RECOVERY OF CHILD SUPPORT FROM FINLAND TO FOREIGN COUNTRIES

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1. INTRODUCTORY REMARKS

1.1. *The Objectives of the Present Paper*

The present paper aims, first of all, to give foreign scholars specializing in international support law a general view of the organization of the recovery of child support from Finland to other countries, of the phases and measures connected with this recovery, and of the number and characteristics of the support cases handled in practice. Quite naturally, this presentation also brings forth the rules of Finnish municipal support law and the manner in which the international support conventions have been interpreted in Finland.

Secondly, this kind of paper may also be of interest in circles other than academic ones: if Finnish support law and the Finnish ways of acting in international recovery cases are well known abroad, this will facilitate and speed up the co-operation between foreign and Finnish authorities in support matters. Even misunderstandings and erroneous support applications may be more easily avoided. It is also possible that the presentation of a national recovery system could give new impetus to persons charged with the preparation of international conventions or national systems of support recovery.

The third objective of the present paper is connected with Finnish domestic legal policy. As pointed out in the subsequent text, the international support law of this country, quite contrary to its new internal support law, is badly out-of-date and fragmentary. When the international support law of Finland is examined in the light of the support recovery cases found in practice, the deficiencies of this law are necessarily revealed. It will be possible to indicate those jurisdiction and choice-of-law rules which absolutely need to be reformed by the Finnish legislator. This is of current interest since there are preliminary plans to reform the international support law of Finland.*

1.2. *The Limits of the Present Paper*

Child support recovery from Finland to foreign countries—as well as recovery from foreign countries to Finland—may be divided into two main fields:

* American legal terminology is used throughout the paper; for instance "support" instead of "maintenance"—except in the official titles of conventions—"visiting rights" instead of "access", "attorney", etc.

recovery within Scandinavia and recovery in wider international relations. The conditions for enforcing a foreign judgment are different in these two situation types, as are the competent authorities and the channels for sending the documents from one country to another. One may state generally that support recovery between the Nordic countries is far easier and swifter than from and to countries outside of Scandinavia,[1] where there are many more problems and where the need of information is greater since the international system of support recovery is more complicated and the legal order in Finland is in some cases quite unknown. This is why the scope of the present paper is limited to those recovery cases in which support is requested from Finland to countries outside of Scandinavia.

Further, the presentation concentrates on those support cases which are sent to Finland through the channels created in the UN convention on the recovery abroad of maintenance ("the New York Convention"). The cases in which a Finnish attorney directly, through his own channels, gets a foreign support claim to be enforced are consequently left aside. This is because, according to empirical studies cited below, Finnish attorneys primarily take care of cases where there is a foreign court decision and this may be easily enforced on the basis of the Hague Conventions. Consequently, there is no attorney practice as to other measures needed in international support recovery cases.[2]

1.3. *The Materials Gathered for the Paper*

It has already been mentioned that the present paper aims to give a general view of the number and characteristics of foreign support recovery cases in Finland, of the way of dealing with these cases, and of the Finnish interpretation of the international recovery conventions. This means that the paper is

[1] This swiftness is manifested, first of all, in the principle according to which support decisions and support agreements are enforceable in the other Nordic States without any enforcement proceedings before a court of law. On the other hand, the documents for a support enforcement matter are sent to another Nordic State at the level of county administration (no Ministries, not even central offices of State administration are used) and, when a matter has been referred to forced execution, all communications are sent directly from the local execution office of the enforcement country to the local social welfare office of the sending country (which normally represents the applicant), and *vice versa*. Cf. the 1962 Nordic Convention on the Forced Recovery of Support, arts. 1 and 2. This Convention is treated in detail in a handbook in Finnish for the use of social welfare officers: Heikki Mattila, *Elatusapujen perintä Pohjoismaista. Periaatteita ja käytännön toimintaohjeita* (Support Recovery within Nordic Countries. Principles and Practical Instructions for How to Act), Helsinki 1984.

[2] The empirical materials gathered by Jari Pouttu (cf. footnote 3 below) indicate that the support enforcement application had been made by a Finnish attorney in half (12) of the cases decided by the Helsinki Court of Appeals. However, the family-law attorneys interviewed for the present paper stated that they had not had any mandates presupposing other kinds of measure pertaining to international support recovery (drawing up a support agreement or bringing a support action in favour of a child abroad etc.).

largely based on empirical research. Besides legal writing, the files of the relevant authorities have been investigated, and certain civil servants and attorneys have been interviewed. Moreover, the present author has partly been able to take advantage of his previous experience as a child welfare officer charged with international support recovery cases at the Child Welfare Office of Helsinki.

More specifically, the following files were systematically examined: the support recovery files of the Finnish Receiving Agency according to the New York Convention (i.e. the Ministry of Foreign Affairs); the files of the Social Welfare Office (formerly: Child Welfare Office) of Helsinki concerning cases sent to this Office for the purpose of getting support for a child abroad; and the files of the Helsinki Court of Appeals (the only court in Finland empowered to enforce foreign support decisions) for the period from 1967 through March 1987. In addition to this, the staff of the Public Legal Aid Office of Helsinki, as well as those attorneys in Helsinki who, according to the Finnish Bar Association, have had support cases of an international nature, were interviewed. The precedents of the Supreme Court of Finland were also checked.[3]

2. A GENERAL VIEW OF THE CASES IN WHICH SUPPORT IS RECOVERED FROM FINLAND TO FOREIGN COUNTRIES

2.1. *The Legislative Basis of Support Recovery Activities*

Finland is a party to the New York Convention on the Recovery Abroad of Maintenance (1956),[4] the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children (1958),[5] and the Hague Convention on the Recognition and Enforcement of

[3] The empirical materials were gathered by Karla Kilpeläinen and Jari Pouttu. Kilpeläinen had already earlier, for another purpose, examined all the enforcement cases decided by the Helsinki Court of Appeals during 1967 to 1983. To complete these materials, Pouttu investigated the corresponding enforcement orders of the period from 1984 to March 1987. He also looked through the precedent registers of the Supreme Court of Finland, as well as through the relevant files of the Social Welfare Office of Helsinki, and interviewed family lawyers of the Helsinki Bar and the Public Legal Aid Office of Helsinki. Finally, the support recovery files of the Ministry of Foreign Affairs, arranged and classified by Marja-Terttu Mäkiranta, were examined by the present author on the basis of special permission granted by the Ministry.

In Finland the files of the courts of law are public, but the files of the Ministry of Foreign Affairs are not. Therefore only decisions of the Court of Appeals are cited by their registration numbers in this paper.

[4] As to Finland, this Convention entered into force on October 13, 1962. Cf. Presidential Decree of September 28, 1962/522.

[5] As to Finland, this Convention entered into force on August 25, 1967. Cf. Act of June 2, 1967 No. 339 and Presidential Decree of July 14, 1967/340.

Decisions Relating to Maintenance Obligations (1973).[6] Moreover, certain conventions in the field of the general law of procedure,[7] as well as certain bilateral agreements,[8] have to be considered in Finland as far as support recovery is concerned.

On the other hand, the internal legislation of Finland is widely applicable in cases where support is recovered for a child living abroad. The Finnish system of special child welfare officers expressly charged with support affairs is regularly used when a foreign support claim is settled and a voluntary support agreement is negotiated. And, if it is necessary to bring an action against a support debtor before a Finnish court, the rules of Finnish international and internal support law, as well as the Finnish law of procedure, especially the law of free legal aid, are applicable.

The interpretation of the above-mentioned conventions in Finland, and the municipal child support legislation of this country, will be examined in connection with the description of each phase of the handling of a foreign support claim by the authorities. Before this, a survey of the characteristics of foreign

[6] As to Finland, this Convention entered into force on July 1, 1983. Cf. Act of April 8, 1983 No. 370 and Presidential Decree of June 17, 1983/521.

[7] For instance, certain conventions on mutual judicial assistance between authorities of different countries may be applicable in cases where a support action is brought before a Finnish district court in connection with the recovery of child support. Finland is a party to the most important of these conventions.

[8] One may cite, e.g., the Agreement of May 27, 1980, between the People's Republic of Poland and Finland on the Protection of Law and Mutual Judicial Assistance in Civil, Family and Criminal Matters (Treaties of Finland 67–68/1981). This Agreement does not immediately concern the enforcement of child support decisions but it has indirect importance in this field. On the other hand, on November 17, 1986, Austria and Finland signed an agreement of a general nature as to the recognition of judgments which even concerns support decisions. In Finland there is already a Government Bill to implement this agreement (Bill No. 27/1987). Even though Austria is a party to the 1958 Hague Convention, this bilateral agreement has its own importance in support enforcement matters, especially concerning increases of support payments on the basis of the Finnish legislation linking the support obligation to the cost-of-living index, and concerning the enforcement in Austria of Finnish support agreements which have been confirmed by a local board of social welfare (arts. 14 and 15). On October 1, 1987, the German Democratic Republic and Finland also signed an Agreement on Mutual Judicial Assistance in Civil, Family and Criminal Matters which regulates, *inter alia*, the channels for presenting support claims (the GDR is not a party to the New York Convention) and also, despite the title of the Agreement, the recognition and enforcement of support decisions (the GDR is not a party to the Hague Conventions). Finally, Finland is endeavouring to effect bilateral support enforcement arrangements with the most important common-law countries outside of Europe. These countries are not—and probably will not be—parties to the Hague Conventions. There is, in effect, a Parliamentary resolution, made during the implementation of the 1973 Convention, which obliges the Government to strive for this kind of arrangement with Australia, Canada and the USA (cf. Report of the Second Parliamentary Committee of Ordinary Law, No. 19/Bill No. 247/1982 Session), and in November 1987 a Finnish delegation visited North America for this purpose. To facilitate the effectuation of such arrangements, the Finnish implementing Act concerning the 1973 Hague Convention provides that a presidential decree may prescribe that support decisions given in countries which are not parties to this Convention are recognized and enforced in Finland (sec. 1.2).

support claims is presented, and the manner in which Finnish authorities co-operate to advance these claims is examined.

2.2. *Characteristics of Foreign Support Claims Sent to Finland*

2.2.1. *Basic facts*

On October 1, 1987, the total number of child support cases which had been sent to Finland through the channels of the New York Convention, and which were in progress or under subsequent surveillance at the Finnish Ministry of Foreign Affairs, was 25. These cases came from the following countries: Poland (13 cases), Switzerland (4 cases), United Kingdom (3 cases), Federal Republic of Germany (2 cases), Italy (1 case), Czechoslovakia (1 case) and Hungary (1 case). On average, the claims were not very old: there were no cases sent to Finland before the year 1970; during the first half of the 1970s only one case had been sent, during the latter half three, and during the 1980s 21 cases. In 22 cases a foreign court decision (and in one case a Finnish one) had been attached to the application, and in two cases a pure support claim was presented without any court decisions: there were no support agreements attached to the applications.

In most (18) of the cases, support was claimed for a legitimate child, and since more than half of the support debtors were male and Finnish citizens, very often the child was also a Finnish citizen (or had dual nationality). As far as the age of the children is concerned, higher age classes were dominant: there were eight "children" having attained the age of 21 years, one child in the age class 18–20 years, ten children in the age class 11–17 years, and four children were 10 years or younger. In two cases the age could not be found in the documents.

2.2.2. *Appreciation of the facts*

The total number of cases is so modest[9] that it is impossible to draw any statistical conclusions in a proper sense. However, it seems that certain features of the materials are significant.

First of all, the number of cases in which support is recovered from Finland to foreign countries is much smaller than where support is recovered from foreign countries to Finland. According to the files of the Ministry of Foreign

[9] As to the number of cases at the beginning of the 1980s, cf. Irma Ertman, *Lapsen elatusavun periminen kansainvälisyksityisoikeudellisissa suhteissa* (Recovery of Child Support in Relations of Private International Law), Department of Comparative Law of the University of Helsinki, Series of Studies No. 7, Helsinki 1983, p. 100.

Affairs, the number of the latter cases was approximately 200 on January 1, 1987. It would be necessary to carry out a separate study to explain this difference. Rate divergences in across-the-border marriages of Finnish men and women, in the moving back of Finns divorced abroad, etc., certainly constitute reasons. On the other hand, as already pointed out, not all the support recovery cases go through the Finnish Ministry of Foreign Affairs. Further, one may presume that the system for recovery of child support is of importance in this respect: in Finland special social welfare authorities take care *ex officio* of the recovery of child support. This means in practice that even international recovery cases are handled in an active way—contrary to countries in which support recovery is left to private initiative.

Secondly, 15 out of the 25 cases researched are from East European countries, 13 from Poland alone, while countries outside of Europe are conspicuous by their absence. This, too, can probably be explained by factors similar to those mentioned above; as far as Poland is concerned, one must remember that in the 1970s there was much tourism between the two countries, and Finland was a popular object for Polish artists seeking more or less temporary employment.

It is perhaps surprising that, even though most cases arrived in Finland only a few years ago, the contingent of "superannuated" children is remarkable. Since support applications are regularly followed by a foreign court decision, it has been possible in some cases (when the application is from a Convention country) to have enforcement granted to the benefit of a child who is not so young any more.[10] Normally, however, for these children there are no other means than to try to induce the debtor to make voluntary support payments. Seen against this background, the proportion of cases in which the support relation has started to function may be considered quite important: voluntary payments have been agreed to in fifteen cases and, in most of these, actual payments are at least partly made. Presumably, it is the co-operation between the Ministry of Foreign Affairs and the social welfare authorities that deserves credit for this (see section 3.1 below).

2.3. *The Progress of Support Claims in the Co-operation Between Finnish Authorities*

Several authorities and lawyers, on the basis of the legislation mentioned in section 2.1, may have to deal with a support claim from a foreign country: the Finnish Ministry of Foreign Affairs (in the role of receiving agency according

[10] An enforcement order of the Helsinki Court of Appeals had been applied for in seven cases.

to the New York Convention), child welfare officers (in the role of negotiators to induce the debtor to make voluntary payments and officials charged with finding out the debtor's ability to pay support), the Helsinki Court of Appeals (granting enforcement of foreign support decisions on the basis of the Hague Conventions), other courts (hearing ordinary support cases), public legal aid counsels and private attorneys (carrying out support actions), and debt execution authorities (executing by force support decisions). The alleged debtor's attitude, the possibilities to apply the Hague Conventions, etc., determine which authorities and lawyers will be involved in each case.

Roughly speaking, a foreign support claim advances in Finland in the following way. The Ministry of Foreign Affairs first takes steps to find out the standpoint of the alleged debtor, and this information is forwarded to the foreign Transmitting Agency that sent the matter to Finland. If the debtor's objections do not cast a shadow on the application, Finnish authorities try to induce him to make support payments according to the claim presented. In case of failure, these authorities attempt to bring about an enforceable Finnish court decision.[11] As to matters having come from a country which is a party to one of the Hague Conventions, and where the claim is accompanied by a foreign support decision, an official of the Ministry of Foreign Affairs sends an enforcement application to the Helsinki Court of Appeals; as to matters which have come from other countries, or where there is no foreign support decision, legal action may be taken before a Finnish district court. Special attention is given to the possibility of having a cost-free trial granted and of using the services of public legal aid counsels. When needed the Finnish court decision is sent for forced execution (which, in Finland, is the duty of separate administrative authorities not connected with the courts of law). As to payment transactions, voluntary or in consequence of forced execution, necessary steps are

[11] As an exception, it seems to be possible to recover support by coercive measures from Finland to a foreign country even before getting an enforceable Finnish court decision. The Finnish Support Guarantee Act of January 28, 1977 (No. 122) provides a procedure where a local board of social welfare, in urgent cases, may order that a parent's wages be partly assigned for his child's needs if the child is suffering from lack of support in consequence of the omission of this parent's support obligation (secs. 29–33). The measure is meant to be only temporary: if a court decision or an enforceable agreement concerning child support is brought forth, the assignment order must be lifted (sec. 29(2)). The Support Guarantee Act, or its *travaux préparatoires*, do not limit the wage assignment to domestic cases only. It therefore seems that this kind of assignment may also be given in favour of a child living abroad. And, such a foreign support decision which is not in force in Finland on the basis of the Hague Conventions should not be a hindrance to the giving of a wage assignment order: there is no *enforceable* support decision, as clearly presupposed by the *ratio* of sec. 29(2). Let us imagine, e.g., a situation where a father living in Finland has been obliged in Argentina to pay support to his legitimate child living, as also the mother, in Argentina. The mother who is in severe financial difficulties has been compelled by these circumstances to place the child in an orphanage. In this situation it should be possible for a local board of social welfare to give an order according to which the Finnish employer of the father would have to pay a part of his wages to the Board to be forwarded to the child's custodian.

taken by the Ministry of Foreign Affairs where the foreign Transmitting Agency gives notice of inadequacies.

This rough schedule of action is quite self-evident, and it must be similar in all the countries which are parties to the New York Convention. What is more interesting is to present the conditions laid down by Finnish legislation for the progress of a foreign support claim and to see what are the problems and interpretation difficulties then encountered. The interpretation of the international conventions is, of course, worthy of special attention. These things will be treated in what follows in regard to each phase of the progress of a foreign support claim.

Some of the problems of international support recovery are connected with the pure routine of these affairs, or they are details of secondary importance. In consequence, these secondary problems are not dealt with in the present paper. This concerns, for instance, the supplementation of incomplete documents, the supervision of forced execution (distraint, foreclosure, etc.), and the control of payment transactions.[12] Accordingly, the following topics will be treated: voluntary payment negotiations and arrangements; enforcement of foreign support decisions by the Helsinki Court of Appeals; and, lastly, an ordinary support trial of an international nature before a Finnish district court.

3. FOREIGN SUPPORT CLAIM AND VOLUNTARY PAYMENT ARRANGEMENTS

3.1. *The Role of Social Welfare Officers in Determining the Debtor's Standpoint and His Financial Situation*

After checking the documents needed and after receiving the supplements that may be asked for, the alleged support debtor is contacted. This means that the

[12] Since, for natural reasons, the documents to be annexed to the support recovery claim have been defined in a very general way in the New York Convention, there are great divergences between the applications arriving from different countries. As a result, supplements are requested quite often. In the applications received in Finland, one of the most common defects has been that there is no detailed arrears calculation indicating how the support obligation has possibly been increased in different years, how the payments have fallen due each month, and how and when the debtor has reduced his debt; the debtor very often objects by claiming that he has already paid the sums stated. It would also be very important to receive the documents with Finnish (or, in exceptions, Swedish) translations, not with translations into an international language (as it was in 14 cases in the researched material); in enforcement proceedings and in ordinary support trials only documents in Finnish, or sometimes in Swedish, are valid, and negotiations with the debtor are more easily arranged at the local level with documents in a national language. Besides these, other important supplements are also worth mentioning: documents proving the financial situation of the applicant in order to apply for cost-free legal aid or trial, power of attorney written to the Finnish Ministry of Foreign Affairs transferable, etc.—In Finnish these practical aspects of international support recovery have been treated in detail in the handbook: Heikki Mattila,

Ministry of Foreign Affairs asks local social welfare authorities for assistance. In Finland there is a special system of local child welfare officers expressly charged with paternity affairs and recovery of child support.[13] These officers have solid experience in settling support claims and in drawing up support agreements. Notwithstanding the legal provisions concerning confidentiality otherwise in force, they also have wide powers to get from other authorities, especially from tax boards, information on the debtor's whereabouts, financial situation and other relevant facts.

The child welfare officer starts by asking the debtor to come to the local social welfare office in order to find out his standpoint in regard to the support claim and to hear his possible objections against it.[14] If the debtor does not come to the office, or if he is unwilling to pay the support claimed, the child welfare officer clarifies the debtor's financial situation by asking for taxation documents relating to him, as well as for other information needed (his current employer mentioned in the registers of the Central Pension Security Office, etc.). A summary of the debtor's financial situation, as well as the child welfare officer's recommendation concerning the amount of fair support payments in the case, are sent to the Ministry of Foreign Affairs for forwarding to the Transmitting Agency abroad. These documents are accompanied by a presentation of the debtor's objections and his possible offer to make support payments lower than the claim. If, on the contrary, the debtor is willing to make the payments claimed, he receives technical payment instructions, and the Ministry is informed to notify the foreign Transmitting Agency of the arrange-

Elatusapujen perintä Pohjoismaiden ulkopuolelta. Periaatteita ja toimintaohjeita (Support Recovery from Countries Outside of Scandinavia. Principles and Instructions for How to Act), National Board of Social Welfare, Helsinki 1984.

[13] The Finnish system of special child welfare officers charged with the establishment of paternity and with the recovery of child support is described in the article: Heikki Mattila, "L'intervention de l'Administration en matière de filiation naturelle en Finlande", in *Revue de la recherche juridique, "Droit prospectif"*, No. 2/1985, pp. 602–20. Though the article concentrates on the measures connected with the establishment of paternity, other functions of these child welfare officers are also briefly discussed.

[14] As far as illegitimate children are concerned, the most serious objection has been, as one may guess, the contesting of paternity, often connected with a claim to have a blood test taken. This objection cannot prove an obstacle to the granting of an enforcement order concerning a foreign support decision (cf. section 4.3.1 below). However, in the cases where this objection was made there was no support decision that could have been declared enforceable by the Helsinki Court of Appeals. The Ministry of Foreign Affairs and the child welfare officers therefore strive to arrange a voluntary blood test in order to assure the debtor of his paternity and thus make him agree to voluntary payments.

Another objection frequently found in the materials researched, characteristic of East European countries, is connected with the channels of payment and with the rate of exchange of the currencies involved. The debtor had made the support payments through the agency of a private person living in the sending country, an East European State, in order to guarantee a high rate of exchange for these payments. The Transmitting Agency quite naturally considered this illegal. The problem has been discussed in Sweden, cf. Michael Bogdan, "Familjerättsligt underhåll i svensk internationell privaträtt (Family-Law Support in Swedish Private International Law)", *SvJT* 1978, pp. 182 f.

ment. In these circumstances the question of drawing up a written support agreement, signed by the debtor, is worth considering.

3.2. *Problems Connected with Drawing up a Written Support Agreement in Cases of an International Nature*

In Finland, child support agreements are normally drawn up by using a printed form approved by the Ministry of Justice.[15] It is the intention of the legislator that this kind of standardized contract of child support is presented to the local board of social welfare for confirmation. If this board accepts and confirms the agreement, after having checked its fairness and its correctness as to the formalities required, it is immediately enforceable just as a final court decision.[16] However, from the pure private-law point of view, a written support agreement is completely valid even if it has not been presented to the social welfare board and even if the printed form has not been used.[17] It is true, though, that this kind of agreement is not immediately enforceable but it may serve as the basis of a later support action before a court of law.

When, in the case of a claim arriving from a foreign country, there is a mutual understanding between the creditor and the debtor as to fair support payments, it would often be desirable to draw up an immediately enforceable agreement, i.e. an agreement confirmed by the local board of social welfare. This would be especially important in cases where there is no foreign support decision that could be declared enforceable by the Helsinki Court of Appeals, or where the parties agree on support payments other than those mentioned in a foreign court decision.

There is, however, a statutory obstacle to this kind of arrangement. Support agreements of an international nature have not been taken into account either in the Finnish Child Support Act (1975 No. 704) or in the Act on Certain Family-Law Relations of an International Nature (1929 No. 379), and this causes a problem of territorial competence in cases where the support debtor is living in Finland but the child and his custodian abroad. A support agreement has to be confirmed by the social welfare board of the habitual residence of the child's custodian,[18] and in the case of a custodian living abroad, there is no

[15] Presidential Decree on the Establishment and Rebuttal of Paternity, and on Child Support (No. 673/1976), sec. 13.

[16] Child Support Act, sec. 8(3). On the other hand, the confirmation of a support agreement is also very important as this is the precondition for standardized support payments made by social authorities instead of the private payments omitted. Cf. Support Guarantee Act, sec. 2.

[17] Government Bill on the Reform of the Legislation Concerning the Position of the Child (Bill No. 90/1974 Session), Motivation, p. 51.

[18] Child Support Act, sec. 8(1).

competent board. In principle it would be possible to remedy this situation by means of a wide interpretation of the law, but the Finnish social welfare boards would hardly be daring enough to do this, and it would be necessary to bring the matter to the Supreme Administrative Court. Hence, the defect should be corrected by means of legislative measures in connection with the planned general reform of Finnish international support law.

On the other hand, in the situation in question, there is no obstacle to drawing up a support agreement without any intention to have it confirmed by the social welfare board and, of course, the printed form may be used for this purpose. This kind of contract will serve as a verification of the agreed stipulations for the parties, and it may also encourage the debtor to make the support payments which he is obliged to pay. Further, even though such a contract is not immediately enforceable, it has an important legal significance: if the payments are omitted and the debtor is sued, the support decision of the court will be based on the agreement if there are no important counter-arguments. Where there is an agreement, the creditor may also claim support arrears without any time-limit (in a non-contract situation retroactive claims are limited).

4. APPLICATION FOR AN ENFORCEMENT ORDER CONCERNING A FOREIGN CHILD SUPPORT DECISION

If the debtor is not at all willing to co-operate in a support matter having come from a foreign country, or if no mutual understanding on a lower payment offer can be reached, the Ministry of Foreign Affairs resorts to measures of coercion. When there is a foreign court decision given in a country which is a party to either of the Hague Conventions, and the decision fulfils the conditions set down in these Conventions, the Ministry makes an application for an enforcement order.

4.1. *The Legislative Basis for Granting an Enforcement Order in Child Support Cases*

Finland is a party both to the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children (1958) and to the Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973). The former has come into force in this country by a parliamentary blanket Act in which the contents of the Convention are not repeated but in which only the

procedure for applying for an enforcement order is regulated.[19] On the other hand, a more detailed law has been enacted to implement the latter Convention. This law includes not only the enforcement procedure but also the rules of the Convention itself.[20]

Quite naturally, the enforcement conditions (e.g. the documents to be presented) established in the implementing Acts correspond to the rules of the Conventions. Besides this, it has been necessary to indicate the authority empowered to grant enforcements in these matters: the Helsinki Court of Appeals is the only organ competent to do this, quite independently of the habitual residence of the support debtor. Furthermore, the Act implementing the 1958 Convention provides that no appeal to the Supreme Court shall be allowed regarding decisions of the Helsinki Court of Appeals. There is, on the contrary, no corresponding prohibition in the Act implementing the 1973 Convention. The present author considers this very sound since the 1973 Convention leaves open many important questions of interpretation (claims concerning the payment of interests, law applicable to the limitation of support claims, increases on the basis of linking the support payments to the cost-of-living index, etc.).

It is also useful to state that a presidential decree connected with the implementing Act to the 1973 Convention provides that, due to a reservation made by Finland, no enforcement will be granted for decisions insofar as they relate to a period of time after the support creditor attains the age of twenty-one years or marries.[21]

4.2. *General View of the Support Enforcement Cases Tried in the Helsinki Court of Appeals*

4.2.1. *Basic facts*

Empirical research showed that during the period studied[22] (from August 1967 to March 1987) the Helsinki Court of Appeals gave a total of 25 decisions concerning the enforcement of child support (in some of these the application

[19] Act of June 2, 1967/339; Treaties of Finland 1967/41–42.

[20] Act on the Recognition and Enforcement of Foreign Decisions Relating to Payment of Support (of April 8, 1983 No. 370). An English translation of the Act is available (Finnish Ministry of Justice).

[21] Presidential Decree Implementing the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (of June 17, 1983/521), Treaties of Finland 1983/35, sec. 2.

[22] The 1958 Hague Convention entered into force in Finland in August 1967. The empirical materials were gathered in spring 1987.

was refused).[23] As to countries in which the original court decision was given, the following list may be drawn up: the Federal Republic of Germany 16 cases, the United Kingdom 3, Austria 2, Switzerland 1, Hungary 1, Czechoslovakia 1, the United States 1 (the last one was rejected since the USA is not a party to the Hague Conventions).

In an overwhelming number of these cases the application was based on a foreign court decision;[24] only in two (rejected) cases was the application based on a foreign support agreement. The support decisions were either independent court decisions, or they had been given in connection with divorce (separation) proceedings, child custody proceedings or paternity proceedings. In many cases the application was based on a court decision given in the default of the defendant. The amount of the support payments was roughly equivalent to the Finnish support standard in cases from Western Europe, especially from the Federal Republic of Germany;[25] in cases from Eastern Europe these payments were much lower.

In seven cases the Helsinki Court of Appeals had dismissed the enforcement application or rejected it. There were four types of case in which the application was dismissed or rejected: the court order was not needed for the enforcement of the foreign decision in Finland (the debtor lived abroad and had no property in this country) but the objective of the enforcement application was to have certain social security payments granted;[26] the application was based on a support agreement, and these fall outside the scope of application of the 1958 Hague Convention;[27] the foreign court decision "had been given before the international entry into force, i.e. January 1st, 1962, of the 1958 Hague Convention";[28] or the foreign court decision had been given in a country which

[23] In spring 1987, one application was still under consideration (H 1986/877). In five cases the enforcement order was based on the 1973 Convention, in the other cases on the 1958 Convention.

[24] Some of these decisions (H 1975/160/251, H 1981/186, H 1980/158, H 1984/52) affected an interlocutory order based on sec. 627 of the German Code of Civil Procedure (ZPO) or an order increasing the support obligation because of the increase in the cost of living (cf. section 4.3.3 below).

[25] To give a rough idea of the amounts of monthly support payments in Finland, it is useful to mention that, according to statistical materials examined by Jan Tennberg, about 30 per cent of the support agreements confirmed by social welfare boards in 1985 were in the range 400 to 499 FIM and about 24 per cent in the range 500 to 599 FIM; there were far fewer payments in ranges above or below these limits. The division of corresponding court decisions was quite similar. Cf. Ilkka Cantell, Risto Jaakkola and Reino Sirén, *Tuomioistuinten päätökset lapsen huollosta ja tapaamisoikeudesta sekä lapselle suoritettavasta elatusavusta* (Court Practice on Child Custody and Visiting Rights, and on Child Support), Publications of the Law Drafting Department of the Ministry of Justice, No. 12/1987, p. 29, and appendix 7. At the moment of writing (Autumn 1987), the child support payments are of course somewhat higher; one might estimate that the most numerous range is 450 to 550 FIM.

[26] H 1972/195/340, H 1976/41/228, H 1984/59 and H 1984/224 B.

[27] H 1971/126/41.

[28] H 1971/126/44. The justification of this order is exceptional: the law courts of the contracting States have normally required that the decision to be enforced be given after both States (the State

was not a party to the Hague Convention (USA).[29] There were no cases in which the rejection would have been justified by public policy (*ordre public*) reasons[30] or by the fact that the defendant had not been legally summoned to answer the support action. In no case had an appeal of a decision of the Helsinki Court of Appeals been made to the Supreme Court of Finland.

The channels created by the New York Convention had been used in 10 cases and the enforcement application had then been drawn up by a legally trained official of the Finnish Ministry of Foreign Affairs. In the remaining cases (15) the applicant had been represented by a Finnish attorney or another counsel. Cost-free enforcement proceedings had been granted to the applicant in 12 cases, and in seven cases a legally trained trial counsel was also appointed to help the applicant in accordance with the Finnish Cost-Free Trials Act.[30a] The consideration time of the enforcement applications was, in the cases researched, approximately nine months on average; enforcement proceedings in the Helsinki Court of Appeals are delayed by the fact that the Court has to give, *ex officio*, the support debtor an opportunity to give a statement regarding the application. This is done with the assistance of the relevant County Administrative Board.

4.2.2. *Appreciation of the facts*

First of all, it is necessary to state that the materials are far too limited—just as in the case of the corresponding materials in the Ministry of Foreign Affairs—to allow for solid statistical conclusions. In spite of this, certain features of the enforcement matters in question seem to deserve attention.

Firstly, it is perhaps surprising that the division of the enforcement cases by country is quite different from the corresponding division in the files of the Ministry of Foreign Affairs (the number of cases is the same only by accident). The main reason for this seems to be that Poland is not a party to either of the Hague Conventions and that the United Kingdom is a party only to the 1973 Convention; the effects of this latter Convention cannot yet be seen in the materials researched. Secondly, it is worth noting that the main part of the enforcement applications has come to the Helsinki Court of Appeals through channels other than those of the New York Convention. In addition to several

where the decision was given and the State of enforcement) have acceded to the Convention. Cf. Mathilde Sumampouw, *Les nouvelles Conventions de La Haye*, T.M.C. Asser Instituut, I—Leyden 1976, pp. 199–202; II—Alphen aan den Rijn & Anvers 1980, pp. 75–77; and III—Dordrecht & Anvers 1984, pp. 53–55.

[29] H 1985/286.

[30] The attorney had claimed in two cases that the enforcement application should be rejected on the ground of *ordre public*.

[30a] This institution is explained on pp. 164f.

cases sent for recovery by private initiative, this fact is the result of the authorities of the Federal Republic of Germany having often hired private attorneys in Finland instead of using the New York channels.

On the other hand, it is striking that the portion of cases in which the application was rejected is quite high (seven cases out of twenty-five). The explanation is not, however, that the Helsinki Court of Appeals had chosen a very strict line of interpretation of the Hague Conventions: badly informed applicants had made several applications which had to be rejected on valid grounds. It is worth underlining that, as already mentioned, no applications were rejected for *ordre public* reasons or on other comparable grounds. On the contrary, the interests of the foreign applicant have been safeguarded by granting full legal aid (cost-free enforcement proceedings) in one half of the cases.

4.3. *The Practice of the Helsinki Court of Appeals in Certain Questions of Interpretation*

The authors of the Hague Conventions have consciously left open certain questions of interpretation which could have given rise to disagreement during the preparation of the Conventions; these questions were left to be resolved in the judicial practice of each country. Some other questions of interpretation have turned up later when the Conventions have been applied by courts of law. Consequently, the international compendia of cases show that divergent interpretations of ambiguous or incomplete provisions of the Conventions have been adopted in different countries.[31]

Due to the limited number of enforcement cases decided by the Helsinki Court of Appeals, it is impossible to give a sure answer to all the questions of interpretation that have been raised abroad. Certain standpoints of principle can be found, however, in the practice of the Helsinki Court. Furthermore, Finnish municipal law gives indications of the probable interpretation of certain of the ambiguous convention provisions in Finland. Some of the questions of interpretation connected with the Hague Conventions would certainly merit a thorough legal analysis (e.g. the law applicable to the limitation of support claims, etc.) but this is impossible within the bounds of the present paper. Consequently, these questions will be treated in what follows only where they find expression in the practice of the Helsinki Court of Appeals or where they can be clarified in the light of Finnish municipal law.

[31] This appears, e.g., in the compendia of cases edited by Mathilde Sumampouw (cf. footnote 28 above). The newest compendium also includes orders of the Helsinki Court of Appeals.

4.3.1. *Paternity as a preliminary question of support decisions*

The application of the Hague Conventions has been inconsistent in many countries regarding such support decisions as are based on foreign paternity judgments. Today there is an established international practice according to which such ancillary support decisions are recognized and enforced quite irrespectively of the fact of whether the judgment determining the personal status of the child comes into force in the relevant country or not,[32] and even where the support decision is based on the so-called *Zahlvaterschaft*.[33]

This practice appears clearly in the decisions of the Helsinki Court of Appeals: support decisions ancillary to foreign paternity judgments have been recognized and enforced. There were eight cases of this kind in the materials researched. In five cases the paternity judgment had been rendered in the Federal Republic of Germany;[34] besides this there was one British,[35] one Swiss,[36] and one Czechoslovak[37] judgment. The recognition and enforcement of British affiliation orders are worthy of special notice since an English "putative fatherhood" does not give the child a personal status in the same sense as e.g. in the Nordic countries and in the Federal Republic of Germany.[38]

4.3.2. *Support payments that can be considered to be unfairly high*

The Hague Conventions are based on the principle that the authority granting a child support enforcement is not allowed to review the merits of the case. Only the conditions explicitly mentioned in the Conventions may be checked as to foreign support decisions. However, there are sometimes clearly unreasonable support payments. A court decision given abroad may have been unfair from the very beginning because, e.g., it had not been possible to find out the real financial conditions of the defendant during the trial, or the payments have grown inequitably later on.

In this kind of situation the enforcement of a foreign decision violates the principle of fairness of child support payments, and the application may be rejected for *ordre public* reasons. This, however, must be entirely exceptional; *ordre public* may only be used in cases where the support payments are apparently unreasonable. The application must then be completely rejected. It

[32] See in detail Sumampouw, *op.cit.*, III (footnote 28 above), pp. 59 ff.

[33] This interpretation corresponds to the aims of the Hague Conventions. Cf. "Explanatory Report" by Michel Verwilghen, *Actes et documents de la Douzième session, Tome IV, Obligations alimentaires, Conférence de La Haye de droit international privé*, The Hague 1975, p. 392 (No. 19).

[34] H 1969/87/196, H 1971/126/45, H 1978/175/59, H 1979/107/263 and H 1983/39.

[35] H 1986/876.

[36] H 1981/59.

[37] H 1985/64.

[38] See, e.g., Stephen M. Cretney, *Principles of Family Law*, 4th ed. London 1984, pp. 592 f.

is not possible to review the merits in order to determine a fair amount for support payments in the situation in question.[39]

As already pointed out when the cases decided by the Helsinki Court of Appeals were presented generally, support payments ordered by West European courts correspond, roughly speaking, to the Finnish support standard, while in East European cases these payments have been much lower than the Finnish ones. It is therefore quite natural that so far there have been no cases where the Helsinki Court of Appeals has rejected an enforcement application on the grounds that the child support payments were considered far too high.[40]

4.3.3. *Modifications of child support payments*

The Hague Conventions are applicable to decisions increasing the former amount of support payments, and in different countries there is much court practice concerning these kinds of adjustment decision. Quite naturally, the materials researched in Finland also include several foreign court decisions increasing the amount of support payments, and all of these have been recognized and enforced. In most of the cases the Helsinki Court of Appeals had given an enforcement order in which both the original support decision and the later adjustment decisions were declared enforceable at the same time. In one case, however, the creditor had applied for separate enforcement of an adjustment decision. This was a German *Regelunterhalt* decision, and it was declared enforceable.[41]

4.3.4. *The duration of support obligation*

As already pointed out, Finland has made a reservation to the 1973 Hague Convention under which a child support obligation ends when the child attains the age of 21 years or marries. As far as the 1958 Convention is concerned, this restriction is mentioned in the convention text itself. On the other hand, in

[39] The principle that *ordre public* may be applied in cases where the amount of the support payments is manifestly inequitable, as well as the limitations of this application, appear—though in the form of a kind of *obiter dicta*—in several places in Verwilghen, *op.cit.* (footnote 33 above), pp. 412, 417 and 419 (Nos. 64, 75 and 80).

[40] Simply to avoid situations where the principle of *ordre public* should be applied to support payments that are excessively high, the 1973 Hague Convention provides the possibility to apply for a partial recognition and enforcement of the decision alone. Cf. Verwilghen, *op.cit.*, p. 419 (No. 80).

[41] H 1986/848. It should be added that, since child support payments are increased in Finland in consequence of the increase of the cost of living, by general administrative decisions which are *ipso jure* applicable to all the court decisions and confirmed agreements (cf. section 5.1.1 below), the increases based on corresponding foreign systems may be included in Finnish enforcement orders.

Finnish municipal law, the obligation normally ends when the child attains the age of 18 years; but even after this age he is entitled to claim support for educational purposes (including university studies).[42] Seen against this background, the decisions of the Helsinki Court of Appeals are quite interesting.

In the earliest case of this kind, a West German court had obliged the defendant to pay child support till the moment of termination of the public welfare payments regularly made for the child ("bis zur Beendigung der Hilfegewährung für seinen Sohn");[43] the Court of Appeals did not take any stand in regard to the duration of the support obligation in its enforcement order. The second case was also from the Federal Republic of Germany. A German court had obliged the defendant to pay support till the moment at which "the child attains economic independence" ("bis zur wirtschaftlichen Selbständigkeit"),[44] and the Helsinki Court of Appeals, with reference to Finnish law, reduced the duration of the support obligation till the moment at which "the child attains the age of 18 years".[45] Since the child in this second case was already over 18 at the time of the enforcement proceedings, the representative of the applicant presented a certificate stating that the child had no income and no property; but there was no certificate stating whether he was attending school or not. In the newest case,[46] a Czechoslovak one, there was no mention of the duration of the support obligation in the original court decision. The Helsinki Court of Appeals then fixed the duration of the support obligation till the moment at which "the child attains the age of 21 years or at which he enters into matrimony". At the time of the enforcement proceedings the child was 13 years old.

These three enforcement orders show that the standpoint of the Helsinki Court of Appeals has been inconsistent as to the law applicable to the duration of the support obligation. In the first case no standpoint was taken. In the second case the Court of Appeals seems to have considered that it must be Finnish law which determines the duration of the support obligation in ambiguous situations. In the third case, on the contrary, decisive importance was given to the criteria mentioned in the 1958 Convention and in the Finnish reservation to the 1973 Convention, i.e. the age of 21 years and entering into matrimony. Simultaneously, however, this standpoint was justified with the argument that "the Czechoslovak court decision does not mention when the child reaches his majority according to Czechoslovak law". The formulation of

[42] Cf. section 5.1.1 below.
[43] H 1981/186.
[44] H 1984/79.
[45] In the same manner *in re* H 1984/52.
[46] H 1985/64.

this justification is not a very happy one,[47] but the Helsinki Court of Appeals seems to consider that the duration of the support obligation is determined by the law which had been applied when the original court decision was given.[48] This principle may be supported on good grounds in the light of the theory of private international law and, since the last-mentioned enforcement decision is the newest one, it will probably be maintained.

4.3.5. *Penal interest on support arrears*

So far there have been no claims for penal interest on support arrears in the enforcement cases decided by the Helsinki Court of Appeals. On the other hand, a penal interest order is regularly included in court decisions on support obligation in certain countries (e.g. Poland), and one may presume that this question will come up in Finland sooner or later. It is therefore useful to anticipate how this kind of interest claim would be treated in Finnish enforcement proceedings.

The standpoint of Finnish internal law regarding this question has changed several times during the past few years. Before the entry into force of the present Interest Act, no interest was calculated on delayed support payments if the parties had not agreed on the opposite. The new Interest Act, which came into force on January 1, 1983, prescribed in its original form that interest must be paid on support arrears. However, this Act was amended after one year had elapsed and, in order to avoid practical difficulties in the calculation of arrears by social authorities, support arrears were excluded from the scope of application of the Act. To obviate the problem of retroactivity, court decisions on child support given during the year 1983, as well as support agreements signed during the same year, are in spite of this automatically interest-bound; and interest is also calculated for the support arrears accrued during the year 1983

[47] Since the fact that the child reaches majority does not necessarily mean the termination of the support obligation, it would have been more adequate to say: "... the Czechoslovak court decision does not mention when the right to support terminates according to the law which has been applied in this decision".

[48] When this is taken into account, the Court, on the basis of the general principles of Finnish international family law, could have proceeded in a different way. It could have acquired *ex officio* (Act of 1929, sec. 56, and the Code of Judicial Procedure, ch. 17, sec. 3, applied *ex analogia*) evidence concerning the termination of support obligations in pursuance of the law which had been applied in the original court decision (i.e. Czechoslovak law). The contents of this law could then have been included in the enforcement order. According to Czechoslovak law the child support obligation terminates when the child is capable of earning his own living; there is no exact time-limit as to the termination of the support obligation (cf. in detail, Jirina Petruláková, "Les rapports d'obligation alimentaire", in *Le droit civil tchécoslovaque*, ed. Stefan Luby, Bratislava 1969, p. 243, and Bergmann and Ferid, see footnote 61 below). Consequently, the end of the wording of the order in question could have been: "... however, the decision cannot be enforced regarding such support payments as will fall due after the moment when the support creditor *becomes able to earn his own living*, or attains the age of 21 years, or marries".

quite independently of when the court decision was given or when the agreement was signed. Furthermore, it is possible, even today, to include in support agreements an explicit stipulation on penal interest.[49]

Since, in Finland, one part of the domestic support decisions and agreements is bound by penal interest, foreign interest orders are compatible with Finnish public policy (*ordre public*). It is therefore presumable that an enforcement order of the Helsinki Court of Appeals may also cover penal interest in a support case.

4.3.6. *Fall of support arrears under the statute of limitations*

It is well known that the fall of support arrears under the statute of limitations is not regulated in a similar manner in different countries. In Sweden, for instance, mature support payments cannot be claimed after three years, and the running of the statute of limitations cannot be interrupted (*Föräldrabalken* 7:9). In the Federal Republic of Germany the running of the statute is suspended while the child is a minor but, after this, support arrears become statute-barred after four years (BGB sec. 197 and sec. 204). In Finland, on the contrary, support arrears fall within the scope of application of the general limitation provisions: each support payment becomes statute-barred after a lapse of ten years calculated from the moment it matured,[50] and the running of the statute may be interrupted, not only by legal proceedings, but also by reminding the debtor of the support arrears in a verifiable way. Each voluntary support payment made by the debtor also interrupts the running of the limitation statute in Finland.[51] Due to these differences between the internal laws of different countries, it is often very important to know which law is applicable to the limitation of support claims.[52]

In any case the Helsinki Court of Appeals has not taken an explicit standpoint regarding the question of the law applicable to the limitation of

[49] See more in detail, Ahti Saarenpää, "Elatusavun muuttuminen, muuttaminen ja palauttaminen" (*Ipso Jure* Adjustments and Individual Modifications of Support Obligations, and Returning of Earlier Support Payments), in Heikki Mattila (ed.), *Lapsioikeuden pääpiirteet* (Introduction to Child Law), 2nd ed., Helsinki 1984, pp. 204 f., and Thomas Wilhelmsson and Leif Sevón, *Korkolaki ja viivästyskorko* (Interest Act and Penal Interest), Helsinki 1984, pp. 33–36.

[50] Limitation Act, sec. 1, and Supreme Court 1938 II 94.

[51] Limitation Act, secs. 1 and 3.

[52] In principle, there are at least three ways of thinking: firstly, as in common law countries, the limitation of claims and actions may be classified as a phenomenon of procedural nature and, thus, the courts and authorities could apply *lex fori* on the basis of the principle of territoriality of procedural laws. Secondly, one may consider that the limitation of claims and actions is governed by the law which is indicated by the choice-of-law rules of the State of enforcement. The third possibility is the theory according to which the legal effects of judgments are transferred across borders: the law applied when the original court decision was given determines the interpretation of the decision and the legal effects which are closely connected with its content, *inter alia* the fall of support arrears under the statute of limitations.

support claims. However, one case may possibly be considered as an indirect standpoint in the matter.[53] In this case the enforcement application had arrived at the Court of Appeals on February 18, 1983, and the applicant requested, on the basis of a West German court decision given in 1972, that the support payments maturing in 1972 (and later) should be declared enforceable, i.e. the applicant claimed support arrears which were older than ten years. The Court approved the application. There was no explicit evidence on the interruption of the running of the statute. Since, according to Finnish law, the effect of the limitation of claims must be taken into account *ex officio* when judgments are enforced, the last-mentioned decision could possibly be interpreted that the Helsinki Court of Appeals found West German law applicable to this question. This conclusion, however, is quite risky: the problem is not at all considered in the files of the case and, furthermore, certain earlier statements of the support debtor might possibly be interpreted as an acknowledgment of the arrears and certain later West German court decisions of a summary nature as reminders of the arrears.

This cautiousness of the Helsinki Court of Appeals means that the question of the law applicable to the limitation of support claims may later come up in connection with the forced execution of a foreign support decision (when the property of the debtor is seized). In the Finnish system the execution officers have to consider *ex officio* whether the arrear claim has become statute-barred or not.[54] Although it is not quite clear if this rule is to be followed in matters where a claim is alleged to be regulated by a foreign law, a standpoint in regard to the applicable law must anyway be taken if a party appeals against an execution officer's decision concerning the limitation of a support arrear claim on the basis of Finnish or foreign law. In the last resort it is up to the Supreme Court of Finland to resolve the problem.

It is not quite sure what the decision of the Supreme Court would be; the question has not been discussed in Finland. However, the decisions of Swedish courts usually have a great influence in Finland, and in 1984 the Supreme Court of Sweden declared in an analogous (inter-Nordic) situation that preeminence should be given to the law which had been applied by the foreign court when the original support decision was given.[55]

[53] H 1983/39. On the other hand, an indirect standpoint in favour of Finnish law could perhaps be observed in that the Court of Appeals nowhere asked for evidence on the question of whether the arrears had become statute-barred or not according to the law applied in the original court decision.

[54] Cf. in detail Jouko Halila and Erkki Havansi, *Ulosotto-oikeuden oppikirja* (Textbook on the Law of Forced Execution), SSL 87, Helsinki 1986, pp. 67 and 115.

[55] The Supreme Court of Sweden, January 10, 1984 (1984 NJA 25). See in detail, Lennart Pålsson, *Svensk rättspraxis i internationell familje- och arvsrätt* (Swedish Court Practice in the Field of International Family Law and the Law of Inheritance), Stockholm 1986, pp. 176 f.

4.3.7. *Litigation costs of the original support trial*

In no enforcement application so far decided by the Helsinki Court of Appeals has the applicant requested that the support debtor be obliged to compensate for the litigation costs of the original support trial. However, there seems to be no obstacle to this. Even if the *travaux préparatoires* of the 1958 Convention do not touch upon this subject, those of the 1973 Convention imply that, besides support payments in the proper sense, the litigation costs which the foreign court has ordered to be paid to the successful party should also be included in the enforcement order. In case of a support decision ancillary to a paternity judgment or to a judgment for divorce, the judge granting enforcement is authorized to consider which part of the litigation costs affects this ancillary decision.[56]

4.3.8. *The expenses of the enforcement proceedings, especially those caused by translation of the documents*

It is normally necessary to translate the documents of the case into Finnish or Swedish for the enforcement application. This is sometimes very expensive. The problem is not resolved in the *travaux préparatoires* of the Hague Conventions but it appears in the enforcement orders of the Helsinki Court of Appeals.

In two cases decided in the 1970s[57] the applicant had requested that the defendant be obliged to compensate for the translation costs of the enforcement documents. The Court of Appeals, however, dismissed the application because "the defendant had not been heard in the matter". This statement of reasons seems to comprise the idea that it was not possible to consider the costs claim in the enforcement proceedings since the plaintiff had not requested in the original support trial that the defendant be obliged to compensate for the future translation costs and, consequently, the latter had had no possibility to take a stand in this respect.

Recently, the question of these expenses has come up in two cases in connection with the granting of a cost-free enforcement proceeding (legal aid).[58] In these cases the applicant to whom a cost-free proceeding had been granted was authorized, on the basis of the Cost-Free Trials Act, to get

[56] Verwilghen, *op.cit.* (footnote 33 above), p. 400 (No. 39), and Catherine Jaccottet, *Les obligations alimentaires envers les enfants dans les Conventions de La Haye*, Publications Universitaires Européennes, Série II, Droit, vol. 296, Berne and Frankfurt am Main 1982, pp. 78 f. and 176.

[57] H 1979/107/263 and H 1978/175/59. This kind of claim was also presented *in re* H 1985/286 but since the principal claim was rejected, no standpoint was taken in regard to the claim on the litigation costs of the enforcement proceeding.

[58] H 1984/79 and H 1983/39.

compensation for the translation costs from public funds. In one of the cases this compensation was left to be made by the State but—what is more interesting—in the other case the support debtor was obliged, on the basis of sec. 21 of the Act, to reimburse the State for the translation costs.

These last-mentioned decisions of the Court of Appeals do not explicitly resolve the question of whether the support debtor may be obliged to reimburse the enforcement expenses of the adverse party (translation costs and attorney's fee) even in cases where cost-free enforcement proceedings have not been requested or have not been granted. These decisions, however, may be a sign of a revision of the standpoint of the Court. Indeed, there seems to be no obstacle to obliging the defendant to reimburse the applicant for the expenses of the enforcement proceedings although this is not stated explicitly in the Finnish legislation implementing the Hague Conventions. In Finland, support enforcement proceedings are in many respects comparable to normal trials (the defendant must be heard etc.) and, besides, trials opened with an application (not with a writ of summons) are becoming more frequent in Finland (e.g. in child custody proceedings). One may also add that in actions for recovery of debt the defendant may be obliged—there is an explicit provision in this respect—to compensate for the costs of the winning party.

4.4. *The Activities of the Finnish Ministry of Foreign Affairs in Support Enforcement Matters*

In Finland attorneys do not hold a monopoly to appear before courts and, since support enforcement is granted in a written procedure, the legally trained officials of the Ministry of Foreign Affairs take care of applications to the Helsinki Court of Appeals. This is done free of charge in compliance with the obligation expressed in art. 9(3) of the New York Convention. A written letter of application is drawn up and sent to the Court of Appeals. As mentioned earlier, it takes on average some nine months to get the enforcement granted; this is because the support debtor is given an opportunity to present a defence in the matter.

The Finnish Ministry of Foreign Affairs strives to attend to the interests of the child in an active way and, consequently, Ministry involvement is not limited only to the conveying of the documents. Thus supplementary documents and clarifications are requested when needed: how is child support regulated according to the law applied in the foreign court decision; is a child who has attained the age of 18 years (or who will attain this age in the near future) studying, and what is his marital status? On the other hand, the

Ministry always aims to get a cost-free enforcement proceeding granted to the applicant whenever possible,[59] even if this has not been requested in the foreign support claim received. In connection with the application for cost-free proceedings the Ministry also requests that the translation costs be paid out of public funds if an invoice can be produced. This also concerns the litigation costs to be paid by the defendant (debtor) according to the original court decision if their payment has been omitted.

As already mentioned, there have been no cases so far in which an enforcement order of the Helsinki Court of Appeals has been appealed against in the Supreme Court of Finland. However, it is probable that the Court of Appeals, in the future, will face important questions of interpretation (cf. section 4.3 above) that should be decided by the Supreme Court. For this eventuality, the plan is that the legally trained officials of the Ministry will represent the applicant in the same manner as in the Court of Appeals.

5. ORDINARY SUPPORT TRIAL BEFORE A FINNISH DISTRICT COURT

In cases where a foreign support decision does not fulfil the conditions required for an enforcement order,[60] or when there is no foreign title to be enforced, an ordinary support action must be brought against a recalcitrant debtor on the basis of Finnish support law (international private law included). It is essential

[59] If the applicant has benefitted in the original trial from legal aid or exemption from costs or expenses, these kinds of privilege have to be granted in the enforcement proceedings. But, even though there may not have been free legal aid or cost exemption in the original trial, the Ministry of Foreign Affairs applies for a cost-free enforcement proceeding under art. 9 of the New York Convention, provided that the applicant has only scanty means.—One may add that aliens are generally entitled to the privilege of a cost-free trial (legal aid) according to Finnish law. Cf. Cost-Free Trials Act, sec. 1(2).

[60] In consideration of the general principles of Finnish international private law, such support decisions as are given outside of the Hague countries cannot be recognized in Finland without review on their merits. The creditor must bring an ordinary support action before a Finnish district court, even though the action may be based on the support decision given abroad (cf. Irma Ertman, *op.cit.* (footnote 9 above), p. 10, and the literature there indicated). As far as illegitimate children are concerned, it is sometimes necessary to consider, in connection with a support action, the significance of a foreign paternity judgment or a recognition of paternity made abroad. Even foreign recognitions of paternity have aroused suspicion in Finland because the internal child law of this country presupposes that the child welfare authorities and courts examine whether the recognition corresponds to biological reality. Quite recently, on October 21, 1987, the Supreme Court of Finland, however, rendered a judgment in which a recognition made in the Soviet Union according to Soviet law was declared valid in Finland, considering that the parties were living together at the moment of the conception and recognition of the child, and the mother was then residing habitually in the Soviet Union (Supreme Court No. 2968, record No. S 86/989).

to know the rules of this legislation when considering whether a support trial is worth the trouble and, therefore, these rules will be treated in the next section.[61]

5.1. *The Legislative Basis of a Finnish Support Trial*

5.1.1. *The internal support law of Finland*

The Finnish legislator started to reform the law relating to the legal position of children in the middle of the 1970s and, as regards the law for domestic cases, these reforms have already been completed. In the area of support law the Paternity Act (1975 No. 700) and the Child Support Act (1975 No. 704) are the most important legislative acts. The leading principle of these Acts is that all children are treated equally in support matters and that, basically, a child may claim support only on the condition that there is a status-creating relationship of parent and child between him and the person he is asking support from. This is especially important in cases of illegitimate children: the paternity of the man in question must have been established.

The Child Support Act also lays down the basic principles defining the level of child support in each case, as well as the beginning and the termination of the support obligation. The level of support is expressed in only very general terms: it is bound to the support ability of the parents and to the child's needs and to his possibilities to earn his own living. Consequently, there are no exact formulas for calculating the level;[62] the judge's *judicium* is decisive in these

[61] Most Finnish paternity and support legislation has been translated into German in Alexander Bergmann and Murad Ferid, *Internationales Ehe- und Kindschaftsrecht*, Frankfurt am Main (loose-leaf edition). The principal statutes concerning Finnish international family law (Act and Decree on Certain Family-Law Relations of an International Nature) have likewise been translated both into French and into German (Bergmann and Ferid, and A.N. Makarov and Hans Dölle, *Quellen des internationalen Privatrechts*, Berlin and Tübingen 1953, *Band* I: *Gesetzestexte*—in French and in German—and *La législation finlandaise concernant le droit familial*, Helsinki 1930). As far as the conflict-of-laws position of children is concerned, the provisions of the Act on Certain Family-Law Relations of International Nature still have their original wording, so that these old translations are still up-to-date. On the other hand, there is a working team in the Finnish Ministry of Justice for the translating of Finnish statutes into English. The Paternity Act and the Child Support Act will be translated during the next few years. One may also add that all the statutes of Finland, as well as the Government bills with their official commentaries and the reports of Parliamentary Committees, are written not only in Finnish but also in Swedish.

As to the literature concerning Finnish support law, special mention should be made of the contribution of Timo Esko and Maarit Jänterä in *L'obligation alimentaire en droit international privé*, vol. 1, Paris 1983.

[62] In Sweden, on the contrary, when the support provisions in force were enacted, it was provided that they would be specified with regulations at the lower level. Consequently, the Swedish National Board of Social Welfare and the National Board of Taxation have given detailed instructions in this respect; these instructions have only a recommendary nature, and they do not bind the courts of law. Cf. Åke Saldeen's report in Peter Dopffel and Bernd Buchhofer (eds.), *Unterhaltsrecht in Europa, Eine Zwölf-Länder-Studie*, Tübingen 1983, pp. 101 ff.

matters. As far as the beginning of the support obligation is concerned, child support must be paid, in litigation cases, from the institution of the action. For special reasons the defendant may however be obliged to pay retroactive support for one year and, in paternity matters, for the five years preceding the institution of the action (sec. 10). The support obligation normally terminates when the child attains the age of 18 years but, as an exception, a parent may be obliged to defray the expenses of the child's education even after this; other reasons do not justify the continuation of the support obligation after the limit of 18 years (sec. 3).

Quite naturally, it is possible to modify the support obligation because of changed circumstances (ch. 5 of the Act). It is, however, more important that the support payments in Finland are linked through an index system to the cost of living.[63] The central social welfare authorities decide each year whether support payments are generally to be raised and, if so, by how much. After this decision (let us say the support payments are raised by 10 %), the change automatically concerns all the support agreements and all the support decisions under Finnish law. Consequently, it is not necessary that the increase be confirmed in each case by a court or any other authority. It is true that the custodian may have the increase noted in the support decision or agreement in the local social welfare office, but this is only a declaratory measure and its omission does not cause forfeiture of the advantage in question.

If no support agreement can be reached, the matter may be decided through a trial, and the action will be brought in the name of the child (chs. 4 and 6 of the Act). A support action must be tried before the court within the ambit of which the representative (custodian) of the child has his habitual residence (sec. 14). The action is brought on behalf of the child by his representative, normally the custodian but in paternity matters the local child welfare officer.

When considering whether he should take legal action or not, the child's representative certainly wants to know if this is possible without considerable costs. In the case thåt a support action is brought in connection with a paternity action, there is no problem since the lawsuit is then carried on *ex officio* by the local social welfare officer, and this is done free of charge.[64] In cases where a separate support action is brought, the general system for guaranteeing the rights of poor people in trials is applicable.

This general system consists of two parallel often simultaneously applicable arrangements: cost-free trial and public legal aid counselling. According to the

[63] A separate Act on the Linking of Support Payments to the Cost of Living has been in force as of December 16, 1966 No. 660. This Act has been partly amended several times.

[64] Social welfare officers are released from the general fees for court proceedings, cf. Presidential Decree of 1987/290, sec. 15.

first-mentioned arrangement, the court may decide that a person of small means be released from the general fees for court proceedings and from the later costs connected with the execution of the judgment; and that his advocate's fee be paid from public funds. Under the second arrangement a person whose income does not exceed a fixed limit is gratuitously, or semi-gratuitously, entitled to the services of lawyers ("public legal aid counsels") employed by the municipality. These services may be either extrajudicial or services in court. When a public legal aid counsel brings an action, he normally applies for a cost-free trial in order to release his client from the general fees for court proceedings and from the later execution costs.

There are guidelines and practices defining the financial situation of the persons entitled to the privileges just mentioned. Some rules of the Cost-Free Trials Act, however, are open to various interpretations. There is, e.g., no clear court practice as to the question of whether the custodian's income and property should be taken into account in addition to the child's own income and property when the privilege of a cost-free trial is considered.[65]

5.1.2. *The international support law of Finland*

The state of Finnish international family law is quite unsatisfactory,[66] especially as to paternity and support law. In this last-mentioned field, an old statute is applicable in its original wording: the Act Relating to Certain Family-Law Relations of an International Nature (1929).[67] The provisions of this Act are completely out-of-date in many respects.

Firstly, the principle of nationality, contrary to present thinking, occupies far too central a place in this Act, and its rules are very incomplete and open to various interpretations: the rules no longer correspond to the leading principles and categories of the reformed internal family law of Finland. For example, different choice-of-law rules are applicable to legitimate and to illegitimate children, and it is not clear which law is applicable to support relations where an illegitimate child is involved. Furthermore, conflict-of-laws regulation is

[65] Cf. Eeva-Liisa Ruso, *Maksuton oikeudenkäynti ja yleinen oikeusapu* (Cost-Free Trials and Public Legal Aid Counselling), Helsinki 1985, pp. 27 f. These institutions have guaranteed quite well the legal protection of people of small means since they have been furnished with sufficient public funds.

[66] This is no longer true for all fields of private international law; the Finnish legislator has already started to remedy the situation. Hence, international adoptions are regulated by modern provisions which are included in the new Adoption Act of February 8, 1985 No. 153. This Act has already been translated into English by the translating team of the Finnish Ministry of Justice. On the other hand, there is a new Family Names Act in force as of August 9, 1985 No. 694, in which the determination of family names is regulated not only in internal cases but also in cases of an international nature.

[67] However, in relations between citizens of Nordic States, the support in favour of a legitimate child is regulated in the case of divorce by a special Nordic convention system.

entirely lacking as to support agreements, and this is even true regarding the jurisdiction of the Finnish courts in support matters of an international nature.

For these reasons, many questions in the field of Finnish international support law remain open at this moment. The present author is striving, however, to present the legal state of Finland in regard to those questions which arise in cases where an action is brought against an alleged support debtor on behalf of a child living abroad.

(a) *The law applicable.* When interpreted literally the Act of 1929, still in force, signifies that in cases where the support creditor (plaintiff) is a legitimate child, the law of the child's nationality is applicable (sec. 19). If the child is illegitimate, the applicable law depends on the sex of the defendant. If it is the child's mother who is the defendant, the law of the child's nationality is applicable (sec. 20). But if the child's father is the defendant, Finnish law is always applicable (sec. 21).

These rules are doubly contrary to present thinking which underlines the equality of human beings, since on the one hand, the position of the children is made to depend on their status (legitimate or illegitimate) and on the other hand, the position of the sexes is different. It is because Finnish courts do not consider that they have the power to declare statutory rules nul and void if these rules violate the Constitution, that the above-mentioned rules still apply. However, one must take into account the general legal principles of international private law which considerably widen the possibilities of the courts. For instance, the principle of public policy (*ordre public*) is explicitly in force in the international support law of Finland ("No one shall, referring to foreign law, neglect a support obligation that a person in his position has in regard to his spouse, parents or children"; the Act of 1929, sec. 57), as well as the principle of *renvoi* (Act of 1929, sec. 53); and there are different opinions as to whether the court should apply foreign law *ex officio* or only on demand. In any case, the irrational choice-of-law system described above should be reformed as quickly as possible.

(b) *Jurisdiction of the Finnish courts.* In internal support matters, the proper *forum*—as already mentioned—is the court of the custodian's habitual residence or his last habitual residence in Finland. In many cases where a support claim is sent to Finland from a foreign country, the custodian of the child has never resided habitually in Finland. In these cases the question is raised whether Finnish courts have jurisdiction and, if so, which is the proper *forum*.

As far as illegitimate children are concerned, the answer to these questions may be found in the Act of 1929, Part II, ch. 2, sec. 23. According to this provision a case concerning an illegitimate child may be heard in a Finnish court if, *inter alia*, the defendant has his habitual residence in this country. This rule is supplemented by a clause concerning a reserve *forum*: if no other court

has jurisdiction over the case, the action is brought before the Helsinki District Court.

On the other hand, it is difficult to understand why ch. 1 of Part II of the Act of 1929, which concerns legitimate children, includes no provisions on the international jurisdiction of Finnish courts. The *travaux préparatoires* to the Act do not treat this topic, and the omission seems to be a *lapsus*. Therefore—since there are no precedents—one may ask whether, on the whole, Finnish courts have jurisdiction over a support case in which an action is brought on behalf of a legitimate child residing abroad with his custodian and, if so, which is the proper *forum*.

The answer must be affirmative without any hesitation. There is no reasonable ground for considering that an action concerning a legitimate child could not be brought in Finland in circumstances where this is possible for an illegitimate one. On the other hand, an affirmative answer is already clear on the basis of the general canons of law and the principle of equality expressed in the New York Convention. If it were impossible to bring a support action in Finland in cases where enforcement could not be granted for a court decision given in the child's country, he would have no remedy to realize his support rights against a recalcitrant parent. This situation would mean a *déni de justice* and, besides, the contracting States oblige themselves in art. 9 of the New York Convention to eliminate all discrimination against support creditors living abroad.

This affirmative answer makes it necessary to find the proper *forum* through the use of interpretation. Two possibilities may then be proposed: either analogical application of the above-mentioned provision which creates a reserve *forum* for illegitimate children, or analogical application of the general provisions of the Code of Judicial Procedure (ch. 10, sec. 1), according to which civil actions are normally brought before the *forum domicilii* of the defendant. In order to guarantee the possibilities of defence of the alleged support debtor, the latter alternative, *forum domicilii* of the defendant, seems to be a better one.

Another question of jurisdiction is much more problematic: has a support debtor living in Finland the right to bring an action in this country aiming to reduce his obligation if the child and his custodian live abroad and a foreign support decision is valid in Finland by virtue of an enforcement order?

This question has not been resolved in the Hague Conventions. During the *travaux préparatoires* to the 1973 Convention, divergent opinions were presented in this respect;[68] the *Verwilghen Report* takes a positive stand in regard to the

[68] Cf. *Conférence de La Haye de droit international privé. Actes et documents de la Douzième session*, vol. IV: *Obligations alimentaires*, p. 232.

matter.[69] Consequently, the authorities of the United Kingdom, *inter alia*, consider that a British support debtor may bring an action in the United Kingdom aiming to reduce a Finnish support decision in force in this country and, reciprocally, a Finnish support debtor has the same right in Finland when a British support decision is valid in Finland.[70] There is thus no convention-created obligation to refrain from reducing, in a Finnish court, a foreign support decision declared enforceable in Finland.

However, as one may guess, the Finnish rules of jurisdiction do not consider this possibility; in the last-mentioned situation there is no proper *forum* in Finland, either according to the Child Support Act or according to the Code of Judicial Procedure (*forum domicilii* of the defendant). The problem should be resolved in connection with the reform of Finnish international support law. In the present situation it is more probable that the debtor brings the reduction action in the child's country. But if the action is dismissed in this country, Finnish courts should, at least in such a case, have jurisdiction over the case.

5.2. *The Activities of the Finnish Ministry of Foreign Affairs in Connection with a Support Trial before a Finnish District Court*

To date, the Finnish Ministry of Foreign Affairs has taken preparatory measures to bring a support action against a parent in Finland on behalf of a child living abroad in one case only,[71] and even in this case legal proceedings were never actually started since the foreign party gave up the support claim. Recently, however, preparations have been made to take legal action in certain new cases, so that more experience of these kinds of action will be gained during the next few years.

In this respect, it is the intention of the Ministry to find an arrangement that guarantees a trial without costs encumbering the custodian of the child. If a private attorney is hired, he is supposed to apply for a cost-free trial before starting legal proceedings in the proper sense (this is possible in Finland). Where appropriate, public legal aid counsels may also be used,[72] or the action may be brought without cost by a legally trained child welfare officer or an official of the Ministry of Foreign Affairs. The privilege of a cost-free trial will be applied for even in the last-mentioned alternatives in order to avoid the

[69] Verwilghen, *op.cit.* (footnote 33 above), p. 417 (No. 76).

[70] Letter of the British Home Office of April 10, 1987 (MR/83 714/1/1).

[71] As pointed out in section 2.2.2 of the present paper, agreements on voluntary payments have been reached quite often, while in many cases the age of the child has excluded the possibility of coercive measures.

[72] The Public Legal Aid Counselling Act of February 2, 1973 No. 88, presupposes that cost-free legal aid may also be given to persons who do not reside habitually in Finland (sec. 12). A clear obligation for equal treatment in this respect is expressed in art. 9 of the New York Convention.

general fees for court proceedings and the costs connected with the execution of the judgment.

6. CONCLUSIONS

Generally speaking, the settlement of foreign support claims arriving through the channels of the New York Convention is arranged in Finland in a way which encourages voluntary payments by the debtor.[73] For this purpose the officials of the Ministry of Foreign Affairs are assisted by local child welfare officers, and these may offer professional skill and knowledge when a foreign support claim is discussed with the debtor. Furthermore, since child welfare officers work in the debtor's home locality, they have good possibilities to determine his financial situation; this is facilitated by the fact that other authorities are obliged to give these officers information about the debtor. Consequently, as pointed out above in section 2.2.2, reconciliation is effected and voluntary payments made quite often. It is therefore astonishing that, in cases where enforcement of a foreign support decision has been granted by the Helsinki Court of Appeals, less than one half of the support claims have come to Finland through the New York channels. It is difficult to find any explanation for this other than complete ignorance of the Convention or, perhaps, prejudices in regard to the activity of the Convention authorities.

As to the enforcement of foreign support decisions, the representation of foreign applicants has been arranged in a satisfactory manner since the enforcement application is made without cost by legally trained officials of the Finnish Ministry of Foreign Affairs; and these officials also apply for a cost-free enforcement proceeding in cases where this is possible, so as to avoid the general fees for court proceedings and the costs of the execution of the enforcement order. However, the time needed for the enforcement proceedings has so far been quite long (9 months on the average, in one case 15 months), especially bearing in mind that there is no review on the merits. Since support for a child abroad is sometimes urgently needed, Finnish authorities should pay attention to this delay which seems to be caused by the fact that the defendant is heard through the agency of County Administrative Boards.

The Helsinki Court of Appeals seems to follow international practice when interpreting the Hague Conventions. There was only one decision that was clearly divergent from the main line of European courts, and even in this case

[73] As far as the result of the negotiations is concerned, support agreements in favour of children living abroad cannot be given immediate enforceability (cf. section 3.2 above). This deficiency should be remedied.

the Finnish interpretation was favourable from the applicant's point of view (the international entry into force of the 1958 Hague Convention was considered decisive as to support decisions covered by the Convention). However, absolute conclusions are made difficult by the fact that there are several questions in which the Court's stand has been wavering, which have been left open in the enforcement decisions, or which have not yet been raised in Finland (termination of the support obligation, limitation of support arrear claims, penal interest claims, litigation costs of the original support trial, cost of the enforcement proceedings). Anyhow, there were no cases where the Court would have applied the principle of *ordre public*.

There have not yet been cases where the Finnish Ministry of Foreign Affairs would have started support proceedings before a Finnish district court. However, such trials are now in preparation. The representation of the support debtor, as well as the financial conditions of the trials, will be guaranteed by means of several arrangements (cost-free trials, public legal aid counsels, child welfare officers, ministerial officials). The result of such support trials may be considered quite trustworthy from the child's point of view since the internal support law of Finland is modern and favourable to the child (an injurious foreign *lex causae* will certainly be considered as contrary to Finnish *ordre public*). The rules of Finnish international support law, however, are badly out-of-date (e.g. the proper *forum* is ambiguous in some cases, as pointed out above). This may cause a delay in legal proceedings and thus harm the interests of the child.

All in all, the Finnish system of international recovery of child support seems to correspond to the needs of children living abroad but, of course, there remain important things to be done. Finnish international support law, the rules of jurisdiction and the choice-of-law rules should be reformed, and it would be desirable to have the enforcement applications decided somewhat more quickly by the Helsinki Court of Appeals. These improvements are urgent: even though the statistical significance of foreign support claims is not very great in Finland, every single case is seen in human terms to be of capital importance.