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Comparative study on enforcement
procedures of family rights

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**Study on the Enforcement of Family Law Judgements
MALTA Report**

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GENERAL¹

The legal relationship between parents and children is regulated by Book First of the Civil Code: Chapter 16 of the Laws of Malta entitled Of Persons. This is based mainly on Roman law although there have been amendments throughout the years, including a drastic overhaul relating to gender equality which came into force in 1993² and changes relating to issues of filiation including the elimination of the term “illegitimate” which were brought about in 2004³.

The relationship between parents and children is primarily placed within marriage so that the law imposes a responsibility on parents in marriage to look after, maintain, instruct and educate their children.⁴ This responsibility is echoed in following articles regarding the relationship between parents and children in general, whether within marriage or otherwise so that there is now little or no remaining distinction between the two types of parent/child relationship. Children are deemed to reside in the place in which the parent(s) exercising parental authority resides.⁵

Under the provisions relating to parental authority,⁶ a child is expected to obey the parents and it shall not be lawful for a child, without the consent of the parents, to leave the parental house, or such house as the parents may have appointed. Where the child leaves the house without such consent, the parents shall have the right to recall him/her, and, if necessary, demand the assistance of the Police. The parents may also, where necessary and upon obtaining court authority, place the child, for such time as is stated in the decree, in some alternative form of care, which the court will “according to circumstances consider suitable, to be, at the expense of the parents, cared for and treated in such manner as the court may deem conducive to the discipline and education of the child”⁷.

It shall also be lawful for the court, for just cause, and without disclosing the same, to authorize the child to leave the parental house. This provision is supported by another action available under the Children and Young Persons (Care Orders) Act⁸ whereby a child may receive care and

¹ All legislation referred to available at www2.justice.gov.mt in both English text as well as Maltese. Case law only available in Maltese text.

² Act XXIII.1993

³ Act XVIII.2004

⁴ Laws of Malta, Chapter 16, Article 3B and Article 7.

⁵ Laws of Malta, Chapter 12, Article 745(c)

⁶ Laws of Malta, Chapter 16, Articles 131-149

⁷ Laws of Malta, Chapter 16, Article 133

⁸ Laws of Malta, Chapter 285

protection by being placed away from the custody of the parent(s), although access may be permitted according to the circumstances of the case.

Where the parents are in a dispute over custody and particularly within the context of a suit for separation, the court is obliged to make provision for the custody of the children, even in cases where such an application is not explicitly requested. The articles of the law relating to separation make clear provision for the allocation of custody and access arrangements and are guided by the principle of best interests of the child⁹. There is also a blanket article within the code which clearly sets out that “Notwithstanding any other provision of this Code, the court may, upon good cause being shown, give such directions as regards the person or the property of a minor as it may deem appropriate in the best interests of the child.”¹⁰

In all cases where the outcome has a direct impact on the present and/or future well being of the child, that child has the right to be heard by the court where he/she has attained the age of fourteen years¹¹. Where the child is younger this does not signify automatic exclusion from a hearing but inclusion is at the discretion of the court.

Enforcement of all orders relating to custody and or access is carried out with the assistance of a court marshal as directed through the decree or judgement given by the court. The marshal may require the assistance of the police to effect enforcement particularly in such cases related to children. Although the law does not specify such, it is the most frequent practice for a social worker to accompany the marshal in the enforcement measures when such intervention is deemed to have a traumatic effect on the minor. In issues relating to the enforcement of care orders the presence of a social worker from the child protection offices is almost automatic.

PART 1. ENFORCEMENT IN DOMESTIC CASES

1A. Procedures and practices for enforcement in domestic cases

1. Description of the general law for enforcement of:

- a. decisions on custody, including orders on the place of residence of the child**
- b. orders on contact and/or access rights**

(a) Issues relating to custody are determined according to the articles set out in Chapter 16 of the Laws of Malta: the Civil Code. The decisions given by the Family Court in this area are then supported by enforcement procedures under Chapter 12 of the Laws of Malta: the Code of Organisation and Civil Procedure. It is also possible to remove a child from the custody of parent(s) where such child is found to be in need of care protection and/or control under Chapter 285 of the Laws of Malta: the Children and Young Persons (Care Orders) Act. This Act contains measures for enforcement which should be read in conjunction with Legal Notice 385:2005.

⁹ Laws of Malta, Chapter 16, Articles 35-66

¹⁰ Laws of Malta, Chapter 16, Article 149

¹¹ Laws of Malta, Chapter 16, Article 6A and Article 131(4)

Applications for allocation of care and custody and orders relating to access are most frequently part of proceedings for separation¹². Mediation is mandatory in most cases of separation,¹³ unless it is proved that such mediation would be detrimental as in the case of domestic violence. The growing trend is therefore to encourage mediated settlements related to custody and access arrangements rather than impose court decisions. However, where the parties do not reach a settlement or where the court is seized of an application for separation which makes no reference to custody provisions, the court may determine custody arrangements *ex motu* if this is deemed in the best interests of the child¹⁴.

The court gives directions as to provisional custody of the child during the pendency of the separation proceedings. It may also direct that neither parent shall have custody, if this is shown to be in the best interest of the child.¹⁵

(b) The court may also exercise its discretion and fix the time, place, and manner in which the father or mother shall have access to the children. It shall be lawful for the court entirely to forbid such access if it is shown to be detrimental to the welfare of the child.¹⁶

Where necessary the court may order that access be conducted under supervision. Although the law does not specify this mode of access, it has become customary for such arrangements to be made with the help of the national Child Welfare Agency¹⁷ entrusted by the court to oversee the arrangements. Reports relating to the supervised access visits may also be ordered by the court and they are frequently an issue for contention where the party awarded visitation rights under supervision feels unjustly monitored. Issues related to enforcement of supervised access visits is by application to the court at any stage of the proceedings and even following the delivery of judgement.

Failure to honour a court judgement ordering custody and/or access arrangements or a consensual contract sanctioned by the court related to such arrangements, is a violation of Chapter 9 of the Laws of Malta: the Criminal Code. The law specifies that where a party refuses to honour a court judgement or contract related to custody and/or access without reasonable cause, this is deemed a contravention against public order and is punishable with imprisonment.¹⁸

There may also be cases where a child is removed from the custody of the parent(s) and placed under the care of the Minister according to the terms of the Children and Young Persons (Care Orders) Act.¹⁹ In such cases the care order is a quasi-judicial order subject to appeal before the Juvenile Court. Arrangements for custody are made within the terms of the procedures

¹² Malta does not have a divorce law but recognises foreign divorce Court judgements.

¹³ Courts and Tribunals Procedures Act 2002, LN 395.2003 (coming into force); The Civil Courts (Establishment of Sections) (Amendment) Order, 2004, LN 8.2004; The Civil Court (Family Sections), the Civil Court (General Jurisdiction Section) and the Court of Magistrates (Gozo) (Superior Jurisdiction) (Family Sections) (Amendment) Regulations 2004, LN 9.2004.

¹⁴ Laws of Malta, Chapter 16, Article 56(3), Article 60 and Article 61

¹⁵ Laws of Malta, Chapter 16, Article 47

¹⁶ Laws of Malta, Chapter 16, Article 57(2)+(3)

¹⁷ Appogg is the national child welfare agency.

¹⁸ Laws of Malta, Chapter 9, Article 338(ii)

¹⁹ Laws of Malta, Chapter 285

accompanying the care order usually allocating custody to a residential care facility or foster care. Arrangements for access may be included in these proceedings, but are more frequently the outcome of a case conference decision and recommendations by the Care Orders Board²⁰. Failure to abide by the access instructions or action whereby a child under a care order is compelled or incited to abscond from the place determined as his/her residence may impute a prison term not exceeding six months and/or a fine.²¹

2. Comments as to the practice of the law with respect to:

a. decisions on custody, including orders on the place of residence of the child

b. orders on contact and/or access rights

Case Law shows that decisions taken relating to the place of residence of the child have always been motivated by the principle of the best interests of the child.²² There are also a number of criteria which determine allocation of custody and collateral orders on access.

These include:

1. The child's primary carer should take care of the daily needs of the children. In practice this motivates a significant number of court decisions to award care and custody of children to mothers, mainly based on the fact that mothers are more involved than fathers in the upbringing of the children.
2. The fitness of each parent including Physical, Mental, Financial and Moral Fitness. However such measure of fitness in deciding custody allocation depends always on the best interest principle²³
3. Marital Fault may be relevant to the fitness of either parent in awarding custody. Prior to the 1993 amendments it was common for judges to award custody to the innocent party although this practice has now changed. However in cases where a parent is violent towards the family, such action is deemed to be considered by society and by the courts as incompetence to raise and educate a child²⁴.
4. The capacity and disposition of the parties to give love, affection, guidance and education to their child is also taken into account in the decision.

²⁰ The Children and Young Persons Advisory Board is appointed under Chapter 285 to advise the Minister responsible for any minor placed under a care order.

²¹ Laws of Malta, Chapter 285, Article 12 (2)

²² The Civil Code includes the best interests of the child principle in:

Article 47 dealing with the custody of the children pending the action;

Article 56(4) empowering the court to revoke or vary such directions respecting the children, where the interests of the children so require;

Article 57(3) dealing with access or forbidding access if it is detrimental to the welfare of the children;

Article 58(1) directs the court to suspend an action of separation in the interests of the spouses and children;

Article 61(1) stating that agreements between the spouses respecting the custody of the children may at any time, on the demand of either of the spouses, be annulled by the competent court, in the interests of the child

²³ A recent attempt following a separation case to declare a now lesbian mother an unfit parent was refused by the court which decided that the child's life was in no way disrupted by the mother's relationship. Case of Clyde KELLY versus Marie Clare EDGAR.

²⁴ Laws of Malta, Chapter 481: Domestic Violence Act + amendments to Chapter 16 at Articles 37(2) and Article 39 + amendments to Chapter 9 at Articles 412C and 412D

Custody determination usually has a bearing on the allocation of the matrimonial home. The courts are reluctant to remove a child from the home so the custodial parent is usually awarded the right to remain in the matrimonial home regardless of whether the home is community or paraphernal property²⁵. Decisions regarding custody are therefore also, at times, accompanied by an order of eviction from the matrimonial home against the non custodial parent.

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)

There are measures set out for enforcement of judgements within the Code of Organisation and Civil Procedure so that Article 222 sets out that “Where the claim is for some specific performance, the judgment shall state a time, according to circumstances, within which the party cast shall perform the act, and shall also state the manner of execution in case of non-performance of the act.”²⁶ The Code does not make any specific provision for issues relating to custody or access, except with regard to the removal of a child from the jurisdiction of Malta.²⁷

Under the general terms of the Code of Organisation and Civil Procedure “There shall be court executive officers who shall be entrusted with the service and the execution of any judicial acts, warrants and other orders given by the Courts, Judges and Magistrates and to perform such other duties as may be assigned to them by the Director General (Courts) and the registrars.”²⁸

The courts have resorted to role of court marshals in the enforcement of decisions related to care and custody. However the marshal may also request the assistance of the police in the execution of such duties. Furthermore, with a growing awareness related to the impact of such interventions on children, the assistance of a social worker is frequently called for in the execution of these orders. Also more attention is being paid to the training of police officers involved in the support of any actions affecting children.

Where the court marshal encounters opposition to the execution of the act he is attempting to enforce, the law provides for serious repercussions against the offender. “If any person

²⁵ Marriage initiates a matrimonial regime between spouses which directs the administration of their property. The automatic regime is community of acquests whereby all property is jointly administered, community of residue under separate administration where property is administered separately and the residue is divided equally at the termination of the marriage and separation of estates where there is no mingling of spousal property. The matrimonial home is regulated outside these regimes in that once a property is chosen by the spouses to be the matrimonial home it becomes subject to the specific conditions determined at law. In cases where the matrimonial home is the sole property (paraphernal) of one spouse it may not be alienated without the consent of the other and may be allocated in use (not ownership) to the other spouse where the court so determines.

Laws of Malta, Chapter 16, Articles 1316-1337 and Articles 3A and 6; 37 and 46

²⁶ Laws of Malta, Chapter 12, Article 222

²⁷ Laws of Malta, Chapter 12, Article 877

²⁸ Laws of Malta, Chapter 12, Article 67 and Subsidiary Legislation 12.21 (Civil Procedure (Regulation of Registries, Archives and Functions of Director General (Courts) and Other Court Executive Officers) Regulations, 30th March, 2004, Legal Notice 139 of 2004.

knowingly avoids, obstructs or refuses service of any act or court order or execution of any warrant or order by any executive officer of the courts, he shall be guilty of contempt of court and shall be liable, on conviction, to the punishments mentioned “ which include a fine and/or imprisonment. ²⁹Should the marshal “be insulted in the execution of any warrant, or in the discharge of his duties, he shall report the matter to the judge or magistrate, and the contemner shall be liable to be by the judge or magistrate sentenced to a fine (*ammenda* or *multa*) or to detention, saving any other punishment, applicable by the competent court, to which the contemner may be liable if the fact constitutes a more serious offence, according to law.”³⁰

Since 2002, it is also a criminal offence against public order, when a person who is ordered by a court or bound by contract to allow access to a child in his or her custody, refuses without just cause to give such access.³¹ A series of judgements given by the Criminal Court of Appeal (Inferior jurisdiction) have examined the various elements of criteria which may constitute “just cause” and have determined that in cases where such reason is lacking, imprisonment for periods up to two weeks has been an apt punishment.³² The parent’s declaration to resolve future compliance is no defence to the violation as it falls under public order and is deemed to be an act of contempt against a judgement of a court.

The only supporting orders specific to family law judgements are recent additions within the terms of the Domestic Violence Act.³³ Where a law suit for personal separation has been filed by either spouse and evidence of acts of domestic violence has been produced, the court may, either on an application of one of the parties or on its own motion in order to protect the safety of the parties involved or in the best interests of the child or children or of any other minor dependants of any of the spouses, issue a protection or a treatment order under the provisions of the Criminal Code.³⁴

A Protection Order may be made by the court where there are reasonable grounds, for the purpose of providing for the safety of the injured person or of other individuals or for the keeping of the public peace or for the purpose of protecting the injured person or other individuals from harassment or other conduct which will cause a fear of violence. It may prohibit or restrict the accused from approaching or following the movements of the injured person or any other individual specified in the order; or prohibit or restrict access by the accused, for a period not exceeding six months or until final judgement, to premises in which the injured person, or any other individual specified in the order, lives, works or frequents even if the accused has a legal interest in those premises; or prohibit the accused from contacting or molesting the injured person or any other individual specified in the order. The court also looks to the need to ensure that the

²⁹ Laws of Malta, Chapter 12, Article 70

³⁰ Laws of Malta, Chapter 12, Article 995

³¹ Laws of Malta, Chapter 9, Article 338 (ii)

³² *Il-Pulizija versus MIZZI Etienne*, 04 April, 2003 (Criminal Appeal (Inferior Jurisdiction) : “Paragraph (ii) under examination does not refer to failure to observe conditions in a decree regarding access; what is being penalised through this disposition is the failure without reasonable cause to grant access when one has been ordered to grant such access.” (Translation from original segment of judgement only available in Maltese: Il-paragrafu (ii) in dizamina ma jtkellimx dwar in-nuqqas ta' osservanza ta' xi kundizzjoni f'digriet ta' access; dak li hu penalizzat b'din id-disposizzjoni huwa biss in-nuqqas, minghajr raguni xierqa, li wiehed jaghti access meta, fost sitwazzjonijiet ohra, jkun gie ordnat li jaghti dak l-access.)

³³ Laws of Malta, Chapter 481

³⁴ Laws of Malta, Chapter 16, Article 39

injured person or other individual specified in the order is protected from injury or molestation; and at the welfare of any children or any dependants who may be affected by the order; and the accommodation needs of all persons who may be affected by the order, in particular of the injured person, his children and his other dependants.³⁵

The Treatment Order may be made together with or separately from a protection order under and provided the court is satisfied that proper arrangements have been made or can be made for treatment, the court may make an order requiring a person to submit to treatment subject to the conditions which the court may deem appropriate to lay down in the order. In practice, this usually involves the perpetrator being ordered to attend anger management sessions at the Domestic Violence Unit for a period of one year or until such time as the treatment is deemed to be effective. Where any person is convicted with an offence, a treatment order by the court may be made with or without the consent of the convicted person and in the case of a person accused with an offence, a treatment order may only be made with the consent of the accused.³⁶

The Court's approach regarding the perpetrator's right of access to the children in circumstances of domestic violence has been one of zero tolerance towards domestic violence and its effects.³⁷ Access may be ordered under the supervision of a social worker or even under police supervision. It may also be denied completely until such time that the perpetrator can prove to the satisfaction of the court that such access would be safe and in the best interests of the child. Where children are deemed by the court to be of an age to determine their preference of residence and access, and always where the child has reached the age of fourteen, the court will take the input of the child into account before reaching any decision.

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**

Prior to December 2003, all judgements relating to family law issues were dealt with in the Civil Courts either in the Second Hall of the Civil Court, court of Voluntary jurisdiction or in the First Hall Civil Court which is a court of contentious jurisdiction.

Until that time applications relating to separation and accompanying applications for custody or first applications relating to custody and or access were directed to the Second Hall of the Civil

³⁵ Laws of Malta, Chapter 9 , Article 412C

³⁶ Laws of Malta, Chapter 9, Article 412D

³⁷ Civil Court (Family Section) , sitting of the 31 October 2006, Writ of Summons 1408/2002 A known as BC, wife of DC versus EC. (Maltese citation: Qorti Civili (Sezzjoni tal-Familja) Seduta tal-31 ta' Ottubru, 2006 Citazzjoni Numru. 1408/2002: A maghrufa bhala B C, mart D C vs E C

Court, namely the Court of Voluntary Jurisdiction. In order to proceed to the First Hall it was first mandatory to apply to the Second Hall where all efforts would be made to effect conciliation between the spouses. Where such efforts were ineffectual, the parties would be authorised to commence contentious proceedings or their mutual agreement would be sanctioned by the court. The Second Hall, Civil Court was empowered to also give provision *pendente lite* in order to resolve applications related to maintenance as well as custody and access during the pendency of the action (which invariably took a substantial length of time). The application was expected at law to be appointed and heard within six working days from filing in the court registry and this time limit was most often honoured until the sheer number of cases and disproportionate staff made it a dead letter.

The cases heard before the First Hall were initially heard by any judge seized of the case according to the date of its filing until in the 1980s it was decided that all family cases would be grouped together and that they would be heard in one separate sitting, although this still meant that a number of different judges presided over these cases. Finally the judges decided that they would appoint all family cases to just one judge who would preside over all family related issues appointed for hearing within the First Hall, Civil Court. Informally this court was referred to as the Family Court although no such legal entity existed.

In 2003, after two previous Commission's recommendations at establishing a Family Court, a legal notice was published establishing a Family Section in the Civil Court First Hall.³⁸ This was subsequently amended in 2006. The amendments brought about the establishment of a family section in the courts to which were assigned all cases³⁹ regulated by (a) Titles I, II and IV of Book First in the Civil Code; (b) the Maintenance Orders (Facilities for Enforcement) Ordinance; and the (c) the Maintenance Orders (Reciprocal Enforcement) Act;⁴⁰ (d) the Marriage Act;⁴¹ and (e) the Child Abduction and Child Custody Act.⁴²

The new Family Section is supported by a panel of mediators and child advocates. On application for separation the court shall summon the parties to appear before a mediator and where deemed expedient the court may also appoint a child advocate to represent the interests of any minor children of the parties. The child advocate may also be appointed upon the close of written proceedings where the court considers that this is required in the best interests of the child. The court may also hear disputes between parties, whether married or otherwise, concerning the custody and maintenance of, or visitation rights to their children; among other issues.⁴³

Where mediation does not succeed and the parties fail to reach a settlement the court shall authorise the parties to initiate proceedings within two months although a longer period may be granted if grave reasons are shown to exist. In any circumstances, this pre-trial period is not

³⁸ The Civil Court (Family Section), The First Hall of the Civil Court and the Court of Magistrates (Gozo) (Superior Jurisdiction)(Family Section) Regulations, Subsidiary Legislation 12.20, Legal Notice 397.2003, as amended by Legal Notices 9 of 2004 and 181 and 186 of 2006.

³⁹ By Legal Notice 9 of 2004

⁴⁰ Laws of Malta, Chapter 48

⁴¹ Laws of Malta, Chapter 255

⁴² Laws of Malta, Chapter 410

⁴³ Subsidiary Legislation 12.20 Article 9 (1) (a)

expected to take longer than one year after the close of written proceedings although “grave and serious reasons” may lead to the granting of an extension.⁴⁴

During this time, any party may during the pendency of the procedures in the conciliation, mediation, pre-trial or trial stages, request the Court to make such provisional orders or to issue such writ or warrant as may be necessary to safeguard its interest.⁴⁵

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 Code of Organisation and Civil Procedure specifies that an appeal against any judgement is entered by means of an application filed in the registry of the Court of Appeal within twenty days from the date of the judgment.⁴⁶

Where several issues in an action have been determined by separate judgments, appeal from any such judgments may only be entered after the final judgment and within the prescribed time, to be reckoned from the date of such final judgment; and in such an appeal express mention of the judgment or judgments appealed from shall be made. However it is possible to enter an appeal from such separate judgments before the final judgment although this is only by leave of court to be read out in open court. Such request for leave to appeal shall be made either orally immediately after the delivery of such judgment or by application within six days from such judgment and when such leave to appeal from such separate judgements is granted the time for the filing of the appeal in respect thereof shall commence to run from the day on which the said leave is read out in open court.⁴⁷

The following may be enforced after the lapse of twenty four hours from delivery:

- (a) any judgment on any collateral issue or any interlocutory decree, provided the time for enforcement is not stated in the judgment or decree itself;
- (b) any judgment rescinding a warrant of impediment of departure of any ship, or rescinding any warrant of seizure or any garnishee order relating to ships or merchandise;
- (c) any judgment ordering the supply of maintenance;
- (d) any award of an arbitrator in accordance with the Arbitration Act.⁴⁸

Any other definitive judgment which does not contain any suspensive condition, and which condemns a debtor to pay a liquidated sum, or to deliver up or surrender a specific thing, or to

⁴⁴ Subsidiary Legislation 12.20, Article 10 (1) and (4)

⁴⁵ Subsidiary Legislation 12.20, Article 5(13)

⁴⁶ Laws of Malta, Chapter 12, Article 226

⁴⁷ Laws of Malta, Chapter 12, Article 231(1)

⁴⁸ Laws of Malta, Chapter 12, Article 255

perform or fulfil any specific act or obligation whatsoever, may be enforced after two days from the day of its delivery.⁴⁹ Therefore cases relating to family law, other than those where a demand is made for maintenance are enforceable after two days from delivery of the judgements while the judgement regarding maintenance is enforceable after 24 hours.

The law specifies that in cases of appeals, the judgement shall be enforceable by the court of first instance independently of whether the Court of Appeal confirms, varies or reverses the judgement of the court of first instance.⁵⁰ In the case of family law judgements, the appealing party cannot use the time required for appeal to stay the enforcement of the judgement of the first court, although an award rectifying the first judgement may be made at the appeal stage. Enforcement measures are exercised through the first court which gave judgement so that the court of appeal is not involved in issues relating to enforcement of judgements.

The Code of Organisation and Civil Procedure allows for the provisional enforcement of any judgment referred to in article 255(c) (which includes judgements relating to maintenance cited *supra*); any judgment providing redress against infringement of the individual's right to life or providing remedies against illegal arrest or forced labour; and any interlocutory decree.⁵¹ However, an appeal from a judgement authorizing the enforcement of another judgement, shall in no case operate as a stay of execution of such other judgement.⁵²

Where a period of five years has expired since the day on which according to law any executive titles mentioned could have been enforced – and this includes all judgements and decrees of the courts of justice of Malta - the enforcement may only be proceeded with upon a demand to be made by an application filed before the competent court. The applicant shall also confirm on oath the nature of the debt or claim sought to be enforced, and that the debt or part thereof is still due.⁵³

In the case of family law issues, the party who has failed to enforce a judgement or decree must show to the satisfaction of the court that there exist similar reasons for the judgement to be confirmed however notice of such measure must be communicated to the other party to the suit who would then have the opportunity to contest the confirmation. In the court of voluntary jurisdiction where a decree has a validity of just six months, it is possible for the party who was unable to enforce the decree to request a renovation of the same decree quite easily but this is because of the non-contentious nature of the proceedings.

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

⁴⁹ Laws of Malta, Chapter 12, Article 256(1)

⁵⁰ Laws of Malta, Chapter 12, Article 265

⁵¹ Laws of Malta, Chapter 12, Article 266 + 267

⁵² Laws of Malta, Chapter 12, Article 269

⁵³ Laws of Malta, Chapter 12, Article 258

Coercive measures to ensure enforcement include those measures outlined above whereby the law provides for repercussions against any person who knowingly avoids, obstructs or refuses service of any act or court order or execution of any warrant or order by the court marshal. Such perpetrator is deemed guilty of contempt of court and shall be liable, on conviction, to a fine and/or imprisonment.⁵⁴ Where the marshal is the victim of insults while in the execution of any warrant, or in the discharge of his duties, the court on hearing such report shall sentence the perpetrator to a fine or to detention, saving any other punishment, if the fact constitutes a more serious offence, according to law.”⁵⁵

It is also an offence against public order within Criminal Law when a person who is ordered by a court or bound by contract to allow access to a child in his or her custody, refuses without just cause to give such access.⁵⁶ The court may impose a fine and/or a custodial sentence on such perpetrator and has repeatedly taken a very serious view of such offences imposing a (brief) prison sentence.

In practice, attempts are made to try to reach an amicable solution through mediation. Particularly after the introduction of compulsory mediation within the family court, increasing emphasis is given to resolution of family law issues which are deemed acceptable to all parties.⁵⁷ However, there remain a number of cases where such settlements are unattainable, most specially where domestic violence has been the cause of the breakdown of the relationship and may have also had effects on the child.

The national social work agency also provides family therapy services and family court services makes referral to this option as part of the proceedings. However, there is a long waiting list for an appointment and private support is expensive.

Where supervised access is ordered by the request either of its own motion or at the substantiated request of one of the parties, coercive measures may be employed to ensure its observance. This may also mean that the child is forcibly taken to a supervised access session, particularly in view of the repercussions the custodial parent faces for withholding access as detailed above. In cases where the parent refuses to honour the access arrangement or where the child refuses to comply, it is then up to the court to determine whether this constitutes reasonable cause. In any event, it is advisable to request revision of the original decree rather than flout a decree given by the court.

The police are reluctant to intervene in any such cases even though parties frequently resort to the police in the attempt to enforce custody and/or access provisions. The police inform the defaulting party of the implications which such non compliance may produce but rarely use physical means to ensure enforcement. It is usually left up to the good offices of the social work agency to attempt to resolve matters amicably.

⁵⁴ Laws of Malta, Chapter 12, Article 70

⁵⁵ Laws of Malta, Chapter 12, Article 995

⁵⁶ Laws of Malta, Chapter 9, Article 338 (ii)

⁵⁷ Subsidiary Legislation 12.20, Article 4 (3)-(13)

4. The impact of other legal or practical conditions relevant during the enforcement e.g. the hearing of the child

The child has the right to be heard in all cases where the outcome has a direct impact on the present and/or future well being of that child. The law specifies that in case of any disagreement either spouse may apply to the competent court for its assistance and the presiding judge, after hearing the spouses and if deemed opportune any of the children above the age of fourteen years residing with the spouses. The court is bound to seek to bring about an amicable settlement of such disagreement.⁵⁸ Where the child is younger this does not signify automatic exclusion from a hearing but inclusion is at the discretion of the court. Elsewhere the law states that the court, after hearing the parents and the child if the latter has reached the age of fourteen years, shall make those suggestions which it deems best in the interest of the child and the unity of the family.⁵⁹

This additional “party” to all proceedings in family law is not to be underestimated. The opening article of the Civil Code sets out that “The Law promotes the unity and stability of the family.”⁶⁰ In practice this means that all decisions must be motivated taking into account the best interests of all parties of the family as well as the interests of the family itself, as an entity.

PART 2. ENFORCEMENT IN CROSS-BORDER CASES

2A. Enforcement of return orders issued under the 1980 Hague Convention, and after 1 March 2005, Regulation 2201/2003

1. Legal bases for enforcement.

The Hague Convention on the Civil Aspects of Child Abduction was ratified in Malta by the Child Abduction and Custody Act 1999, which entered into force on August 1, 2000⁶¹ The Criminal Code provides for two offences of abduction : the first offence relates to those cases where there is violence and the intent to abuse or marry the abducted person⁶² while the second offence makes provision for the abduction of minors under 18 years of age where there is intent to traffic them, to exploit them for the production of goods or provision of services.

In cases of abduction, proceedings can only be initiated if there is a *querela*; that is to say if there has been no impact on public order or any instance of public violence, criminal proceedings can

⁵⁸ Laws of Malta, Chapter 16, Article 6A

⁵⁹ Laws of Malta, Chapter 16, Article 131(4)

⁶⁰ Laws of Malta, Chapter 16, Article 2(1)

⁶¹ Laws of Malta, Chapter 410: Child Abduction and Custody Act (in force 1st August, 2000), Act XIII of 1999 as amended by Act VI of 2001.

⁶² Laws of Malta, Chapter 9, Article 199 (1) Whosoever shall, by violence, abduct any person, with intent to abuse or marry such person, shall, on conviction, be liable, in the first case, to imprisonment for a term from eighteen months to three years, with or without solitary confinement, and, in the second case, to imprisonment for a term from nine to eighteen months.

(2) The punishments laid down in sub article (1) shall apply to any person who shall, by fraud or seduction, abduct any person under the age of eighteen years, who is under the authority of a parent or tutor, or under the care of another person, or in an educational establishment.

only be instituted upon the complaint of the aggrieved party. In this way one parent may bring an action against the other, provided a complaint is lodged with the police.⁶³

The Code of Organization and Civil Procedure makes a number of provisions in order to address the issue of child abduction and to afford prevention for its eventuality. It provides that a warrant of prohibitory injunction may be issued to restrain any person from taking any minor outside Malta.⁶⁴ The warrant shall be served on the person or persons having the legal or actual custody of the minor enjoining them not to take, or allow anyone to take, the minor, out of Malta. The warrant shall also be served on a number of key officials who may contribute towards the prevention of the abduction of the child : the officer charged with the issue of passports is ordered not to issue, and or deliver, any passport in respect of the minor and not to include the name of the minor in the passport of the minor's legal representatives or in the passport of any other person; the Commissioner of Police is ordered not to allow such minor to leave Malta.

If, before the service of the warrant on the officer charged with the issue of passports, a passport in respect of the minor had already been issued or the name of the minor had already been included in the passport of another person, such officer shall take the necessary steps to withdraw the passport in respect of the minor, and of any other passport which includes the name of the minor, and to delete the name of the minor from such passport.

Where any person served with the warrant, directly or indirectly, takes the minor, or allows the minor to be taken, out of Malta, that person shall be guilty of contempt of court. The warrant remains in force until revoked by a court order.⁶⁵

⁶³ Laws of Malta, Chapter 9, Article 543+545

⁶⁴ Laws of Malta, Chapter 12, Article 877

⁶⁵ Example of warrant of prohibitory injunction according to Schedule No. 24 of Chapter 12

Warrant of Prohibitory Injunction restraining a person from taking a minor outside Malta.

In (*here insert name of Court*)

(Applicant)

.....

versus

(Respondent)

.....

Application of

Respectfully sheweth and confirms on oath: -

That the applicant has an interest that the minor, hereinafter indicated, be not taken outside Malta;

That the respondent/s is/are the persons having, or who might have, the legal or actual custody of the said minor;

Wherefore, the applicant respectfully requests that this Court orders the issue of a warrant of prohibitory injunction against the respondent/s enjoining him/them not to take, or allow anybody to take, the said minor out of Malta;

Particulars of the minor: (*here insert the name and surname of the minor and any other particulars, including the date and place of birth and the names of the parents for establishing the identity of the minor*)

Advocate

Legal Procurator

This, day of 20--

Confirmed on oath before me, after I have read to him the contents, and in the presence of witness to identity, and filed by

(*Registrar's signature*)

The Child Abduction and Custody Act 1999 provides that the First Hall of the Civil Court has the jurisdiction to hear cases concerning child abduction. Whenever any person interested or the Director responsible for welfare alleges that a child has been wrongfully removed within the meaning of Article 3 of the Convention, he may, without prejudice to any other action with respect to the same matter that is lawfully available, make an application under sub article (1) for redress. Any party to the proceedings shall have a right of appeal to the Court of Appeal.⁶⁶

The Minister of Justice has the discretionary power to make an order allowing any other court to have jurisdiction to hear applications under the Convention. Where an application has been made under the Convention to the First Hall of the Civil Court or to any other court which the Minister may by order designate, the court may, at any time before the application is determined, give such *interim* directions as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application.⁶⁷ The court has the authority to make a declaration that the removal of a child from Malta, or retention of a child outside Malta is unlawful.⁶⁸

To prevent the spirit of the Convention from being frustrated by any contrary custody orders issued in Malta, the Child Abduction and Custody Act provides that any custody order that is inconsistent with a custody decision or order for the return of an abducted child will cease to have effect. Furthermore, “a custody decision given in or entitled to recognition in Malta is not a ground of the Maltese Court to refuse to return a child, although the Maltese Court may take account of the reasons for that decision.”⁶⁹

Applications made under the Convention are received and processed by the Central Authority and filed before the competent court by the Office of the Attorney General. The Central Authority in Malta is the Director of the Department of Family Welfare.⁷⁰

A form for applications under the Convention is available from the Department of Family Welfare which requests information about:

- the identity of the child and his parents
- the identity of the applicant information
- the place where the child is thought to be, including any details about the abductor
- the date and circumstances of the wrongful removal or retention
- the factual or legal grounds justifying the request
- any civil proceedings in progress

If the child has been removed from Malta during custody proceedings the court can, upon an application for the return of the child, declare the removal to be unlawful if “it is satisfied that the applicant has an interest in the matter and that the child has been taken from or sent or kept out of Malta without the consent of the person having the right to determine the child’s place of

⁶⁶ Laws of Malta, Chapter 410, Article 6

⁶⁷ Laws of Malta, Chapter 410, Article 7

⁶⁸ Laws of Malta, Chapter 410, Article 25

⁶⁹ Laws of Malta, Chapter 410, Article 27

⁷⁰ Laws of Malta, Chapter 410, Article 5 and Article 16

residence.” Malta has made a reservation as mentioned in article 26 of the Convention that the costs of applications under the Convention are not provided for by any authority in Malta.

Malta as a state party did reply to the questionnaire of the Hague Conference. The official responses are listed in bold with additional comments entered below.

LEGAL BASIS FOR THE ENFORCEMENT OF RETURN ORDERS

1. Please give details of any specific legislative provisions which exist in your State concerning the enforcement of return orders. Please specify the title of the instrument, its legal nature (law, decree, administrative regulation or rules of court etc.) and short description of content.

There is no specific legislation regarding the enforcement of return orders under the 1980 Hague Convention

2. Please give details of any general legislative provisions which exist in your State concerning the enforcement of court orders in the area of family law and govern the enforcement of return orders (either in the absence of specific provisions under question I.1 or in addition to any such specific provisions). Please specify the title of the instrument, its legal nature (law, decree, administrative regulation or rules of court etc.) and the content of the relevant provisions.

The general legislation regarding the enforcement of return orders under the 1980 Hague Convention is the Child Abduction and Custody Act, Chapter 410 of the Laws of Malta (Act XII of 1999)

3. Please give details of any judicial decisions, practice directives or guides concerning the enforcement of court orders in the area of family law that govern the enforcement of return orders (either in the absence of specific provisions under question I.1 or in addition to any such specific provisions).

There are no practice directives or judicial decisions in Malta regarding the enforcement of return orders under the 1980 Hague Convention.

However there have been a number of decisions given relating to the enforcement of return orders following child abduction.

These include Marion Ruth SATCHELL versus Peter Paul Angelo SATCHELL 11.08.2000 Citazzjoni 77/00G1 [MM] Court of Magistrates (Gozo) Superior Jurisdiction;

Monique GRECULA v Ronald Allen GRECULA 6.03.2002 Citazzjoni 231/02 [RCP] First Hall, Civil Court

Director of Family Welfare v Heleen Cornelia VAN DER LINDE 15.05.2003 Rikors 2987/2003 [RCP] First Hall, Civil Court

[Also Michael BORG proprio et nomine vs. Penelope LEE,

Dr. Stephen Thake Vassallo nomine vs. Joseph PORTELLI]

All judgements are united in citing the best interests of the child for their decision to return or keep the child.

4. Do you have any other comments relating to the law governing enforcement of return orders, including any comments on the effectiveness of these rules?

No

2. Procedure and practice with regard to return orders

Malta as a state party did reply to the questionnaire of the Hague Conference. The official responses are listed in bold with additional comments entered below.

III. ENFORCEMENT PROCEDURE

A. The order to be enforced and the aims of enforcement

1. If an application for return of a child is successful, what is normally ordered:

- a) the surrender of the child to the applicant (if necessary, “for the purposes of returning the child to his / her State of habitual residence”)
- b) the return of the child to State X
- c) other?

It is in the discretion of the Court, according to the circumstances of the case, whether to surrender the child to the applicant or to return him/her to his state of habitual residence.

2. If such order has to be enforced, please specify which of the following is / are normally the aim of enforcing a return order:

- a) to remove the child from the abductor or any other person
- b) to hand the child over to the applicant or a person designated by him or her in the State where enforcement takes place
- c) to ensure the child’s return to his or her State of habitual residence
- d) other.

To hand over of the child to the applicant and to ensure the child’s return to his or her State of habitual residence

3. Whose responsibility is it to organise the repatriation of the child?

The Maltese Central Authority together with the Central Authority of the State of Origin

B. Actors involved in enforcement

1. Once a return order is made, is a specific request for enforcement necessary? If yes, which authority is responsible and which procedure applies?

No, the return order has an executive title

2. Please specify who initiates enforcement of the court’s return order:

- a) the applicant (in person or through his or her lawyer)
- b) the Central Authority
- c) the court
- d) the enforcement organ itself
- e) other.

Where the law leaves choices or discretion, please give details concerning actual practice.

The Maltese Central Authority

3. a) Please give details of the persons, organs and institutions (e.g. enforcement organs, court, parties, psychologists, social workers, Central Authorities, other) involved in the enforcement of return orders

Although it is not mandatory, the Central Authority is usually involved. Other persons may be called upon to give their input according to the circumstances of the case

Appogg as the national welfare agency is usually involved in the psychological and social work back up required providing assistance and support in the enforcement of return.

- i) according to the law

Such help may be requested, but it is not given automatically.

The law does not specify any such help but courts may and do make the recommendation, as necessary.

ii) in practice.

Please describe their respective roles and functions in enforcement, and whether their participation is mandatory. If this is not the case for some or all of the actors mentioned, please specify who decides about their respective participation and to what extent they are normally involved in return cases (regularly or exceptionally and, in the latter case, depending on which conditions).

The presence of the applicant is not required.

While attempts are made to include all parties to the suit, where this is not possible the case proceeds in their absence. The use of video-conferencing has facilitated full participation.

b) In particular, are any social or psychological services available in order to prepare the child and / or the defendant for the return in order to de-escalate or even avoid enforcement by coercive measures?

Appogg, previously mentioned, is instrumental in such a role.

c) Please specify also whether the presence of the applicant (or a person designated by him or her) is required and, if this is the case, at which stage of the enforcement proceedings and for what purpose.

See above

4. a) Is there any supervision / control of the enforcement procedure by a court, the Central Authority or any other State authority? If a court is supervising / controlling the enforcement procedure, which court is it? The court that made the order or other (e.g. a specific enforcement court)?

There is no direct supervision, however the ultimate authority to control the procedure, would be the Central Authority.

However the Central Authority would require the input of the Court to issue any order

b) What if the court of first instance refused return, and the appellate court or court of appeals ordered return? Would the court of first instance, the appellate court or court of appeals which ordered return, or any other court be the court supervising / controlling enforcement in such a case?

The Court of Appeal who ordered the return.

C. The actual enforcement procedure

1. Is there a timeline for enforcement?

Maltese law does not give any timelines with regard to enforcement of return orders, however proceedings with respect to enforcement will be taken according to the general powers of the Court of Appeal.

This is an ongoing issue relating to fast tracking of family law related cases

2. Is it normal to allow a period of time for voluntary compliance with a return order or to allow appropriate practical arrangements for the return of the child to be made?

Time for voluntary compliance would be allowed according to the circumstances of the case.

3. Are any measures available in order to prevent the abductor from taking the child into hiding after the return order is made and before it can be enforced? In the affirmative, please give details.

The Court can issue an order to stay departure. In such a case there would be notification of such an order to the Commissioner of Police, Immigration Department, Customs Department, Passport Control and Airport Authorities. The order would remain in force until the return order is enforced.

4. What happens if the child is taken into hiding after the order was made and before it can be enforced?

Which actors would be involved (e.g. Central Authority, police, public prosecutor, other) and which measures can they take to locate the child? What is the effect of the hiding on a possible timeline for enforcement?

The actors involved would be the Central Authority, the Police and the Prosecutor, and they would adopt the customary procedures for missing persons.

5. When enforcement is initiated, what are the required steps (e.g. measures by the applicant, the court or any other supervisory authority, and the enforcement organs)?

The Court of Appeal would be the authority who would take the measures for enforcement as if it had delivered the judgement.

6. Which coercive measures are available and under what conditions (e.g. pecuniary fines, physical force [against whom? the child? the defendant? others?], detention)? Which of these are normally used in practice?

Coercive measures against any of the parties involved are used as a last resort. Customary procedure is to engage the services of a social worker to facilitate the process.

7. a) Do they have to be ordered specifically (i.e. either “fine”, “physical force”, “detention”)? If so, when and by whom?

If the defendant is violent, physical force is to be used according to circumstances

b) If problems occur during enforcement, may the enforcement organs unilaterally “upgrade” the intensity of coercive measures, or do they have to obtain authorisation from any particular higher authority (e.g. an enforcement court or other)? Please specify.

If the defendant does not comply with the orders given by the enforcement organs, the Executive Police will have the power of detention.

8. Please give details of any court orders which can be obtained in emergency situations. Can these orders be obtained after hours and ex parte?

The Court may, at any time before the application is determined, give those interim directions which it may deem fit for the purpose of securing the welfare of the child or of preventing changes in the circumstances relevant to the determination of the application.

A judicial act may be filed after hours requesting a court order in emergency situations, at the application of the interested party. Laws of Malta, Chapter 12, Article 109:

(1) Court sittings may be held on such days and at such times as may be prescribed by the Minister responsible for justice by regulations made under this article and during such other time as the court may, in its discretion, fix.

(2) The registries of the courts shall be open for the filing of judicial acts during such days and at such times as may, by regulations, be prescribed by the Minister responsible for justice under this article:

Provided that any of the aforesaid registries may by special order of the court or by order given in writing by the registrar, be opened for the filing of judicial acts on any day or at any time.

(3) The Director General (Courts) and the registrar shall abide by and fully execute any order of the court to open the court on any day and at any time as the court may specify in the order.

(4) A judicial act may be served or carried into execution on such days, at such times and in such manner as may be prescribed by the Minister responsible for justice by regulations made under this article:

Provided that by special order of the court or by order given in writing by the registrar in cases of urgency, it shall be lawful to serve or carry into execution any judicial act on any other day or at any other time.

D. Costs

1. Are costs incurred for the enforcement? If so, are they part of the costs of the court proceedings as a whole? How are they calculated? For which services are they charged?

The cost incurred for the filing of the application for registration of decision, which is part of the general court proceedings.

Laws of Malta, Chapter 410, Article 26(3)

The Minister responsible for justice may by regulations under this sub article establish the fees payable in the registry of the courts in relation to the filing of judicial acts in connection with any procedure under this Part of this Act:

Provided that until such fees are so established by the Minister, the fees contained in the Code of Organization and Civil Procedure shall apply.

In the circumstances, tariffs applicable to court proceedings are similarly applied to this process.

2. Who has to pay the costs for enforcement? To whom? Is a reduction or exemption possible, e.g. under a Legal Aid Scheme? Under which conditions? In particular, is advance payment required in order for the enforcement organs to act? If legal aid was granted for the proceedings leading to the return order, would it cover the enforcement stage or would the application for legal aid have to be renewed?

The Maltese Government is not bound to assume any costs related to participation of legal counsel/advisers or court proceedings, except when such costs may be covered by legal aid. The provision of legal aid would be applicable if the requirements of the Code of Organisation and Civil Procedure are met with.

Laws of Malta, Chapter 12 makes specific provision in relation to costs incurred for within the context of cross border disputes.

Article 928B. (1) Legal aid shall be granted to the applicants involved in a cross-border dispute who are, partially or totally, unable to meet the costs of the proceedings as a result of their economic situation.

(2) Applicants who have received legal aid in a Member State other than Malta in respect of proceedings before a court in that other Member State shall be entitled to receive legal aid in Malta if recognition or enforcement of the judgement is sought in Malta.

(3) Legal aid applies to:

(a) pre-litigation advice with the aim of reaching a settlement prior to instituting legal proceedings;

(b) legal assistance and representation in court, even at the appeal stage, with or without the cost of proceedings of the recipient;

(c) the costs of the opposing party had the recipient lost the case and would be so obliged to pay such costs if he were domiciled or habitually resident in the Member State in which the court is sitting;

(d) the enforcement of authentic instruments in another Member State;

(e) extrajudicial procedures under the conditions defined in the Directive if there is a legal requirement for the parties to use them or if the parties to the dispute are ordered by the court to have recourse to them.

(4) Legal aid shall be granted or refused by the competent authority when the Court is sitting in Malta and by the competent authority of the Member State other than Malta when the Court is sitting outside Malta.

(5) Without prejudice to subarticle (4), legal aid applicants may not be prevented from legal aid if they prove that they are unable to pay the cost of the proceedings as a result of differences in the cost of living between the Member State of domicile or habitual residence and of the forum.

Article 928D. It shall be the duty of the competent authority:

(a) to act as a receiving or transmitting authority for legal aid applications;

(b) to assist the applicant in ensuring that the application is accompanied by all the supporting documents known by such applicant to be required to enable the application to be determined;

(c) as a transmitting authority, to assist the applicant in providing the translation of the application and of the necessary supporting documents when the application is submitted to the authorities in another Member State;

(d) as a receiving authority, to assess the economic situation of a person in the light of the provisions of article 912, including the amount of the resources of persons who are financially dependent on the applicant;

(e) to grant or refuse legal aid;

(f) to consider, when taking a decision on the merits of an application, and without prejudice to paragraph (d), the importance of the individual case to the applicant, and may also take into account the nature of the case when the applicant is claiming damage to his or her reputation but has suffered no material or financial loss, or when the application concerns a claim arising directly out of the applicant's trade or self-employed profession;

(g) to keep the applicant informed with the processing of the application, and where the application is totally or partially rejected, to give reasons for the rejection;

(h) to decide whether recipients of legal aid must refund in whole or in part the assistance granted if their financial situation has substantially improved or if the decision to grant legal aid had been taken on the basis of inaccurate information given by the recipient and to collect any reimbursement so due.

Article 928E. (1) Legal aid applications by persons who are domiciled or habitually resident in Malta may be submitted either:

(a) to the competent authority in Malta hereinafter referred to as "the transmitting authority"; or

(b) to the competent authority of the Member State in which the court is sitting or where the decision is to be enforced, hereinafter referred to as "the receiving authority".

(2) Legal aid applications shall be completed in accordance with such forms as may be prescribed by the Minister responsible for justice by Order in the Gazette.

(3) The competent authority in Malta may decide to refuse to transmit an application to the receiving authority of another Member State if it is manifestly:

(a) unfounded; or

(b) outside the scope of the Directive.

When an application for transmission is totally or partially rejected, the reasons for rejection shall be given, and the provisions of article 917 shall apply.

- (4) Without prejudice to subarticle (3), when the competent authority in Malta receives a request for legal aid in relation to proceedings which are being heard before a court in a Member State other than Malta, it shall transmit the application to the competent receiving authority in the other Member State within fifteen days of the receipt of the application duly completed in one of the languages of the Member State of the competent receiving authority, and the supporting documents translated, where necessary, into one of those languages.
- (5) Applicants for legal aid shall be fully informed of the processing of the application.
- (6) Where the competent authority in Malta refuses to grant legal aid, it shall inform the applicant of the reasons for rejection, and the provisions of article 917 shall apply.

Article 928F. (1) Legal aid granted by the competent authority in Malta when it is acting as a receiving authority shall cover the following costs:

- (a) interpretation;
- (b) translation of documents required by the court or by the competent authority and presented to the recipient, which are necessary for the resolution of the case;
- (c) travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the applicant's case is required in court, and the court is satisfied that the persons concerned cannot be heard to the satisfaction of the court by any other means.

(2) Legal aid granted by the competent authority in Malta when it is acting as a transmitting authority shall cover the following costs:

- (a) costs relating to the assistance of a local lawyer or another person entitled to give legal advice, incurred by the competent authority until the application for legal aid has been received in the Member State where the court is sitting;
- (b) the translation of the application and of the necessary supporting documents when the application is submitted to the authorities of that Member State where the court is sitting.

Article 928G. Costs related to the translation of the application and supporting documents incurred by the competent authority following an application for legal aid by a person domiciled or habitually resident in Malta shall be repaid to the competent authority if the application is rejected by the competent authority of the Member State other than Malta where the Court is sitting.

3. Are the costs of the actual repatriation of the child (e.g. airfare for child and possible accompanying person) considered as part of the enforcement costs? Who has to pay for the repatriation? Is advance payment a condition for enforcement?

The costs of repatriation would be borne by the applicant or by the person who removed the child from the habitual place of residence. However no such costs will be borne by the Minister or the Maltese Government.

4. Please specify how foreign applicants are provided with information about enforcement costs to be borne by them. **Such information is given by the Central Authority, upon a request by the applicant.**

5. Please provide details regarding the enforcement organs' specific duties as they relate to the enforcement of Hague return orders concerning children.

N/A

6. Do you have any other comments relating to the enforcement procedure?

No.

3. Enforceability and legal remedies of return orders

Malta as a state party did reply to the questionnaire of the Hague Conference. The official responses are listed in bold with additional comments entered below.

II ENFORCEABILITY AND LEGAL REMEDIES

1. a) Is a return order subject to appeal or other forms of challenge? Please give details (number and character of legal remedies, possible time-limit for them, possible time-limit for appellate court or court of appeals to decide etc.).

Return orders are subject to challenge in the Court of Appeal. These appeals are usually appointed for hearing without delay.

b) Please specify whether any such challenge may only be made once, and which court or body has jurisdiction to hear the appeal.

No further appeal may be made according to Maltese law.

2. a) Please give details of any authorisation or other decision required for the actual enforcement of the Hague return order (e.g. registration for enforcement, declaration of enforceability, order of a specific enforcement measure or other).

The enforcement order needs to be registered in the registry of the Court of Appeal

b) Which is the competent organ for these decisions?

The Court of Appeal

3. Does the Hague return order have to be final and no longer subject to ordinary appeal before any authorisation for enforcement or other measure specified under II.2 may be ordered?

The enforcement is not subject to appeal.

4. a) Are any of the decisions specified under II.2.a) (authorisation to enforce or other decision) subject to appeal independent of any appeal against the merits of the return order? Please give details (number and character of legal remedies, possible time limit to lodge them, possible time-limit for appellate court or court of appeals to decide etc.).

An interested person may present an application in the Court of Appeal, in order to state why there should not be recognition of the enforcement order. The Court of Appeal will decide the matter as expeditiously as possible.

b) Please specify whether any such challenge may only be made once, whether it suspends the enforceability / enforcement of the order and which is the court or body to decide the appeal.

The appeal may only be made once, in the Court of Appeal, and such appeal would suspend the enforcement of the order.

5. If in your State both types of legal remedy as specified under II.1 and II.4 (i.e. against the order on the merits and against any decision taken at or required for the enforcement stage) exist, can they be lodged simultaneously? Is it the same court that deals with them if they are lodged (a) simultaneously, and (b) at different times?

Both applications will be made to the Court of Appeal, which will decide on both issues

6. Do you have any other comments relating to legal remedies and the enforcement of return orders?

No

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

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

The Hague Convention on Intercountry Adoption

The Hague Convention on the Civil Aspects of Child Abduction

European Convention on the Adoption of Children [1983]

European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children [2000]

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the protection of Children

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

Convention on International Access to Justice

Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters

EU Convention on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1997)

Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters

Convention between the Member States of the European Communities on the Simplification of Procedures for the Recovery of Maintenance Payments

Convention on Jurisdiction, Recognition and Enforcement of Judgements in Matrimonial Matters

Laws of Malta Chapter 242, Maintenance Orders (Reciprocal Enforcement) Act ⁷¹

Laws of Malta, Chapter 12, also has an entire section entitled: OF THE ENFORCEMENT OF JUDGMENTS OF TRIBUNALS OF COUNTRIES OUTSIDE MALTA ⁷²

Article 825A. Where regulations of the European Union provide, with regard to the matters regulations under this title, in any manner different than in this title, the said regulations shall prevail, and the provisions of this Title shall only apply where they are not inconsistent with the provisions of such regulations or in matters not falling within the ambit of such regulations.

⁷¹ Enacted by Act XX of 1974, as amended by Legal Notice 148 of 1975; + Acts: LVIII of 1974, XIII of 1983, and XXIV of 1995.

⁷² Act III.2004 + Act XXII.2006

826. Saving the provisions of the British Judgments (Reciprocal Enforcement) Act, any judgment delivered by a competent court outside Malta and constituting a *res judicata* may be enforced by the competent court in Malta, in the same manner as judgments delivered in Malta, upon an application containing a demand that the enforcement of such judgment be ordered.

Article 827. (1) The provisions of the last preceding article shall not have effect:

(a) if the judgment sought to be enforced may be set aside on any of the grounds mentioned in article 811;

(b) in the case of a judgment by default, if the parties were not contumacious according to foreign law;

(c) if the judgment contains any disposition contrary to public policy or to the internal public law of Malta.

(2) For the purposes of this article, the plea to the jurisdiction of the court by which the judgment was delivered, may be raised in terms of article 811(d), even though that court may have adjudged upon a plea to its jurisdiction, in the case of any action brought against any person not subject to the jurisdiction of that court by reason of domicile or residence, unless such person had voluntarily submitted to the jurisdiction thereof.

Article 828. The judgment ordering the enforcement of another judgment delivered by a court outside Malta, upon being registered in the Public Registry Office, shall create as from the day of registration a hypothec in regard to the debt judicially acknowledged by the judgment the enforcement of which is ordered.

2. National law relevant for cross-border enforcement of family law judgments under Brussels 2A

The enforcement of cross-border family law judgements would apply in the same way as enforcement of internal case, as set out *supra* according to the provisions of the Code of Organisation and Civil Procedure. However there are also specific provisions detailed in the Child Abduction Act⁷³ which set out the need for registration of any foreign court decision relating to custody in the registry of the Court of Appeal.⁷⁴ Such an application shall be treated as a request for enforcement for decisions under the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children.

There has been no relevant case law on the enforcement of Brussels II A with reference to decisions of the national court for enforcement in another EU member state or the enforcement of a judgement from another member state in Malta.

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

⁷³ Laws of Malta, Chapter 410

⁷⁴ Laws of Malta, Chapter 410, Articles 18 + 19

There are no specific rules relating to the application of Brussels IIA and the enforcement of such judgements in another member state.

In deciding a case which has a cross-border factor, the court will attempt to ascertain information necessary to the enforcement of the judgement. Advocate to the parties will be requested to provide information which may be instrument to the enforcement of access arrangements. For instance, the national welfare agency Appogg may be (and has been) requested to use its links with International Social Services to determine social work provision in the country where the judgement is to be enforced in order to ensure the least possible trauma for the child. This is not to say that lack of such support has directly influenced the court in its decision but as all cases are motivated by the best interests of the child principle, practical considerations are a vital element influencing the court's final judgement.

Parties are also encouraged to use mediation facilities available in order to enable them to reach a settlement without the imposition of specific terms determined by the court. As this is a growing area of expertise, mediators are encouraged to further their training in order to be culturally sensitive to parties from (often widely) differing backgrounds.

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

It is reasonable to expect that enforcement measures would be applied within the local context. For instance, if a child were ordered to visit with a parent at a police station, this might not be well received because of the national interpretation of the best interests principle. Such an order would probably be interpreted by allocation of supervised access according to local provision. This would entail substitution of a police station by a suitable secure site for the access visit(s), without the physical presence of the police deemed unwarranted in the child's best interests.

5. Setting aside or amending of foreign judgments

There are no specific timeframes indicated at law. To the contrary in this particular scenario, where the welfare of the child is an issue, applications to the court may be entered without time constraints. The court is empowered to give directions as to the custody and access arrangements of children, depending on the best interest principle. The revocation and or variation of any directions relating to such arrangements may be made "at any time"⁷⁵ This does not mean that any party may capriciously set out to undo a custody arrangement set out by a previous court, irrespective of whether this is national or foreign in origin. The court in examining the case must be satisfied that such changes will actually be in the best interest of the child. Changes to a judgement given by a foreign court would only be changed where it was clearly shown to the satisfaction of the court that the provisions no longer met the current needs of the child.

For instance, in the case Borg nomine versus Lee, the defendant had escaped with the child who alleged that the plaintiff had been abusive towards her and towards their minor son. The Maltese courts stated that "[the Court] may at any time revoke or vary an orders relating to a minor, where the specific circumstances of the child so require." The case ended in an amicable settlement

⁷⁵ Laws of Malta, Chapter 16, Article 60

according the mother full care and custody of the minor son, subject to the right of determined access of the father.⁷⁶

Where a decision which has been registered is varied or revoked by an authority in the Contracting State in which it was made, the person on whose behalf the application for registration of the decision was made shall notify the Court of Appeal of the variation or revocation. The Court of Appeal shall then cancel the registration and notify the prescribed persons⁷⁷ of the cancellation or variation.⁷⁸

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

1. The role of organs and institutions

Cross border enforcement in relation to Hague Conventions and Brussels IIA are entrusted to a designated Central Authority. The duties of this authority are discharged by the Director responsible for welfare. Actions taken within this context are also supported by the First Hall, Civil Court and Court of Appeal.

2. Time limits relevant for enforcement proceedings and the effect of time

There are no specific rules other than those already cited *supra*.

3. Coercive measures to ensure enforcement

There are no specific rules other than those already cited *supra*.

4. Other legal or practical conditions that may form obstacles to enforcement

There are no specific rules other than those already cited *supra*.

5. Issues of specific concern in cross-border cases

In all cases relating to custody and access the central issue to be determined is the best interest of the child. Determination of cases requesting allocation of custody is set according to the criteria listed *supra*. In all but exceptional cases, parental authority remains vested in both parents regardless of who is designated the primary carer so that extraordinary acts of administration require the joint consent of both parents.⁷⁹ The law specifies that in case of disagreement between the parents on matters of particular importance, either parent may apply to such court as may be prescribed by or under any law in force from time to time indicating those directions which he or she considers appropriate in the circumstances and this would certainly include the

⁷⁶ Michael Borg proprio et nomine versus Penelope Lee, First Hall, Civil Court, “[Qorti]...tista’ f’kull zmien tirrevoka jew tibdel dawk l-ordnijiet dwar l-ulied, meta l-interessi ta’ l-ulied hekk jitolbu...” (translation from Maltese text)

⁷⁷ As referred to under Laws of Malta, Chapter 12, Article 29

⁷⁸ Laws of Malta, Chapter 410, Article 19

⁷⁹ Laws of Malta, Chapter 16, Article 136: These include alienation of movables by nature, including motor vehicles for the object of profitably investing the proceeds thereof; the collection of capitals that may become due; the granting of personal rights of enjoyment over immovable property; the acceptance of an inheritance, legacy or donation in the name of the child; the partition of movables by nature;

removal of a child from the jurisdiction by one parent resulting in loss of access by that child to the parent.⁸⁰

In such cases, the law provides that “the court, after hearing the parents and the child if the latter has reached the age of fourteen years, shall make those suggestions which it deems best in the interest of the child and the unity of the family. If the disagreement between the parents persists, the court shall authorise the parent whom it considers more suitable to protect the interest of the child in the particular case, to decide upon the issue ...”⁸¹

6. Mediation/Alternative dispute resolution

It has already been shown that mediation plays a central role in the resolution of family law disputes. Following legislation introduced in 2003, mediation is mandatory for all family law cases⁸² and specifically also in connection with “disputes between parties, whether married or otherwise, concerning the custody and maintenance of, or visitation rights to their children”.⁸³

It is the duty of the mediator to attempt to mediate between the parties in an effort to make them reach an agreement on the matter in dispute. The agreement so reached is recorded and transmitted to the court which then decrees on the matter accordingly. Where the parties fail to reach an agreement, the mediator is bound to inform the court of this eventuality.⁸⁴ However this does not impede the parties from applying to the court for the issue of a provisional order or the issue of an act or warrant to safeguard individual rights while the mediation process is taking place. Furthermore where a person is summoned to appear before a mediator and fails to do so, the mediator shall inform the court and indicate the reason for failure where possible.⁸⁵

These rules apply to all family law cases so that it can be assumed that disputes with a cross-border element would also be entrusted to a mediator whose role is to attempt to help the parties reach an agreement, where this is practicable.

⁸⁰ Laws of Malta, Chapter 16, Article 131(1)-(3)

⁸¹ Laws of Malta, Chapter 16, Article 131(4)

⁸² The Civil Court (Family Section), the First Hall of the Civil Court and the Court of Magistartes(Gozo)(Superior Jurisdiction)(Family Section), S.L. 12.20, Article 4(3)

⁸³ The Civil Court (Family Section), the First Hall of the Civil Court and the Court of Magistartes(Gozo)(Superior Jurisdiction)(Family Section), S.L. 12.20, Article 9(1)(a)

⁸⁴ The Civil Court (Family Section), the First Hall of the Civil Court and the Court of Magistartes(Gozo)(Superior Jurisdiction)(Family Section), S.L. 12.20, Article 9(3),(4)+(5)

⁸⁵ The Civil Court (Family Section), the First Hall of the Civil Court and the Court of Magistartes(Gozo)(Superior Jurisdiction)(Family Section), S.L. 12.20, Article 11