětí*)³³, or England & Wales (*Reciprocal Enforcement of Maintenance Obligations Office*)³⁴; or

²⁵ Art. 4(1) Hague Maintenance Convention and art. 49(1) Maintenance Regulation.

²⁶ 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. See also Hague Conference, *Draft Explanatory Report*, (2007) Preliminary Document No. 32, p. 20-21, §73.

²⁷ 1965 Hague Service Convention, 1970 Hague Evidence Convention, 1996 Hague Child Protection Convention and 2000 Hague Adult Protection Convention. At EU level, 2001 EU Evidence Regulation, Brussels IIbis, 2006 EU Consumer Regulation and 2007 EU Service Regulation.

²⁸ See further, I. Curry-Sumner, "International Recovery of Child Support: Are central authorities the way forward?", in: B. Verschraegen (ed), *Family Finances*, Jan Sramek Verlag: Vienna 2009, p. 176-184, at p 191-193 and I. Curry-Sumner, "International Recovery of Child Maintenance Administrative co-operation in incoming child maintenance cases", in: UCERF, *Actuele Ontwikkelingen in het Familierecht: Reeks 3*, Ars Aequi: Nijmegen 2009, p. 53-58.

²⁹ E.g. Hague Conference, *Draft Explanatory Report*, (2007) Preliminary Document No. 32, p. 21, §76.

³⁰ I. Curry-Sumner, "International Recovery of Child Support: Are central authorities the way forward?", in: B. Verschraegen (ed), *Family Finances*, Jan Sramek Verlag: Vienna 2009, p. 176-184.

³¹ Translation: Social Insurance Agency.

³² Translation: National Maintenance Collection Agency.

³³ Translation: Office for International Legal Protection of Children.

- a ministerial department as in Austria (*Bundesministerium für Justiz*).³⁵

One difference between the Hague Maintenance Convention and the Maintenance Regulation, on the one hand, and the current system of administrative co-operation, on the other, is that countries will be obliged in the future to designate **one** authority for both incoming and outgoing cases.³⁶ At present, although many countries have indeed fused the streams of incoming and outgoing cases into one agency (e.g. Austria, Czech Republic, England & Wales, The Netherlands, and Sweden),³⁷ other countries operate two entirely different systems for incoming and outgoing cases (e.g. Denmark).³⁸ Despite this difference, both the Hague Maintenance Convention and the Maintenance Regulation provide for the possibility to delegate the duty to transmit and receive applications.³⁹ How these organisational and structural amendments will affect the practical operation of international maintenance claims is as yet unclear.

The inclusion of a specific duty in the Maintenance Regulation imposed on a Central Authority that receives a request despite not being competent must be regarded as the specification of a rather self-evident obligation.⁴⁰ It is to be expected that Central Authorities operating under the authority of the Hague Convention will also apply the same obligation. Furthermore, the requirement to inform the relevant authorities of changes is included in both instruments, albeit in vastly different places within the instrument.⁴¹

³⁴ REMO is a unit of the International Litigation Section within the Litigation Services Department of the Office of Court Funds, Official Solicitor and Public Trustee. This Office is, in turn, an associated and independent office of the newly formed Ministry of Justice. As such, and in this way, REMO operates under the delegated authority of the British Secretary of State for Justice. More information on the Official Solicitor's Office can be found at: <http://www.gls.gov.uk/about/departments/offsol.htm>. See also I. Curry-Sumner, "International Recovery of Child Maintenance Administrative co-operation in incoming child maintenance cases", in: UCERF, *Actuele Ontwikkelingen in het Familierecht: Reeks 3*, Ars Aequi: Nijmegen 2009, p. 53-58.

³⁵ Translation: Federal Ministry of Justice.

³⁶ This proposal received widespread report in the First Special Commission, Hague Conference, *Report on the First Meeting of the Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance*, (2003) Preliminary Document No 5, p. 14, §14.

³⁷ See for more information with regard to the English system: I. . Curry-Sumner, "International Recovery of Child Maintenance Administrative co-operation in incoming child maintenance cases", in: UCERF, *Actuele Ontwikkelingen in het Familierecht: Reeks 3*, Ars Aequi: Nijmegen 2009, p. 53-58 and the Dutch system: p. 59-63 of the same publication

³⁸ See for more information with regard to the Danish system: I. . Curry-Sumner, "International Recovery of Child Maintenance Administrative co-operation in incoming child maintenance cases", in: UCERF, *Actuele Ontwikkelingen in het Familierecht: Reeks 3*, Ars Aequi: Nijmegen 2009, p. 46-51.

³⁹ Art. 6(1)(a), in conjunction with art. 6(3) Hague Maintenance Convention and art. 51(1)(a), in conjunction with art. 51(3) Maintenance Regulation.

⁴⁰ An obligation is namely imposed on the Central Authority that receives the request whilst not being competent, to forward the request to the competent Central Authority, art. 49(2) Maintenance Regulation.

⁴¹ Art. 4(3) Hague Maintenance Convention and art. 71(1) Maintenance Regulation.

4.5.2 *Functions of Central Authorities*

Both instruments permit applicants to pursue claims without using the Central Authority system,⁴² and ensure that the use of this system is highly encouraged by providing for free legal assistance/aid if an applicant applies through the Central Authority in the state of his or her residence.⁴³ An interesting difference between the two instruments surfaces with respect to the interpretation of the term 'residence'. The Hague Maintenance Convention notes that the term 'residence' for the purposes of an application through a Central Authority is to be regarded as excluding mere presence.⁴⁴ An equivalent provision in the Maintenance Regulation is noteworthy in its absence. Nevertheless, a similar reference is made in the Recital 32 to the Maintenance Regulation. The question must, however, be asked why this explanation has been downgraded to a reference in the preamble. Due to the lack of parliamentary proceedings or explanatory notes to the Maintenance Regulation, the exact significance of the placement of this reference will ultimately have to be determined by the European Court of Justice (hereinafter ECJ). It is nevertheless to be expected that the reference in the preamble coupled with the original version of the Maintenance Regulation⁴⁵ should lead to the conclusion that art. 55 Maintenance Regulation has the same scope as the equivalent provision in art. 9 Hague Maintenance Convention.

Both the Hague Maintenance Convention and the Maintenance Regulation draw a threefold distinction between:

- general, mandatory, non-delegable functions (§4.5.2.1),⁴⁶
- specific, mandatory, delegable functions (§4.5.2.2),⁴⁷ and
- specific, discretionary, delegable functions (§4.5.2.3).⁴⁸

4.5.2.1 *General, mandatory, non-delegable functions*

Central Authorities will be under a general duty to co-operate with each other and promote co-operation amongst all internal competent authorities. The Maintenance Regulation specifically emphasises the obligation to exchange information. This inclusion is at first glance slightly unusual. However, this is linked to the inclusion of provisions in the Maintenance Regulation pursuant to the access of information and the holding of meetings.⁴⁹ Accordingly, attention has been explicitly drawn to the express obligation imposed on Central Authorities to exchange information.

⁴² See, for example, Art. 37 Hague Maintenance Convention.

⁴³ Art. 9 Hague Maintenance Convention and art. 55 Maintenance Regulation.

⁴⁴ A. Borrás *et al*, *Explanatory Report*, Hague Conference, November 2009, p. 52, §228.

⁴⁵ COM (2005) 649 final, art. 42(1). The original version obliged the applicant to apply to the Central Authority of his or her **habitual residence**, whereas the final text of art. 55 Maintenance Regulation only refers to the term **residence**.

⁴⁶ Art. 5 Hague Maintenance Convention and art. 50 Maintenance Regulation.

⁴⁷ Art. 6(1) Hague Maintenance Convention and art. 51(1) Maintenance Regulation.

⁴⁸ Art. 6(2) Hague Maintenance Convention and art. 51(2) Maintenance Regulation.

⁴⁹ See I Curry-Sumner, "Administrative co-operation and free legal aid in international child maintenance recovery. What is the added value of the European Maintenance Regulation?" *NIPR* 2010, p. 161-171.

Although explicit reference to the provision of information to the Permanent Bureau was made in earlier drafts of the Hague Maintenance Convention,⁵⁰ it was stated on numerous occasions that express reference in art. 5 to the provision of information was not required if art. 57 was accepted.⁵¹ Ultimately, the text of art. 57 was accepted and thus express reference to the provision of information in art. 5 was deleted. Accordingly, the specific inclusion of this reference in the Maintenance Regulation should not be regarded as an omission in or a narrowing in the scope of the Hague Maintenance Convention. The exchange of information is obviously an integral part of any administrative network and, therefore, should also be regarded as necessary, according to the Hague Maintenance Convention.⁵²

4.5.2.2 *Specific, mandatory, delegable functions*

Extensive debate focussed not only on the wording of the various articles in these new instruments, but also on their (relative) placement. In the original draft of the Hague Maintenance Convention, no distinction was drawn between different types of specific functions.⁵³ After deliberations during the Second Special Commission, it was decided that two duties in particular should be set apart from the other duties due to their mandatory nature, namely the duty to “transmit and receive applications” and the duty to “initiate or facilitate the institution of proceedings”. In discharging these duties, a Central Authority is denied from taking “all appropriate measures”, and instead must discharge these duties comprehensively. The same distinction is also manifest in the Maintenance Regulation.

It is also worth noting that the Central Authorities are obliged “in particular” to perform the tasks listed in art. 6(1) Hague Maintenance Convention and art. 51(1) Maintenance Regulation. Accordingly, and perhaps rather peculiarly, the mandatory obligations listed are non-exhaustive.⁵⁴ On a critical note, it must be

⁵⁰ Hague Conference, *Working Draft of a Convention*, (2004) Preliminary Document No. 7, p. 5, art. 7(2)(a); Hague Conference, *Working Draft of a Convention*, (2005) Preliminary Document No. 13, p. 5, art. 5(b); Hague Conference, *Tentative Draft Convention*, (2005) Preliminary Document No. 16, p. 5, art. 5(b); Hague Conference, *Report of the Administrative Co-operation Working Group*, (2006) Preliminary Document No. 19, p.13, art. 5(b) suggested language change; Hague Conference, *Preliminary Draft Convention*, (2007) Preliminary Document No. 25, p. 5, art. 5(b); Hague Conference, *Revised Preliminary Draft Convention*, (2007) Preliminary Document no. 29, p. 5, art. 5(b).

⁵¹ See, for example, the comments made by Australia and the USA: Hague Conference, *Consolidated list of comments on revised Preliminary Draft Convention*, (2007) Preliminary Document No. 36, p. 13. Article 57 expressly refers to the obligation to provide the Permanent Bureau of the Hague Conference with information describing its laws and procedures with regards maintenance obligations.

⁵² This is supported with reference to the Draft Explanatory Report, see Hague Conference, *Draft Explanatory Report*, (2007) Preliminary Document No. 32, p. 24, §91. Furthermore, the wording of art. 5(1) Hague Maintenance Convention ensured coherence with the equivalent texts in art. 30, 1980 Hague Abduction Convention and art. 29, 2000 Hague Adult Protection Convention.

⁵³ Hague Convention, *Working Draft of a Convention*, (2004) Preliminary Document No. 7, p. 5, art. 8; Hague Conference, *Working Draft of a Convention*, (2005) Preliminary Document No. 13, p. 5, art. 6.

⁵⁴ Hague Conference, *Draft Explanatory Report*, (2007) Preliminary Document No. 32, p. 26, §108.

stated that the very essence of mandatory obligations is that one is aware of the nature of these obligations prior to discharging the duty. If a Central Authority is not aware that it is obliged to discharge a mandatory duty, can it later be held not to have satisfied this responsibility? Regardless of the nature of the duties listed, the mandatory duties listed in these articles, may be delegated and thus may be performed by other public bodies.

4.5.2.3 Specific, discretionary, delegable functions

With respect to all the discretionary functions listed in art. 6(2) Hague Maintenance Convention and art. 51(2) Maintenance Regulation, the Central Authority must take “all appropriate measures” in ensuring that these obligations are satisfied.⁵⁵ This phrase obliges States to do all that is possible within their power with the available resources and within the legal restraints.⁵⁶ Moreover, the use of the word “shall” indicates that Central Authorities are obliged to take all appropriate measures. However, the measures that need to be taken are subsequently left to the discretion of the requested Central Authority.

Differing from the current system of administrative co-operation, both new instruments explicitly list some of the core roles and duties of the administrative authorities. The imposition of specific duties and the inclusion of such duties in international instruments ensured that these provisions were some of the most extensively discussed provisions during the negotiations of both instruments. A delicate balance needed to be drawn between creating a minimum set of standards according to which all States must operate, on the one hand, and overburdening States with inflexible duties and functions, on the other. Furthermore, as was already mentioned previously, the nature and legal position of the Central Authority in any given legal system is crucial to its functioning. As a result, flexible functions needed to be laid down which catered for this diversity in organisational structure. This flexible approach is no more apparent than with respect to the specific, discretionary, delegable functions.

In reaching agreement on the functions, tasks, roles and duties of the Central Authorities careful attention was paid to the balancing of two interests, namely the costs for applicants who often have limited means versus the increased costs for the State. In reaching consensus, delegates attempted to ensure that although a State may indeed incur more costs, these costs were not disproportionate to the resulting benefits.

(a) *The whereabouts of the debtor*: In the first working draft of the Hague Maintenance Convention, the functions of the Central Authority were defined in rather restrictive terms. For example, authorities were under a duty to ‘discover the whereabouts of the debtor’.⁵⁷ However, this duty

⁵⁵ At an earlier stage, reference was made to “the most effective measures available”. However this was not acceptable because not all measures taken will eventually be effective. Often measures may well have to be taken regardless of the outcome of success: Hague Conference, *Tentative Draft Convention*, (2005) Preliminary Document No. 16, p. 5, art. 6(2).

⁵⁶ Hague Conference, *Draft Explanatory Report*, (2007) Preliminary Document No. 32, p. 27-28, §119.

⁵⁷ Hague Conference, *Working Draft of a Convention*, (2003) Preliminary Document No. 7, art. 8(d).

was subsequently weakened so as to impose the duty to ‘help locate the debtor’. In this way, flexible verbs such as help, encourage and facilitate have been used to limit the overburdening of authorities with these duties. Furthermore, in the original convention drafts, reference was only made to the assistance needed in locating the debtor; in the preliminary draft of January 2007 this was extended to include locating the creditor.⁵⁸ The text is identical to the relevant provision in the Maintenance Regulation, save for the cross-reference to arts 61, 62 and 63 in the Maintenance Regulation.⁵⁹

(b) *Obtaining relevant information concerning income and assets*: Once again the choice of flexible verbs here is noticeable with a change from ‘seek out relevant information’ to ‘help obtain relevant information’.⁶⁰ The only difference between the Maintenance Regulation and Hague Maintenance Convention here relates to the cross-reference in the Maintenance Regulation to arts. 61, 62 and 63.⁶¹

(c) *Encouraging amicable solutions*: In the earlier drafts of the Hague Maintenance Convention, references to mediation and conciliation had been included in separate provisions.⁶² In the end it was felt that these duties would only arise in seeking amicable solutions and therefore were better suited in the same provision. Once again, there are no differences on this point between the Hague Maintenance Convention and the Maintenance Regulation.⁶³

(d) *Facilitation of maintenance payments*: In the original drafts of the Hague Maintenance Convention reference was also made to the obligation to monitor payment of maintenance. This phrase was eventually removed. Although the reasons for this removal are not provided in the preliminary documents to the Hague Maintenance Convention, discussions with the Central Authorities reveal a reluctance to burden Central Authorities with case management tasks. In many countries, *e.g.* Sweden, Denmark and England & Wales, the payment of maintenance occurs completely outside the oversight of the Central Authority. To change this system would involve major structural change, which would in turn entail associated costs. Again, there are no differences in wording between the Hague Maintenance Convention and the Maintenance Regulation.⁶⁴

⁵⁸ Hague Conference, *Preliminary Draft Convention*, (2007) Preliminary Document No. 25, p. 5, art. 6(2)(b). Australia was the only State to comment on this inclusion: Hague Conference, *Consolidated list of comments on revised Preliminary Draft Convention*, (2007) Preliminary Document No. 36, p. 14.

⁵⁹ Art. 51(2)(b) Maintenance Regulation.

⁶⁰ Hague Conference, *Working Draft Convention*, (2007) Preliminary Document No. 7, p. 5, art. 8(e) compared with the final text in art. 6(2)(c), 2007 Hague Convention

⁶¹ See §3.5.3.

⁶² Hague Conference, *Draft Explanatory Report*, (2007) Preliminary Document No. 32, p. 33, §153.

⁶³ Art. 6(2)(d) Hague Maintenance Convention and art. 51(2)(d) Maintenance Regulation.

⁶⁴ Art. 6(2)(e) Hague Maintenance Convention and art. 51(2)(e) Maintenance Regulation.

(e) *Other obligations*: Both the Hague Maintenance Convention and the Maintenance Regulation also oblige the Central Authorities to facilitate the collection and transfer of payments,⁶⁵ facilitate the obtaining of evidence,⁶⁶ provide assistance in establishing parentage,⁶⁷ initiate or facilitate proceedings to obtain provisional measures⁶⁸ and the service of documents.⁶⁹

4.6 Conclusion

The landscape of the international recovery of maintenance both in European terms, as well as globally has undergone a paradigm shift in the last year. Although the progress that has been made cannot be overestimated (for example the abolition of exequatur within the European context and the simplification of administrative cooperation procedures in a global context), problems will arise with respect to the interaction between these instruments and the interpretation of certain provisions.⁷⁰

5. Things askew

On 7th June 2011 in the judgment in the cases *S.T.S. v. the Netherlands*⁷¹ the European Court of Human Rights unanimously held that the Dutch government had violated the rights of S.T.S. (a minor) under Article 5.4 (right to liberty and security). The case concerned the length and ineffectiveness of S.T.S.'s appeal against custodial placement confined institution. S.T.S. was born in 1988. By the time he was in his early teens the Dutch Child Care and Protection Board was made aware of the fact that he had dropped out of school and was committing crimes. On 9 October 2002 he was placed under supervision of a Youth Care Foundation and sent to a confined institution for treatment and observation on the authorization of the Groningen District Court.

The ECHR concluded there were two violations. One concerned the time it took the Dutch Supreme Court to rule on the appeal filed by S.T.S. (294 days). The ECHR states that all States that have ratified the European Convention on Human Rights are required to organize their legal system in such a manner that urgent matters can be dealt with speedily. In this case the Court judged that the time it took the Leeuwarden Court of appeal to judge on the matter (63 days) was acceptable given the fact that the court needed to gather information, but that the 294 days it took the Supreme Court to judge on the case were not acceptable. Moreover, by the time the Supreme Court came to judge S.T.S.'s appeal, S.T.S. was

⁶⁵ Art. 6(2)(f) and art. 51(2)(f) Maintenance Regulation.

⁶⁶ Art. 6(2)(g) and art. 51(2)(g) Maintenance Regulation. The only distinction between the provisions here is that the Maintenance Regulation cross-references with the provisions of the European Evidence Regulation (No. 1206/2001).

⁶⁷ Art. 6(2)(h) Hague Maintenance Convention and art. 51(2)(h) Maintenance Regulation.

⁶⁸ Art. 6(2)(i) Hague Maintenance Convention and art. 51(2)(i) Maintenance Regulation.

⁶⁹ Art. 6(2)(j) Hague Maintenance Convention and art. 51(2)(j) Maintenance Regulation. The only distinction between the provisions here is that the Maintenance Regulation cross-references with the provisions of the European Service Regulation (No. 1393/2007).

⁷⁰ For a critical analysis of the interaction between the administrative cooperation provisions of the Regulation and the Convention, See I Curry-Sumner, "Administrative co-operation and free legal aid in international child maintenance recovery. What is the added value of the European Maintenance Regulation?" *NIPR* 2010, p. 161-171.

⁷¹ ECHR 7 June 2011 no. 277/05 *S.T.S. v. The Netherlands*.

not longer in custody. The Supreme Court therefore declared S.T.S.'s appeal on points of law inadmissible for lack of legal interest, since he was no longer in custody. This is the second violation. S.T.S. may have a legal interest in the determination of the lawfulness of his or her custodial placement confined institution after liberation, for example if he or she wants to claim compensation for having been subject of an unlawful order for custodial placement in a confined institution. In a subsequent judgment the Dutch Supreme Court⁷² reassessed its previous attitude and decided in line with the ECHR judgment that even where the detention against which the minor has appealed is no longer there, that in itself is not reason enough for the court not to judge on the facts.

6. Conclusion

2011 was a pretty uneventful year for Dutch family law. Perhaps that is not such a bad thing after all. The rapid development of family law rules in the past few years, has left many feeling that the rate at which family law legislation is drafted and implemented sometimes reduces the quality of the provisions. Overall coherency between the various provisions of Dutch family law is increasingly to be difficult to grasp. Perhaps years such as 2011 will provide the legislature with the much needed time to assess the current state of affairs and undertake fundamental research into the redevelopment of family law *en masse* instead of the piecemeal approach that has typified legislative developments over the last few years.

⁷² Dutch Supreme Court 24th June 2011, *LJN* BQ2292.