



T.M.C. ASSER INSTITUUT

Comparative study on enforcement procedures of family rights

JLS/C4/2005/06

Annex 6 National Report Belgium

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Study on the Enforcement of Family Law Judgments

National Report of Belgium

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LEGAL QUESTIONNAIRE

PART I. ENFORCEMENT IN DOMESTIC CASES

1.A. Procedures and practices for enforcement in domestic cases

1. and 2. Description of the general law for enforcement of and comments as to the practice of the law with respect to
- a. decisions on custody, including orders on the place of the residence of the child
 - b. orders on contact and/or access rights

Applicable legislation

Substantive and procedural rules on parental responsibility, including custody and contact and access rights, are laid down in arts. 371-387ter Civil Code (*Burgerlijk Wetboek, Code civil*). Furthermore, the procedural rules of the Code of Civil Procedure (*Gerechtelijk Wetboek, Code judiciaire*) and the Act on Juvenile Protection of 8th April 1965 (*Jeugdbeschermingswet, Loi sur la protection de la jeunesse*) apply. An official version of all legislation is available online both in Dutch and in French on http://www.juridat.be/cgi_wet/wetgeving.pl.

Important modifications of the relevant sections have been introduced by Act of 18th July 2006 “on the privileging of the evenly divided residence of the child of separated parents and on the forced execution of orders on the residence of the child”, published in the Government Gazette (*Belgisch Staatsblad, Moniteur belge*) of 4th September 2006 and in force since 14th September 2006¹.

Substantive law on custody, access and contact

Parental responsibility (*ouderlijk gezag, autorité parentale*) is exercised over minor children, i.e. children under 18.

Parental responsibility is however terminated before reaching the age of majority in case of emancipation (*ontvoogding, émancipation*) of the child by his marriage or, from the age of 15, by judicial decision (arts. 372, 476 and 477 Civil Code).

The right of custody (*gezag over de persoon van het kind, autorité sur la personne de l'enfant*) includes the rights to determine the place of residence of the child, to take daily decisions on the care of the person of the child and to take important decisions on the care of the person of the child, enumerated in art. 374 Civil Code². These decisions concern: the housing conditions of the child, important decisions on health care, on parenting, on education, on recreation and on religious or ideological choices.

As a rule, both parents are equally holder of parental responsibility, and have joint custody, over their child, whether or not they are or have been married and whether or not they cohabit (art. 373 and 374 Civil Code). They must act together or may act alone after reaching a consensus. The law however contains a refutable presumption

¹ On this new Act: P. SENAËVE and H. VANBOCKRIJCK, ‘De Wet van 18 juli 2006 op het verblijfsco-ouderschap, de blijvende saisine van de jeugdrechtbank en de tenuitvoerlegging van uitspraken aangaande verblijf en omgang’, *E.J.* 2006, 117.

² F. SWENNEN, *Gezins- en familierecht in kort bestek*, Antwerpen, Intersentia, 2005, 125 ss.

vis-à-vis *bona fide* third persons that one parent is acting with the consent of the other, even if he is not present. Third persons are *bona fide* if they do or should not know of the disagreement of the other parent. Third persons should of course be cautious when one of the parents wants to take one of the abovementioned important decisions on the care of the person of the child alone.

In case cohabiting or non-cohabiting parents do not reach a consensus on a decision on the care of the person of the child, they can request the Juvenile Court (*Jeugdrechtbank, Tribunal de la jeunesse*) to solve their dispute. The Juvenile Court can allow one parent to act alone (art. 374 subsection 4 Civil Code).

In case non-cohabiting parents do not reach a consensus on the housing conditions of the child or on important decisions on the care of the person of the child, or in case their consensus is not in the best interest of the child, they or the Public Prosecutor (*Openbaar Ministerie, Ministère Public*) can request the competent Court – see hereafter on the competence – to solve the dispute. In practice, the Public Prosecutor never acts *ex officio*³.

The competent court can then either maintain joint custody and decide on the residence of the child or grant sole custody on one parent and decide on contact and access rights for the other parent.

In case joint custody is maintained, the competent Court must decide on the housing conditions and the residence of the child. The periods of residence of the child will be divided between the parents. At the request of at least one parent, the Court must examine whether the evenly divided residence (50/50) is the most appropriate solution in the best interests of child and of the parents. If it is not the most appropriate solution, the Court can order an unevenly divided residence⁴. Mostly, the *primary residence* (*hoofdverblijf, résidence primaire*) of the child will then be with his mother and the *secondary residence* (*secundair verblijf, résidence secondaire*) with the father. This secondary residence mostly encompasses one weekend every fortnight, a Wednesday afternoon (every fortnight) and half of the school vacations.

In the extraordinary cases where sole custody is granted to one parent, the court must grant rights of access and personal contact to the other parent, except in case particularly serious reasons justify the denial of these rights. As under the Regulation 2201/2003, the rights of access include the right to take the child to a place other than his or her habitual residence for a limited period of time. The right to contact is organised on a case-by-case basis and encompasses the right to communicate with a child e.g. by snail mail, e-mail, chat, sms and/or telephone. The parent has supervision over the sole custody of the other and has a right to be informed by third persons and to petition to the Juvenile Court in the interest of the child.

Parents are under a legal duty to prepare the child psychologically to reside or have contact with the other parent⁵.

On the ground of art. 375*bis* Civil Code, the Juvenile Court can grant contact and/or access rights to other persons than the parents in the interest of the child. The request is made by the parties concerned or by the Public Prosecutor. In practice, the Public Prosecutor never acts *ex officio*. The grandparents of the child are *qualitate qua* entitled to contact and/or access rights. Any other person – such as a brother, or an ex-

³ F. SWENNEN en N. CALUWE, 'De (vorderings)rechten van het Openbaar Ministerie in burgerlijke zaken', C.B.R. (ed.), *De procesbekwaamheid van minderjarigen*, Antwerpen, Intersentia, 2006, 75.

⁴ Hereto P. SENAEVE and H. VANBOCKRIJCK, *l.c.*, 4 ss.

⁵ E.g. Supreme Court 2nd December 1997, *Div. Act.* 1998, 102.

partner of the parent – is *virtually* entitled to access and/or contact, on the condition of the proof of a particular affective bond with the child.

Moreover, every interested person – such as a grandparent or an aunt – can apply to the civil Court for a child to be temporarily put under his or her care. The child will be housed with this person, who nevertheless does not acquire parenting rights in the sense of the Regulation 2201/2003. There is no clear statutory basis for such court orders. In fact, although they are disputed⁶, the Supreme Court approved them⁷.

Finally, placement of a child in a foster family or in institutional care is possible on the ground of the Juvenile Protection Act 1965 or on the ground of the regional Decrees on special youth assistance. These measures will be left aside.

*Procedural rules*⁸

As a rule, the competent Court is the Juvenile Court (art. 387*bis* Civil Code) of the place of residence of the parents (art. 44 Juvenile Protection Act). The Juvenile Court is a chamber of the Court of First Instance (*Rechtbank van eerste aanleg, Tribunal de première instance*). There is one Court of First Instance per judicial district; there are 27 judicial districts in Belgium.

The proceedings are initiated by a writ (*verzoekschrift, requête*; art. 45 Juvenile Protection Act). Once initiated, the case will automatically remain entered on the Juvenile Court's cause list until the majority or emancipation of the child(ren) concerned. The proceedings need not be initiated again; in case of changed circumstances, the parties can address the registry (*griffie, greffe*) by written request or by brief.

The Juvenile Court will first try to reconcile (*verzoening, conciliation*) the parties.

The Court will also inform the parties on the content and the benefits of voluntary or judicial mediation (*bemiddeling, médiation*), as organised in part VII (arts. 1724 ss) of the Code of Civil Procedure. It can adjourn the proceedings for a maximum period of one month so as to allow the parties to reach a solution by mediation. Their agreement can then be authenticated in a judgment.

Pending proceedings, the Court can order official inquiries as well as provisional measures at request or *ex officio*.

Except in case the parties and the Public Prosecutor agree otherwise, the Court can also take a temporary decision on the children which can be evaluated after a period of one year maximum.

In urgent cases, the President of the Court of First Instance (art. 584 Code of Civil Procedure) can order interim measures pending the decision of the competent court.

Moreover, parents who are married (art. 223 Civil Code) or bound by legal cohabitation (art. 1479 Civil Code) can request the Justice of the Peace (*Vrederechter, Juge de paix*) of their (last) common residence by a writ to decide on custody, access and contact. There is one Court of the Peace per judicial canton; there are 225

⁶ A. DE WOLF and F. APS, 'Rechtsbescherming bij materiële bewaring van een kind door een derde', *E.J.* 2004, 54.

⁷ Supreme Court 19th December 1975, *Arr. Cass.* 1976, 492. See e.g. Court of Appeal Liège 26th June 2002, *J.T.* 2003, 50, case note H. SIMON.

⁸ P. SENAËVE and H. VANBOCKRIJCK, *l.c.*, 49 ss.

cantons. The Justice of the Peace is competent to order urgent provisional measures between married or legally cohabiting partners, including the abovementioned measures on the children of the family.

Pending divorce proceedings, married partners can petition the President of the Court of First Instance (art. 1258 and 1280 Code of Civil Procedure) to order provisional measures concerning their joint children. These measures will stand after divorce (art. 302 Civil Code) until revocation by the competent Juvenile Court.

General rules on enforcement

Enforcement is generally provided for in arts. 1386 ss Code of Civil Procedure⁹.

Enforcement presupposes an enforceable title (art. 1494 Code of Civil Procedure):

- (a) only Court decisions (orders, judgments) and notarial deeds can be enforced
- (b) a form of enforcement must be attached (art. 1386 Code of Civil Procedure)
- (c) a Court decision must first be served upon the debtor by the bailiff (art. 1495 Code of Civil Procedure)
- (d) except for orders for money payment, the Court decision must not be definitive. Enforcement is possible pending the time limit for appeal. The appeal itself however suspends the enforcement, except in case the decision is immediately enforceable (art. 1388 and 1495 Code of Civil Procedure). A decision can be immediately enforceable *ex lege* or if so provided by of a Court order.

Except in case of urgent necessity and permission of the Court, enforcement is not allowed between 9 pm and 6 am and on Saturdays, Sundays and public holidays (art. 1387 Code of Civil Procedure).

A creditor may not enforce the title himself. The competent body is the bailiff (*gerechtsdeurwaarder, huissier de justice*), assisted by the Public Authorities and/or experts in the matter concerned.

Direct enforcement is the rule under Belgian law.

Beside the abovementioned general rules, the Code of Civil Procedure however only contains rules on direct enforcement of duties to pay and not on enforcement of duties to act, to refrain from acting or to hand over something.

Of particular importance with regard to family law decisions is the adage *Nemo praecise ad factum cogi potest*. Since the Act of 30th January 1980 on penalty payments, physical coercion is prohibited in Belgium. Before this date, the Supreme Court already found that the prohibition of physical coercion is a general principle of justice under Belgian law¹⁰.

With regard to duties to act, to refrain from acting or to hand over something, only indirect pressure can be exercised, e.g. by adjudication of a penalty payment. See hereto, *infra* 1.B.3.

⁹ See in general J. LAENENS, K. BROECKX, D. SCHEERS, *Handboek gerechtelijk recht*, Antwerpen, Intersentia, 2004, 1228 and 1322 ss.; B. MAES, *Inleiding tot het gerechtelijk privaatrecht*, Brugge, die keure, 2001, 259 ss.

¹⁰ Supreme Court 7th March 1975, *Arr. Cass.* 1975, 764.

*Specific rules on enforcement of family law decisions*¹¹

A

Faced with frequent non-observance of family law decisions, the Belgian legislator has introduced new rules on enforcement of these decisions by the abovementioned Act of 18th July 2006 (new art. 387ter Civil Code).

The new fast-track procedure only applies to Court decisions on the residence of, and on contact and access rights with regard to, children as well as to the agreement of the parties thereto in case of divorce with mutual agreement (art. 387ter, para. 1 and 2 Civil Code).

In case of refusal of one of the parents to observe the arrangements with regard to the children, the interested party can request the Court who made the order or the Court where the case is actually pending or the Juvenile Court in case of non-observance of the divorce agreement, to solve the dispute.

The case must be heard with priority.

Except in case of urgent necessity, the Court may order official inquiries, try to reconcile the parties or propose mediation.

The Court may

- (a) review the arrangements with regard to the children, mostly to the detriment of the refusing parent¹². The primary residence that was fixed with the mother can thus be transferred to the father in case of non-observance by the mother of his secondary residence rights. This kind of orders is however disputed. The residence of the child should indeed be determined in the interest of the child and cannot be designed as a sanction on a parent.
- (b) allow the victim of the non-observance to apply for coercive measures. Hereto, *infra* 1.B.3.
- (c) adjudicate a penalty payment. Hereto, *infra* 1.B.3.

In case of absolute necessity, a party can, by unilateral writ, request the Court to be allowed to apply for the abovementioned coercive measures. The party must prove to have summoned the parent in question to observe the arrangements on the one hand and the refusal of this parent to observe the arrangements on the other hand (art. 387ter, para. 3 Civil Code).

The Court decision is immediately enforceable *ex lege*, thus notwithstanding appeal.

The abovementioned procedure applies without prejudice to the binding international rules on international child abduction (art. 387ter, para. 4 Civil Code; hereto *infra* Part 2).

¹¹ P. SENAËVE and H. VANBOCKRIJCK, *l.c.*, 68 ss.

¹² E.g. Court of Appeal Ghent 13th February 2003, *R.W.* 2003-2004, 1732.

B

Beside that specific procedure, it must be stressed that the Public Prosecutor can enforce judicial decisions *ex officio* in matters of public policy (art. 139 Code of Civil Procedure), such as parenting rights.

3. Supporting orders

- a. what supporting orders (i.e. ‘compliance orders’ or ‘measures to further the effect of the family law judgment’) are available under domestic law?
- b. can you make any remarks as to legal practice (i.e. what supporting orders are practicable, what is the usual content)

Supporting orders are not dealt with explicitly in the relevant provisions.

A penalty payment is probably the most ‘convincing’ supporting order. A penalty payment is considered a coercive measure; it is dealt with under 1.B.3.

The Court has the power to accompany the arrangements with regard to the children with the appropriate supporting orders¹³:

Firstly, the Court can make the exercise of residence, contact and access rights subject to the *absence* of third person – e.g. the new partner of a parent, or of the *presence* of a third person – such as a grandparent or a social worker. Further-reaching, it can oblige a parent or other person to exercise contact and/or access rights in a *public or neutral meetingpoint*, under the supervision or with counselling of experts.

Secondly, with regard to journeys abroad, the use of personal documents can be restricted. On the one hand, in cases of doubt on the consent of one parent to the other travelling alone with the child, the other parent would need to provide himself with a travel permission. On the other hand, the use of personal documents could be restricted by judicial decision, e.g. so as to oblige one parent to consign the passport or other personal documents (of the child) to the other parent or to the Juvenile Court. However, some judicial authorities are reluctant to order this, in particular when the personal documents need to be carried and presented at the request of official authorities¹⁴.

Thirdly, also with regard to journeys abroad, the judicial authorities can at any time restrict the right of a parent-holder of parental responsibility to travel abroad¹⁵ or they can vest the parental responsibility (partly) with one parent, so that the other cannot travel with the child any more without the one parent’s consent.

¹³ A. DE WOLF, ‘Ontwikkelingen inzake het ouderlijk gezag en het recht op contact’, in P. SENAËVE (ed.), *Personen- en familierecht*, Brugge, die keure, 2001, 87, 26 ss.

¹⁴ Cf. Court of First Instance Charleroi 30th October 1991, *Rev. trim. dr. fam.* 1993, 239. Comp. Court of Appeal Liège 13th May 2003, *Rev. trim. dr. fam.* 2004, 394, where the Court ordered to hand over the passport to the parent-victim of a child abduction.

¹⁵ E.g. Justice of the Peace Saint-Gilles 1st December 1988, *T. Vred.* 1989, 95; Justice of the Peace Saint-Gilles 2nd February 1998, *T. Vred.* 2000, 219.

1B. Specific issues relating to the enforcement of family law judgments in domestic cases

1. The organisation of organs and institutions involved in enforcement of family law
 - a. Regulation under substantive law (legislation that establishes the organ or institution and regulates its tasks and powers)
 - b. Procedural law rules relevant for the functioning of these organisations (procedural rules on the role of these organisations in the enforcement of family law decisions)
 - c. Practical aspects relevant for the legal position of these organisations

The competence of the various *Courts* has been described above. With a few exceptions mentioned above, the Code of Civil Procedure applies. Appeal against the Courts' decisions is possible according to the general rules. The Court of First Instance is the competent Court for appeals against decisions of the Justice of the Peace; the (President of the) Court of Appeal is the competent Court for appeals against the decisions of the (President of the) Court of First Instance. Appeals against the Juvenile Court's decisions are dealt with in the Juvenile Chamber of the Court of Appeal. An appeal to the Supreme Court is possible in case of a presumed breach of substantive or procedural rules; not on the ground of the asserted wrong assessment of the facts.

The *Public Prosecutor* – Juvenile Section is competent to act *ex officio* before the Court of First Instance – including the Juvenile Court – and the Court of Appeal with regard to arrangements concerning children. As mentioned before, the Public Prosecutor so to speak never makes use of this competence.

The Public Prosecutor can also enforce family law decisions *ex officio*.

There is an Office of the Public Prosecutor per judicial district, headed by the Public Prosecutor. There is also an Office of the Public Prosecutor at the Court of Appeal, headed by the Prosecutor-General.

As a rule, only *bailiffs* are competent to serve Court decisions and enforce them subsequently (art. 516 Code of Civil Procedure). A bailiff is also competent to ascertain material facts at the request of Public Authorities or of private persons (art. 516 code of Civil Procedure), such as the non-observance of the arrangements regarding children.

The bailiff is a ministerial public servant, appointed by the King. He is obliged to act upon request, at a fixed fee. He is competent to act in the judicial district for which he is appointed; there is a limited number of bailiffs per district. The foregoing notwithstanding, the profession of bailiff is organised as a liberal profession.

All bailiffs of a judicial district are member of the District Chamber of Bailiffs, administrated by a Council and competent a.o. for disciplinary matters. Countrywide, the bailiffs form the National Chamber of Bailiffs, administrated by a council and managed by a board of directors. The National Chamber has a.o. an advisory function¹⁶.

Finally, *public welfare services* should be mentioned. Official inquiries ordered by the judge will be executed by the social worker of a House of Justice (*Justitiehuis, Maison de Justice*). There is one House of Justice per judicial district, financed by the Federal Ministry of Justice.

¹⁶ J. LAENENS, K. BROECKX, D. SCHEERS, *o.c.*, 339-346.

With regard to the forced execution of arrangements regarding children, the Court may appoint persons, such as a psychologist or a social worker, who may accompany the bailiff on the occasion of the enforcement. In a supporting order, the Court may also order the presence of public welfare servants or order the rights to be exercised in a neutral meetingpoint. The aforementioned public welfare servants are usually employed by the Regional (Brussels, Flemish, French or German) public welfare services.

2. Time limits relevant for enforcement proceedings
 - a. Time limits for appeal, both against family law decisions and against decisions supporting their enforcement
 - b. Any other time limits that have an effect on enforceability
 - c. The effect of appeal on enforceability
 - d. The effect of the passing of time on the enforceability of a family law judgement
 - e. The effect of change of circumstances on the enforceability

The time limit for appeal against all abovementioned decisions is one month after the decision has been served (*betekening, signification*) or, exceptionally, notified (*kennisgeving, notification*) (art. 1051 Code of Civil Procedure). The time limit for an appeal at the Supreme Court is three months after service or notification of the final decision (art. 1073 Code of Civil Procedure).

Enforcement of a Court decision is not suspended during the time limit to appeal. As mentioned before, as a rule enforcement is suspended pending the appeal, except in case the decision is immediately enforceable (art. 1388 and 1495 Code of Civil Procedure). A decision can be immediately enforceable *ex lege* or on the ground of a Court order. Court decisions on the enforcement of family law decisions are immediately enforceable *ex lege* (art. 387ter Civil Code). Enforcement is never suspended pending an appeal at the Supreme Court, though the creditor will bear the risk of enforcement.

As a rule, the general limitation of ten years applies to the *actio judicata* or action to enforce Court decisions (art. 2262bis para. 1 Civil Code)¹⁷. However, the appeal on coercive measures to enforce family law decisions must be explicitly allowed by a separate Court decision (see hereafter). The Court may take into account the passing of time or changed circumstances in its decision what coercive measures to allow or not to allow an appeal on coercive measures at all. Moreover, a limitation of six months applies to the enforcement of a penalty sum¹⁸ (art. 1385octies Code of Civil Procedure; see hereafter).

3. Coercive measures to ensure enforcement
 - a. Measures available by law
 - b. Measures usually taken in practice
 - c. Taking of coercive measures when the child opposes enforcement
4. The impact of other legal or practical conditions relevant during the enforcement e.g. the hearing of the child

¹⁷ Supreme Court 8th December 2000, <http://www.cass.be>; *T.B.B.R.* 2001, 365, case note B. KOHL.

¹⁸ J. LAENENS, K. BROECKX, D. SCHEERS, *o.c.*, 1352.

As mentioned before, the Code of Civil Procedure contains no explicit provisions on direct enforcement of duties to act, to refrain from acting or to hand over something.

The parental responsibilities being a matter of public policy, the interested party could in principle make an appeal to the Public Prosecutor, the Public Authorities (police, armed forces) or a bailiff for the forced execution of the family law decision.

No physical coercion may however be used against the person who has the child under his care (*Nemo praecise ad factum cogi potest*).

It was disputed under Belgian law whether or not physical coercion could be used against the children so as to hand them over to a parent or third person with a view of the exercise of residence, contact and/or access rights.

In practice, physical coercion was never used against children with a sufficient degree of maturity to decide on their residence and social contact, on the ground of the abovementioned adage.

Sometimes, physical coercion was used against younger children.

The Supreme Court however allowed lower Courts to prohibit the use of physical coercion on a case-by-case basis¹⁹. After that Supreme Court decision, both the Police and the National Chamber of Bailiffs always refused the use of physical coercion against children²⁰.

This was an unsatisfactory solution²¹. Non-observance by a parent of his legal duty to motivate the child to reside or have contact with the other parent or third persons²², remained unpunished. The legislator of 2006 therefore was of the opinion that the use of physical coercion against immature children can be justified so as to avoid parental alienation.

Art. 387ter, para. 1, subsection 4 Civil Code now provides that the Court may allow a victim of non-observance of the arrangements regarding children to make an appeal on specified coercive measures. Only the Court can allow this appeal. It must describe the nature of the coercive measures as well as the way they may be used in the interest of the child. It may designate the persons authorised to accompany the bailiff on the occasion of the enforcement of the decision. This designation relates to the supporting orders, such as the presence of a psychologist or social worker or the exercise of the rights in neutral meetingpoint.

In sum, the Court must balance the right to physical integrity of the child and the right to respect of his private and family life of a parent or third person. The Supreme Court had introduced this test in the context of paternity tests²³.

Before the Act of 2006, many Courts adjudicated penalty payments (*dwangsom, astreinte*) as indirect pressure.

Penalty payments were introduced in Belgian law by Act of 31st January 1980, as a result of a Benelux initiative. The penalty payment is awarded to the creditor of a duty

¹⁹ Supreme Court 11th March 1994 <http://www.cass.be>, *A.J.T.* 1994-95, 4, case note R. UYTENDAELE; *Arr. Cass.* 1994, 253; *Div. Act.* 1996, 115; *E.J.* 1995, 82, case note K. DEKELVER; *J. dr. jeun.* 1995, 133, case note B. VAN KEIRSBILCK.

²⁰ P. SENA EVE and H. VANBOCKRIJCK, *l.c.*, 87; A. DE WOLF, *l.c.*, 38.

²¹ E.g. in the light of the E.C.H.R.-judgments; hereto P. SENA EVE and H. VANBOCKRIJCK, *l.c.*, 88.

²² Supreme Court 2nd December 1997, *Div. Act.* 1998, 102.

²³ Supreme Court 17th December 1998, *R.W.* 1998-1999, 1144, case note F. SWENNEN.

in case of non-observance of this duty after the Court decision has been served on him. It does not apply to duties to pay a sum of money nor in the sector of labour law. The penalty sum can be awarded per day or per incident.

The Benelux Court of Justice has accepted the applicability of penalty payments to family law duties, such as the non-observance of residence, access and/or contact rights²⁴. Many Belgian Courts are however reticent to adjudicate penalty payments in this context²⁵. These Courts firstly refer to the abovementioned objections with regard to forced execution. No indirect pressure by way of a penalty payment could be allowed in cases where direct enforcement would be contrary to the dignity of the victim of the enforcement²⁶. Secondly, these Courts are of the opinion that adjudication of a penalty payment would only mount the tension between the parties. Therefore, a penalty payment is only awarded as an *ultimum remedium*, in case of non-observance of the arrangements regarding the children in the past and fear of non-observance in the future. An analysis of the relevant Court decisions has shown that a penalty payment is awarded almost always in case one of parents has his residence abroad; no concrete fear of non-observance has to be proved in such cases. As a rule, the penalty payment must be adjudicated as an *accessorium* in the Court decision on the arrangements regarding the children and not in a separate judgment. Given the reticence of many Courts to adjudicate a penalty payment without proof of non-observance in the past and the asserted impossibility to adjudicate it in separate decision, the penalty payment was an insufficiently used pressure means.

In the 2006 Act, the legislator has enhanced the technique of the penalty payment (art. 387ter Civil Code)²⁷. On the one hand, the possibility to adjudicate the penalty payment in a separate Court decision is now provided for explicitly. On the other hand forced execution of the penalty payment is now possible by attachment of *all* earnings of the debtor. As a rule, a minimal sum is protected against attachment; this protection of the debtor does not apply in case of enforcement of family law decisions (art. 1412 Code of Civil Procedure).

The debtor of a penalty payment can request the Court to be released from payment in case of impossibility to execute the Court decision to which the penalty payment was attached²⁸. Such a request would be possible in case a mature child opposes enforcement of the decision.

On the ground of art. 431 and 432 Penal Code, it is a criminal offence not to present the child to a person with a view of exercising residence or access rights (*niet-afgifte; non-représentation*). This offence is punishable with imprisonment from 8 days to one year and/or a fine of 26 to 1.000 euro (x 5). The parent or other person will not be punishable in case of non-observance in two hypotheses. On the one hand, he can invoke necessity in case the child would be in great danger when handed over to the other parent or person. On the other hand, he can invoke duress in case the mature child opposes enforcement of the decision²⁹.

²⁴ Benelux Court of Justice nr. A 81/3, 11th May 1982 (Ladan / De Bruin), Benelux Jur. 1981-82, 1, concl. F. DUMON; *J.T.* 1982, 679; *R.W.* 1982-83, 289, concl. F. DUMON, case note M. STORME.

²⁵ P. SENAEVE and G. ONKELINX, 'Overzicht van rechtspraak (1995-2003) – De aanwending van de dwangsom inzake huwelijk en echtscheiding', *E.J.* 2003, 150, 4 ss; A. DE WOLF, *l.c.*, 39.

²⁶ J. LAENENS, K. BROECKX, D. SCHEERS, *o.c.*, 1329.

²⁷ P. SENAEVE and H. VANBOCKRIJCK, *l.c.*, 92 ss.

²⁸ J. LAENENS, K. BROECKX, D. SCHEERS, *o.c.*, 1351.

²⁹ A. DE WOLF, *l.c.*, 42.

From the age of twelve, a child must be heard by the Juvenile Court before taking a decision on housing, residence, access and contact arrangements (art. 56*bis* Juvenile Protection Act 1965). In all other cases all Courts must hear any child (and the Juvenile Court must hear children younger than twelve) with a sufficient degree of maturity (art. 931 Code of Civil Procedure). Both the child and the judge can take the initiative for the hearing, which will be conducted by the judge or by a person appointed by the judge.

As mentioned before, the opinion of the child is also relevant with regard to the enforcement of the Court decision. No physical coercion may be used against mature children. The opposition of the child is also relevant with regard to enforcement of the penalty payment and the criminal prosecution of a parent or other person in case of non-observance of a Court decision.

PART 2. ENFORCEMENT IN CROSS-BORDER CASES

2.A. Enforcement of return orders issued under the 1980 Hague Convention and Regulation 2201/2003

1. Legal basis for enforcement

Belgium has ratified the Hague Convention on the civil aspects of international child abduction. It was approved by Act of 10th August 1998³⁰ and entered into force on 1st May 1999. Belgium has also ratified the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children. It was approved by Act of 1st August 1985³¹ and entered into force on 1st February 1986.

The procedure for applications relating to the protection of cross-border custody and access rights are organised in art. 1322*bis*-1322*octies* (Chapter XII*bis*) of the Code of Civil Procedure. Those provisions were introduced by the Act of 10th August 1998 by which Belgium ratified the 1980 Hague Convention.

It is assumed that the fast-track procedure set up in Chapter XII*bis* of the Code of Civil Procedure is applicable to cases falling under the scope of Regulation 2201/2003, although the first provision in the referred Chapter (Article 1322*bis* *Code Judiciaire*) only mentions the actions based upon the 1980 Hague Convention on the civil aspects of child abduction and the 1980 European Convention on the recognition and enforcement of decisions concerning children custody.

In March 2006, the Belgian Council of Ministers passed a Draft Law Proposal to implement Regulation 2201/2003.³² This document was submitted to the scrutiny of the *Conseil d'Etat / Raad van State*³³ and will be ready to be presented as a Law Proposal to the Belgian Parliament in the coming months. Until then, the Draft is not available to the public but the authors of this study were authorised to examine the Draft for the purposes of the present Study.

One of the goals of the future Law on the implementation of Regulation 2201/2003 is to modify the Code of Civil Procedure to extend the application of the fast-track procedure set up in Chapter XII*bis* of the Code to the applications for return of a child based upon the abovementioned Regulation.

Another key element of the Draft Law Proposal shall be to limit the number of Belgian courts that will deal with cases on international child abduction. It is proposed that such cases should be dealt with by one of the five Belgian courts specifically appointed for such matters.

³⁰ *Moniteur belge* 24th April 1999.

³¹ *Moniteur belge* 11th December 1985.

³² The authors thank Ms. Irène Lambreth of the Federal Public Service on Justice for willing to provide some information on the pending Law Proposal Draft.

³³ The Council of State rendered its Opinion on 31st May 2006 (Opinion 40378/2, not yet published).

2. Procedure and practice with regard to return orders³⁴

A. Order to be enforced and the aims of enforcement

A specific procedure is to be followed when a child is wrongfully removed. The action is to be filed by a writ before the President of the Court of First Instance of the place where the child resides when the action is filed.

It should be noted that the future Law on the implementation of Regulation 2201/2003 grants exclusive jurisdiction to the President of the Court of First Instance of the place where a Court of Appeal is located and where, depending on the case, the child is present or where he habitually resides at the time that the application is filed or the request is sent. When enacted, this modification will significantly reduce the number of competent courts to deal with this kind of applications to a maximum of five courts in Belgium (i.e. Brussels, Antwerp, Ghent, Liège or Mons). It is expected that the five appointed courts will be able to specialise in this specific subject matter.

Another improvement of the future Law on the implementation of Regulation 2201/2003 is that the filing of the action is possible by two alternative means: either, as under the current provisions, by the filing of a writ with the registry or by sending the writ by certified post to the court officer.

This is not an *ex parte* action and hence the parties will be requested to appear before the President within eight days from the court registration of the writ. For urgent cases, the President may authorise a hearing within three days of the writ's registration.

The action is limited to the return order and it is therefore impossible for the defendant to file a counterclaim (*tegenvordering, demande reconventionnelle*) (Art. 1322*octies* Code of Civil Procedure). It may be pointed out that the Court of First Instance of Brussels refused to hear the connected claims filed by the applicant for payment of penalty sums and restitution of passports of the abducted children, as the procedure is specifically meant for rendering an order on return.³⁵

B. Actors involved in enforcement

Pursuant to Art. 1322*quinquies* of the Code of Civil Procedure, the Public Prosecutor will file the writ whenever the Federal Public Service Justice (Belgium's Central Authority) is contacted by a parent or by another country's Central Authority. It should be stressed that, in case the Public Prosecutor is faced with a conflict of interests, the Federal Public Service on Justice shall designate an attorney to file the writ. For instance, the Court of Appeal of Liège dealt with a case where criminal

³⁴ This part is based upon the contribution of F. COLLIENNE and P. WAUTELET, 'Enlèvement international d'enfants – La pratique des juridictions belges' in P. WAUTELET, (ed.), *Actualités du contentieux familial international*, Series Commission Université-Palais, Brussels, Larcier, 2005, 219-249.

³⁵ Court of First Instance Brussels, 17 April 2003, *J.T.* 2003, 516; *R.T.D.F.* 2003, 568.

proceedings had been filed by the Public Prosecutor against the father, who requested a return order and was supported by the Federal Public Service Justice.³⁶

As stated by Art. 29 of the 1980 Hague Convention, any interested party who claims that his/her custody rights have been violated may file a writ without the intervention of the Public Prosecutor or the Federal Public Service Justice.³⁷ In practice, it may be useful to inform and request the collaboration of the Federal Public Service Justice.

C. Enforcement procedure

The return order generally aims at the return of the child to State X. The order to return the child to his or her State of habitual residence is enforceable by its own motion, pursuant to Arts. 1322*septies* and 1039, 2nd para. of the Code of Civil Procedure. A request for the provisional execution of a return order to the father's domicile was hence dismissed by the Court of Appeal of Liège.³⁸

As foreseen by the 1980 Hague Convention, the Central Authority is considered to be the principal actor in the enforcement of the return order. Usually, the Central Authority examines in the first place whether a voluntary execution of the order is possible. Accordingly, it is normal to allow a period of time for voluntary compliance. It is important that the requesting parent provides the Central Authority with all useful information on the chances of a voluntary compliance. However, in cases of extreme necessity (for instance, if the child's life is in danger), coercive measures to ensure enforcement should be immediately available (by analogy with Article 1041 of the Code of Civil Procedure). Belgian practice confirms indeed the active role of the Central Authority in the enforcement of return orders (in particular, it can be entrusted the practical organisation of the repatriation of the child).

The new fast-track procedure for enforcement in domestic cases (cf. *supra* p.6-7) is available for abduction cases. As set out above (cf. *supra* p. 8), the Court may appoint a qualified person, such as a psychologist or a social worker, to facilitate the enforcement of the return order. It is expected that the new rules on enforcement, applicable as from 14th September 2006, will reinforce the until now contested application of coercive measures and/or measures in emergency situations if the enforcement of the return order so requires.

D. Costs

No costs are charged for the intervention of the Central Authority in order to ensure the enforcement. However, repatriation costs or any additional costs made to locate the child will not be paid by the Central Authority, although this entity appears to be willing to advance payment and then attempt to recover the incurred costs from the abducting parent. In this respect, the Central Authority advises the parent that undergoes abduction to request to the court that deals with the merits of the case to

³⁶ Court of Appeal Liège, 13 May 2003, *R.T.D.F.* 2004, 392.

³⁷ Court of First Instance Brussels, 12 September 2001, available on www.incadat.com

³⁸ Court of Appeal Liège, 13 May 2003, *R.T.D.F.* 2004, 392.

render a decision on the costs of repatriation and/or any other additional costs. In particular, the court can order that the abducting parent is responsible for such costs.³⁹

3. Enforceability and legal remedies of return orders

This section refers to the enforceability abroad of return orders given by Belgian courts and examines which legal remedies exist against a return order ordered by a court in Belgium.

Contrary to the return orders based upon Article 11 of the Regulation 2201/2003, a return order based upon the Hague Convention is subject to appeal. The request for appeal must be filed within a time-limit of one month from the date that the return order was served or notified (Article 1051 Code of Civil Procedure). The request for appeal must be filed with the Court of Appeal of the jurisdiction to which the Court of First Instance that rendered the appealed decision, belongs. The five Courts of Appeal in Belgium are located in Brussels, Antwerp, Ghent, Liège and Mons.

An appeal to the Supreme Court is possible against the decision of the Court of Appeal in case of a presumed breach of substantive or procedural rules. On the contrary, a presumed wrong assessment of the facts cannot lead to proceedings before the Supreme Court. The time limit for an appeal at the Supreme Court is three months after service or notification of the appeal decision (Article 1073 Code of Civil Procedure).

According to Article 1039 of the Code of Civil Procedure, the return order is enforceable notwithstanding appeal against the decision. In other words, the Hague return order does not have to be final before the effective enforcement of the decision is pursued. No further authorisation or other decision is required for the actual enforcement of the Hague return order. Unless where the return order explicitly so provides, the actual enforcement of the Hague return order will not be made conditional upon the requirement of a security, bond or payment by the applicant.

2.B. Law and practice with regard to enforcement of family law judgments other than return orders

This section discusses the particularities of the enforcement of judgments relating to family matters other than return orders.

1. Instruments and national legislation relevant for the enforcement of family judgments in cross-border cases

Belgium has ratified the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children ('the Luxembourg Convention'). It was approved by Act of 1st August 1985⁴⁰ and entered into force on 1st February 1986.

³⁹ Cf. the brochure published by the Belgian Ministry of Justice on International Abduction, that is available on-line through the link http://www.just.fgov.be/img_justice/publications/pdf/13.pdf.

⁴⁰ *Moniteur belge* 11th December 1985.

Belgium has not ratified the 1961 or 1996 Hague Conventions on protection of children.

Where the referred European and international instruments are not applicable, Belgian courts will apply the rules on recognition and enforcement of the Belgian Code of Private International Law.⁴¹

According to Article 22 of the Code, the recognition of a foreign judgment is automatic, i.e. is not conditional upon a declaration of recognition by the Belgian courts. If necessary (for instance because a public authority refuses the recognition) it is possible to obtain a declaration of recognition from the Belgian courts. Conversely, a foreign judgment cannot be executed before that the Belgian courts pursuant to Article 23 of the Code have declared judgment enforceable. The Code sets out the procedural requirements in Article 24 and following. In particular, Article 25 enumerates the grounds for refusal of recognition or enforcement, which include the violation of the public order, the violation of the rights of defence, the circumvention of the law that would apply pursuant to Belgian rules on conflict of laws, the non-definitive character of the foreign decision,⁴² etc.

2. National law relevant for cross-border enforcement of family law judgments under Regulation 2201/2003

As set out above, Belgium is in the process of adopting new legislation to incorporate the specific requirements of Regulation 2201/2003. However, the new rules particularly focus on the application of Article 11 and of Section 4 of Chapter III (on the enforceability of certain judgments concerning rights of access and of certain judgments that require the return of the child) of Regulation 2201/2003. In other words, the traditional *exequatur* regime set out by this Regulation in the other sections of Chapter III is not considered in the Draft Law Proposal.

3. National practice with regard to the enforcement of family law decision of your own courts in another member state

A number of examined decisions show indeed that Belgian courts are willing to take the cross-border factor of the dispute into consideration.

From a legal perspective, this means that courts will take into consideration which measures are available under the law that, pursuant to Belgian conflict of laws, is applicable to the case at stake. Article 35 of the Belgian Code on Private International Law states that the governing law for child protection disputes or disputes on parental responsibility shall be the law of the State where the child (or the children) habitually reside at the time that the dispute arises. According to the same provision, should the law of the habitual residence of the child fail to provide sufficient protection to the person or the assets of the children, the national law of the child would apply instead. Furthermore, Article 35 *in fine* states that Belgian law shall apply when it is

⁴¹ For commentaries in English on the Code, cf. a.o. A. FIORINI, “The codification of private international law. The Belgian Experience”, *I.C.L.Q.*, 205, 499-519 and M. PERTEGÁS SENDER, “The Belgian Code on Private International Law : a tour d’horizon”, *IPRax*, 2006, 53-61.

⁴² In that particular case, the court may authorise the provisional enforcement, if necessary conditional on the provision of security by the applicant.

materially or legally impossible to enforce the protection measures as set out in the applicable foreign law.⁴³

From a practical point of view, Belgian courts are ready to take into consideration the fact that the rendered decision needs to be enforced abroad. For instance, specific provisions may be included on the travel arrangements (how should parents take care of practicalities relating to the access rights if those rights involve travelling abroad, who must pay for those travelling arrangements, etc.).⁴⁴ Specific measures concerning the issuance or use of personal documents required for travelling or travelling restrictions may be ordered. Furthermore, the cross-border dimension of a case will necessarily be taken into consideration in assessing the modalities of exercising joint custody or access rights (cf. *supra*, p. 3-4).

However, when it comes to specific enforcement measures, it is rare to find judgments which take into consideration the enforcement setting of the State where the measures should be executed. This is perhaps due to the fact that enforcement law is territorially bound and that Belgian courts are not willing to interfere with the exclusive jurisdiction of the State where the enforcement will take place.

4. National practice with regard to the enforcement of family law decisions of another member state in Belgium

We are not aware of any enforcement decisions that would amend them to ensure enforcement in Belgium.

5. Setting aside or amending of foreign judgments

A distinction should be made between two hypotheses.

First, if the foreign decision is still to be recognised and enforced in Belgium, the fact that a 'local' decision has been rendered will be a ground for refusal of recognition and enforcement according to Article 25, §1 5° of the Belgian Code of Private International Law (cf., *supra*, p. 17).

Second, if the foreign decision has been recognised in Belgium, this decision sorts out legal effects in Belgium as if it had been rendered by local courts. Accordingly, if a new case is filed to modify or set aside the adopted measures, the Belgian court could invoke the exception of *res judicata* to dismiss the action. In other words, the new action is dismissed because there is already a final decision on the issues submitted to the court. If, on the other hand, the interested party can prove that the circumstances have changed in the meanwhile, the new action shall be declared admissible.

⁴³ For a commentary, K. JANSEGGERS, “Recht toepasselijk inzake ouderlijk gezag, voogdij en bescherming van onbekwamen”, in *Le Code de droit international privé commenté*, Antwerp, Intersentia-Bruylant, 2006, 186-190.

⁴⁴ Cf. for instance, Court of Appeal Brussels, 14 August 2006, nr. 2006/KR/269, not yet published.

2C. Specific issues relating to the cross-border enforcement of family law judgments

1. The role of organs and institutions

No particular details need to be mentioned (cf. *supra*, p. 4), except when the family law judgment (other than return orders) must be submitted to a Belgian court to obtain the 'exequatur'. Both under Regulation 2201/2003 and under the Belgian Code on Private International law, the court that decides upon the enforceability of the foreign court orders is the Court of First Instance (Declaration of Belgium pursuant to Article 68 of Regulation 2201/2003 and Art. 23 Code).

No particular issues arise as to questions 2, 3, 4 and 5.

6. Mediation/ADR

Mediation is an important component of the dispute resolution techniques available to parties in family disputes. Mediation is generally offered to those parties as an alternative to proceedings before the court. In particular, family disputes may be submitted to specialised mediators. These mediators have followed a specific multidisciplinary programme in family disputes (i.e. legal, pedagogic and psychological sessions) and have received a specific accrediting degree as 'mediator in family disputes'.

Since 2001, mediation is recognised as a dispute resolution technique for family disputes in the Belgian Code of Civil Procedure. A new Act on mediation (of 21 February 2005) extended the recognition of this technique to other civil and commercial disputes.

There are two alternative mediation mechanisms. First, there is the voluntary mediation, set up by the parties themselves, irrespective of the fact that proceedings between them are already pending. The organisation and duration of the mediation is agreed upon by the parties in a written covenant between them and the arbitrator. If mediation leads to an agreement, the latter is reproduced in a written document to be signed by the parties and the mediator.

Second, a mediator can be appointed by the judge. The case is pending while the mediation takes place and it is up to the judge to take any appropriate measure with respect to the mediation. When the period time for mediation expires, the mediator shall inform the judge in writing whether the parties were able to reach an agreement or not. In the absence of a full agreement, the judge will continue with the proceedings or extend the mediation period.

If a full agreement is reached, parties may submit their agreement to the judge for homologation. The homologation can only be refused if the agreement is contrary to public policy or, in particular, contrary to the interests of the involved minors. The homologation amounts to a judgment.

Mediation is increasingly used as a resolution technique for family disputes. Mediation is provided for in the new fast-track procedure on enforcement of family law decisions (art. 387ter Civil Code). However, we are not aware of the *application* of mediation in the specific case where voluntary enforcement of family law decisions fail and forced enforcement is required.

EMPIRICAL STUDY

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