Comparative study on enforcement procedures of family rights

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Annex 10 National Report Estonia

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Study on the Enforcement of Family Law Judgements

National Report of Estonia

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PART 1. ENFORCEMENT IN DOMESTIC CASES

1A. Procedures and practices for enforcement in domestic cases

1. Description of the general law for enforcement of decisions on custody, including orders on the place of residence of the child and orders on contact and/or access rights

Substantive law – custody, access rights and the child

The legal rights and obligations between parents and children are mainly regulated under the Family Law Act\(^1\). According to section 49 of the Family Law Act parents have equal rights and duties in respect of their children. In other words, parents share responsibilities for their children on equal footing. The term “custody” is alien to Estonian domestic law, although section 50 of the Family Law Act prescribes the obligation of care for parents towards their children and obligation to watch out for the best interests of the child.\(^2\) The term “custody” was introduced into the Estonian legal system by the adoption of the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, which entered into force in Estonia on June 1, 2002. According to the aforementioned Convention that has become part of Estonian domestic law, custody means a “decision of an authority in so far as it relates to the care of the person of the child, including the right to decide on the place of his residence, or to the right of access to him.” However, the term custody is somewhat extended according to the Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (which entered into force on 1 June 2003 in Estonia) art 3b of which defines rights of custody as including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence. So despite the fact that custody as a term is not defined in Estonian domestic law and its roots derive from international conventions adopted by Estonia, custody under Estonian law can be defined as a composition of parental rights and responsibilities towards the child, which includes but is not limited to

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2 Section 50 of the Family Law Act (Rights and duties of parents) prescribes as follows: “(1) Parents have the right and duty to raise a child and to care for a child. (2) A parent is required to protect the rights and interests of his or her child. A parent is the legal representative of a child. As a legal representative, the parent has the authorisation of a guardian. (3) A parent has the right to demand his or her child back from any person who has control of the child without legal basis. The parent does not have the right to the return of the child if the return of the child is evidently contrary to the interests of the child. (4) A parent shall not exercise parental rights contrary to the interests of a child.”
obligations of care and maintenance as well as rights to access the child and determine its place of residence.

Access rights are regulated under section 52 of the Family Law Act which prescribes that a parent living apart from the child has the right to communicate with the child and the parent living with the child has no right to make obstructions to that. The definition of access rights under Estonian domestic law is thus parallel to the respective definitions in European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children.

The term “child” is based on the concept of descendant and in essence is not limited with particular age. However, parental obligations of maintenance are expressly limited to minor children. The obligation of care as well as the right to access the child and determine his place of residence is not expressly limited to minor children, but those parental rights and obligations implicitly assume the minority of the child as well. Under Estonian law all children under the age of 18 years are considered minors – it is a general rule under the General Part of the Civil Code Act\(^3\) that person assumes full active legal capacity upon the age of 18, all children younger than 18 years have limited legal capacity. Active legal capacity of minor children is further subdivided as follows. Children under the age of 7 years have no capacity to perform unilateral acts with legal consequences and their capacity to perform multilateral acts only extends to contracts performed with funds provided by his/her parents for the purposes of such contract. Although children between ages 7-18 years have no capacity to perform unilateral acts either, multilateral acts performed by them are not invalid if a parent gives his/her subsequent approval to the act or contract or if no civil law obligations arise from the act to the minor or if the contract was performed with funds provided by the parents to the child. The law also enables to extend the limited legal capacity of the child by a court order to enable the child to do legal acts and contracts that normally exceed the limits of minors’ legal capacity. On the other hand, according to section 58 of the Family Law Act, the court deciding a matter concerning the interests of the child, must take account of the wishes of a child of at least 10 years old. The opinion of a younger child must be taken into account insofar as the level of development of the child justifies it. However, under the Code of Civil Procedure\(^4\) in family law cases before the court a child of at least 14 years that presents sufficient abilities of judgement may appeal independently a court order in a case that concerns him or her (section 553 of the Code of Civil Procedure). Irrespective of independent right of appeal children of at least 7 years have the right to be heard by the court in the court proceedings of family law matters dealing with the appointment of a guardian to the child (section 556 of the Code of Civil Procedure). In family law cases regarding custody and determination of parental rights the court shall hear a child of at least 7 years old and of sufficiently sound judgement, if the wishes, the will or the relationships of the child are of significance in making a judgement on the case (section 559 of the Code of Civil Procedure).

It is difficult to imagine a case of custody where the wishes, the will and the relationships of

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\(^4\) Code of Civil Procedure entered into force on 1 January 2006, replacing the previous Code of Civil Procedure in force since 1 September 1998 until 31 December 2005. There is no English translation of the new code available yet
the child would not be of significance in deciding the matter, therefore it is common practice to hear the opinion of the child in the court proceedings regarding custody.

*Procedural law – court judgements and orders regarding custody and access rights*

In cases of divorce or separation the general rule is that parents agree among themselves with which parent the child shall be living and only if amicable agreement cannot be reached, the court shall decide the matter with a court order both in respect of the place of residence of the child and the access rights of the parent living apart from the child (Section 51 of the Family Law Act). However, irrespective of the agreement or court order on the place of residence of the child, both parents have the right to access the child (Section 52 of the Family Law Act) – if on that question parents cannot come to an amicable agreement either, the court shall settle the matter with a court order as well.

Section 52 of the Family Law Act also provides for an option for the parents to turn to the guardianship authority (i.e. social welfare unit of the local governments) for the out-of-court settlement of issues relating to contact and access rights and/or place of residence of the child. The competence of the guardianship authority regarding contact or access rights and/or place of residence of the child relates mainly to reconciling the parents and reaching an agreement without going to court. However the guardianship authority is also entitled to apply to court with a claim to remove the child from the parent without depriving the parent of parental rights (Section 53 of the Family Law Act) or along with the claim to deprive the parent of parental rights (Section 54 of the Family Law Act). In cases where leaving the child with the parent(s) may endanger the health or life of the child, the guardianship authority is also entitled to remove the child from the parent(s) prior to the delivery of the court judgment, even prior to submitting a claim for removal of the child or deprivation of parental rights to the court. However, in the latter case such claim must be submitted to court no later than within 10 days from the time of taking the child from the parent(s).

The competence of the guardianship authority in court proceedings relates to provision of an opinion on which type of settlement would serve best the interests of the child (Section 59 of the Family Law Act).

*General rules of enforcement procedure*

The rules for enforcement are prescribed in the Code of Enforcement Procedure. Section 2 of the Code of Enforcement Procedure lists the execution documents that can be enforced, e.g. court orders and judgements, certain notarised agreements etc. The court order or judgement must have entered into force, i.e. the time-limits for appeals must have lapsed, before

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5 Section 52 of the Family Law Act prescribes as follows: “(1) A parent living apart from a child has the right of access to the child. A parent with whom a child resides shall not hinder the other parent’s access to the child. (2) If parents have not agreed in what manner the parent living apart participates in the raising of a child and has access to the child, a guardianship authority or, at the request of a parent, a court shall settle the dispute.”

initiating the enforcement procedure. For initiating the enforcement procedure the person seeking enforcement must submit an application to the bailiff along with the execution document. The execution document presented to the bailiff must carry a certification from the court or institution that has made the decision or order (except for notarised agreements) on the fact that the decision or order has entered into force.

The application to initiate the enforcement proceedings must be submitted to the bailiff that has his bureau in the same territory as the place of residence of the obliged person or the place of the assets of the obliged person against whom enforcement proceedings are initiated.

After receiving the application to initiate enforcement proceedings, the bailiff will check the preconditions for initiating the enforcement proceedings (mainly whether the execution document is presented and whether such documents are included in the exclusive list of execution documents and have entered into force, carrying a certified note thereof) and if such preconditions are fulfilled, shall send to the obliged person a notice on enforcement proceedings.

It must be noted that a principle of formality applies to the enforcement proceedings meaning that the bailiff may not refuse from initiating the enforcement proceedings if an execution document conforming to the formal requirements set by law is presented (the document must be included in the exclusive list of execution documents in the Code of Enforcement Procedure, must be drafted by the competent authority, conform to the requirements of formatting, presented to the bailiff in the original copy or a notarised copy etc). When initiating the proceedings the bailiff may not assess the argumentation of the court in the order or the judgement presented to him for enforcement, nor upon initiating the enforcement must he check whether the claim submitted for enforcement has already been voluntarily performed (that is an objection to be presented by the obliged person in the course of the enforcement proceedings already initiated). The principle of formality in enforcement proceedings serves to separate the functions of the court and those of the bailiff, the functions of the latter being strictly limited to actual enforcement.

The enforcement proceedings shall be deemed to be initiated if and when the bailiff sends a notice thereof to the obliged person and the obliged person shall be granted a period from 10 up to 30 days of grace to fulfil the obligations voluntarily – should the obligor choose to fulfil his obligations voluntarily the bailiff shall be entitled to claim his fee only up to 50 % of the full rate of fee prescribed by law. All the documentation submitted to the bailiff as of initiating the enforcement procedure, including notices sent to the obliged person shall be registered in a separate file, the parties to the enforcement proceedings have the right to acquaint themselves with the contents of the file.

In the course of enforcement proceedings the bailiff has the right to make inquiries regarding the necessary information for the due progress of enforcement proceedings. The right to make inquiries extends to both state and local authorities, credit authorities and third persons in general. The bailiff also has the right to search the property of the obliged person, including the right to open locks and other shut-off devices that prevent the bailiff from completing the search, provided that the search is necessary for the enforcement proceedings and the obliged person has consented to the search. However, if the obliged person objects or refuses to give
his consent to the bailiff for searching his property, an order from the court is required to proceed with the search by the bailiff. If the obliged person obstructs the due course of enforcement proceedings or the bailiff has sufficient reason to suspect that the obliged person will obstruct enforcement proceedings or when committing enforcement acts in the rooms or property of the obliged person without the presence of the obliged person himself or his representative, the bailiff shall include two impartial observers of the investigative activities (manukas) or include a police officer. It is a general rule that enforcement acts may not be conducted during night-time (from 10 pm till 6 am) except for extraordinary circumstances.

The expenses of enforcement proceedings include the fee of the bailiff and other expenses associated with conducting the enforcement proceedings including but not limited to fees and expenses related to gathering information on the assets and personal information of the obliged person, expenses of posting the procedural documents, travelling expenses necessary for the conduct of the enforcement proceedings etc. The exact principles of calculating the expenses of the enforcement procedure are regulated by a regulation of the Minister of Justice. The obligation to compensate for the expenses entailed by the enforcement proceedings lies with the obliged person, the expenses shall be determined by the respective decision of the bailiff at the end of the enforcement proceedings. Under certain conditions when extraordinarily large expenses on enforcement are foreseeable the bailiff may also claim prepayment of enforcement expenses from the person initiating the enforcement proceedings, but generally not in family law cases. See also below at Part 2 – 2A under point 2 “Costs of enforcement”.

**Rules of enforcement for judgements on custody and contact/access rights**

Because family law cases are decided in proceedings upon petition (hagita menetlus) as opposed to proceedings on action, the outcome of the proceedings in family law cases is a court order, which, according to the law, is subject to immediate enforcement. However, the person submitting a timely appeal against the court order may apply the court for suspension of the enforcement proceedings, by providing sufficient security. Section 179 of the Code of Enforcement Proceedings prescribes that for the performance of enforcement proceedings in respect of court orders regarding the handing over of the child or granting access to the child a representative of the local government agency must be present. Such representative must be professionally trained to communicate with children, such as a social worker or child welfare/protection officer. As an exception from the general procedure of enforcement physical force may not be exercised. If the person against whom enforcement proceedings have been initiated refuses to hand over the child or grant access to the child, the bailiff may make a proposal to the court to fine the person. If the fining does not result in voluntary actions by the obliged person to hand over the child or grant access to the child, then instead of imposing a fine for the second time the obliged person may be arrested up to 30 days. The bailiff may also raise the issue before the court of whether it would be in the best interests of the child to be temporarily admitted to a local child care institution.

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7 The differences of procedural rules regulating procedure on petition and procedure on action are analyzed below.
However, there is a new and specific provision in the new Code of Civil Procedure with regard to enforcement of court orders on contact or access rights. According to Section 563, if one of the parents breaches a court decision on access or contact rights (visiting rights) or otherwise hinders the enforcement of such a decision, the other parent may ask the court to initiate a conciliation procedure and to invite both parents the court to solve the dispute by an agreement. The role of the court is to encourage the parents to reach an agreement. The court will discuss with the parents the possible consequences of one parent not being able to contact or see the child to the child’s welfare, it will draw the parents’ attention to possible coercive measures that may be taken to force the parent to obey the court decision on access or contact rights and to the possibility of restricting or depriving the contact rights from such parent and also to the possibility of using the family consultation service. If the parents come to an agreement as to the access or contact rights which is different from that prescribed by the court decision and such an agreement is not in conflict with the interests of the child, the agreement will be recorded in the records of the session and the court approves the settlement by court order which will replace the previous one. If the parents do not reach an agreement in court or in using the family consultation service or if one of the parents does not appear to the court, then the court will make a court order whereby it declares the conciliation procedure unsuccessful and determines a) which coercive measures shall be applied; b) to what extent the court decision on access or contact rights shall be amended; c) what kind of amendments shall be made in parental rights [Section 563(6) of the Code of Civil Procedure]. If the court has declared the conciliation procedure unsuccessful, then the court is not obliged to invite the parents for another conciliation procedure should one of the parents make another statement to the court that the other parent breaches a court decision on access or contact rights (visiting rights) or otherwise hinders the enforcement of such a decision. According to Subsection 563(7) of the Code of Civil Procedure, in case of breach of a court order on access or contact right, the enforcement proceedings may be carried out only under the court order rendered pursuant to Subsection 563(6) of the Code of Civil Procedure. Consequently, it seems that if one parent breaches the court order on contact or access rights, the other parent must first turn to the court for conciliation proceedings and only after unsuccessful conciliation when the court has made an order under Subsection 563(6) of the Code of Civil Procedure to apply coercive measures the parent may turn to the bailiff to enforce the court order and to apply the coercive measures. There is, however, no practice with regard to such court conciliation procedure.

2. **Comments as to the practice of the law with respect to decisions on custody, including orders on the place of residence of the child, and orders on contact and/or access rights**

The precise regulation of access rights and ratio behind the court’s decision in granting custody and access rights depends on the circumstances of the case and thus making generalizations is difficult. The factors of importance are quite universal – in granting custody the court estimates which parent is more capable of providing the child with the care needed. Although the financial position of the parent is important in assessing whether he or she is capable of taking care of the child, it is not the ultimate determinant as alimony can be claimed from the other parent. In practice custody is mostly granted to the mother of the child
and alimonies claimed from the father, visiting rights are less frequently object of regulation by the court.

Due to the delicate and personal nature of the issues subject to court judgements in family law cases, and in particular judgements relating to access rights and place of residence of the child, the aim is to avoid necessity for coercive measures and participation of the bailiff in enforcing the judgement. In line with that goal the court judgements or orders relating to access rights and/or place of residence of the child tend to be very specific on how exactly the judgement shall be enforced in order not to create additional tensions in the course of enforcement procedure but to discuss the issues and rule upon them in the course of the court procedure. Therefore, it is usual in practice that the court judgements on access rights prescribe the precise place, time-schedule and length of meetings between the child and the parent as well as any other circumstances of relevance to the parties of the court procedure. Considering the development of the child and the probability that circumstances relevant to the establishment of access rights may change as time passes, the court may also restrict the regulation of access rights and place of residence to a certain age of the child.

Sometimes the court limits the extent of the judgement to general guidelines on enforcement of the judgement on access rights by providing for example that the child and the parent shall meet monthly. The latter solution is efficient only if and insofar as the parents are willing to cooperate and agree among themselves the details of the visits to the child.

However, there are cases where the court does not prescribe any particular rules on the enforcement of the judgement, but only declares the place of residence of the child with one parent and the other parent’s right to access and visit the child, leaving the actual enforcement of the judgement and way of implementation of the access rights in detail to the social worker to decide. The latter is not an efficient solution, because usually the parents have already turned to the social worker for consultations and out-of-court solutions prior to court proceedings, but have failed to reach an agreement and thus have turned to court. Therefore unfortunately it is not unusual that enforcement of such judgement through the social worker fails in practice and the parties and the social worker are forced to turn to court once again to establish a more detailed regulation of access rights.

The participation of the social worker in exercising the access rights is prescribed in the court judgement or order in some particularly problematic cases where it is obvious during the court proceedings that the parents will not reach an agreement in respect of the details of meetings with the child and are not willing to cooperate for the benefit of the child. However, it is far more usual in practice that there is no necessity for including the social worker to the meetings of the child with the parent(s).

In respect of court proceedings leading to the judgement on access rights and place of residence of the child the parents quite often come to the conclusion during the court proceedings that they can reach an out-of-court settlement after all. The initiative to explore options for out-of-court settlement may come also from the judge. Moreover, it is the obligation of the court to make efforts in all stages of the proceedings to facilitate out-of-court settlement and mutual agreement of the parents in respect of access and contact rights and
place of residence of the child in family law cases (Section 561 of the Code of Civil Procedure).

As commented in previous sections of the study, the law requires to ask and to take into account the opinion of the child as well when delivering the judgement on access rights and place of residence of the child. However, in practice the child is often manipulated by one of the parents and thus the actual will of the child may not be clear to the court. On the other hand, conducting a questioning of the child to find out his/her opinion is a traumatic experience to the child’s psychology, irrespective of the fact that the presence of a social worker or psychologist is required while questioning the child in court.

As commented in previous sections of the study the social workers from the guardianship authority may participate in court proceedings for establishing the access rights and/or place of residence of the child. The function of the social workers in the course of court proceedings is to give an opinion on the question of which of the parents is better suited to have custody of the child and how it would be most beneficial for the child to organize the conduct of access rights. To give such an opinion the social worker visits the homes of both parents and speaks with the child. According to social worker the issue that presents considerable difficulties in practice for the social workers in performing their function during the court proceedings properly is the very limited possibilities for the social workers to obtain relevant information on the parents for giving their opinion to the court (e.g. on psychiatric illnesses of the parent). According to the point of view of the social workers the courts tend to be too rigorous in respect of the opinions of the social workers and tend to prefer the parental rights even if leaving the child with the parent(s) may not always be in the best interests of the child.

3. Supporting orders

a) what supporting orders are available?

Sections 551 and 378 of the Code of Civil Procedure prescribe that the court, when conducting proceedings on petition in family law cases may make interim orders to secure the proceedings and apply measures such as the prohibition to leave the country and specifically in family law cases also apply measures such as preliminary regulation of parental rights regarding the child, rights of communication and access of the parent regarding the child, obligation to give the child over to the other parent, obligation to turn over the personal belongings of the child to the child and the other parent (Subsection 378 (3) of the Code of Civil Procedure) as well as the prohibition to approach the parent and/or the child should there be a realistic danger from the other parent to the well-being of the child and/or the parent claiming prohibition of access (Section 544 of the Code of Civil Procedure). The list of interim measures available is not exhaustive and the court can for instance apply a measure during the court proceedings to place the child to the child care institution for the time of the proceedings. It must be noted that when the court regulates the access and visiting rights or obligates one of the parents to hand over the child by interim measures prior to settling the entire dispute, the court must also hear the opinion of the child that is at least 10 years old and the opinion of the competent local authority. As an exception the court may also regulate the relationship between the child and the parent(s) by interim measures on the initiative of the
competent local authority, if the lack of such interim measures poses a realistic threat to the welfare of the child (Section 384 subsections 4-5 of the Code of Civil Procedure).

Interim measures can be applied during any stage of the court proceedings and are subject to immediate enforcement according to the court order.

The person concerned can submit an appeal on the court order setting interim measures within 10 days from the day of notification of the person concerned of the order in question.

In addition to interim measures the court may also prescribe in the court order itself in addition to the conclusive part of the order the precise manner of enforcement if the parties to the court procedure so wish (section 445 subsection 1 of the Code of Civil Procedure).

b) can you make any remarks as to the legal practice?

It must be noted that implementation of interim measures in family law cases is not very widely used because the aim of the court proceedings is to reach a final settlement as soon as possible and in practice court orders in family law cases, especially in respect of rights of access and custody, are delivered in a much shorter period than in other civil law cases, provided that fast solution serves the best interests of the child. However, there may be cases when delaying the delivery of the court judgement may prove to have better results and motivates the parents to find an out-of-court settlement. Moreover, it is the obligation of the court to make efforts in all stages of the proceedings to facilitate out-of-court settlement and mutual agreement of the parents in respect of access and contact rights and place of residence of the child in family law cases (Section 561 of the Code of Civil Procedure) – therefore more often than not the case will be settled by mutual agreement of the parties out of court without any need for interim measures.

However, when the implementation of interim measures is necessary in the opinion of the court, the measure mostly used is setting out the temporary course of communication with the child.

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

1. The organization of organs and institutions involved in enforcement of family law judgements

a) regulation under substantive law (legislation that establishes the organ or institution and regulates its tasks and powers)

The legal position of bailiffs is primarily regulated under the Bailiffs Act (kohtutäituri seadus)8. Since 2001 bailiffs in Estonia are no longer employed by the state but are members of the liberal profession meaning that they are neither entrepreneurs nor national officials and

their status in Estonia resembles the one of public notaries. The privatisation of the enforcement procedures serves to save the money of the taxpayers as well as to achieve better results in actual enforcement by providing bailiffs with better motivation.

The bailiff must preserve independence and be impartial when participating in enforcement procedure. They are also under the obligation to keep confidential any business secrets or personal information that has become known to them during the course of enforcement proceedings.

Bailiffs are in the area of government of the Minister of Justice, who determines the territorial jurisdiction of the bailiffs and the number of bailiffs to be appointed. The territorial jurisdiction of the bailiffs coincides with the territorial jurisdiction of the courts of first instance, altogether there are 52 bailiffs appointed in Estonia.

Bailiffs are appointed after careful examination procedures after the completion of a preparatory service, they must hold Estonian citizenship and have good command of the Estonian language. The successful performance of a bailiffs’ examination is a precondition for taking part in competitions for vacant positions as a bailiff. Bailiffs are appointed by the Minister of Justice for an indefinite period. Upon appointment to the position bailiffs shall take an oath. Bailiffs are dismissed by a respective decision of the Minister of Justice upon violations on part of the bailiff, or when reaching the age of 65 or due to considerations of health, bankruptcy of the bailiff and also upon the wish of the bailiff himself.

Bailiffs may not generally hold other professional positions aside from that of a bailiff, except for academic work and work as a bankruptcy trustee, in particular bailiffs may not be involved in the organs of business entities.

Bailiffs carry full responsibility for any damages caused in the process of enforcement proceedings, the state is not responsible for their actions. Therefore bailiffs are under the obligation to have professional liability insurance conforming to the conditions prescribed by the Minister of Justice.

Bailiffs must open a bureau in their territorial jurisdiction that is open daily at least for 4 hours. Although a bailiff may recruit help to the bureau the enforcement proceedings must be conducted by the bailiff himself personally and most essential obligations and actions of the proceeding may not be delegated even to bailiff candidates in preparatory service. Should the bailiff need to leave his work territory for more than 5 days, he must appoint a substitute bailiff for that period. Substitution may not amount to more than 2 months per calendar year.

Conduct of the enforcement proceedings by the bailiff is a fee-charging service. The rates and calculation of fees of the bailiffs are regulated in the Bailiffs Act and the rates mostly depend on the sum of the claim that is object for enforcement or in case of family law cases there is a fixed fee, which is 50% of the minimum monthly wages per proceeding. Under certain restricted conditions regulated by law where enforcement is particularly difficult the bailiff is entitled to additional fees, however not in family law cases.
The professional organization of bailiffs in Estonia is called Kohtutäiturite Täiskogu which includes all the appointed bailiffs (as well as substitutors of bailiffs) of Estonia and is competent to regulate questions of additional educational programs for bailiffs, the activity of the so-called court of honour and the ethical code of bailiffs as well as questions regarding examinations of bailiffs and the internal matters of the organization itself.

The inspecting capacity in respect of the bailiffs lies also with the Minister of Justice who has comprehensive competence to make inquiries regarding the activities of the bailiffs and initiate disciplinary proceedings if necessary that may result in fines and/or dismissing the bailiff.

b) procedural law rules relevant for the functioning of these organizations (procedural rules on the role of these organizations in the enforcement of family law decisions)

As mentioned earlier, one of the most important procedural principles for the functioning of bailiffs in Estonia is the principle of formality meaning that the bailiff may not refuse from initiating the enforcement proceedings nor obstruct the due course of enforcement proceedings if an execution document conforming to the formal requirements set by law is presented (the document must be included in the exclusive list of execution documents in the Code of Enforcement Procedure, must be drafted by the competent authority, conform to the requirements of formatting, presented to the bailiff in the original copy or a notarised copy etc). When initiating and conducting the proceedings the bailiff may not assess the argumentation of the court in the order or the judgement presented to him for enforcement, nor upon initiating and conducting the enforcement must he check whether the claim submitted for enforcement has already been voluntarily performed (that is an objection to be presented by the obliged person in the course of the enforcement proceedings already initiated). The principle of formality in enforcement proceedings serves to separate the functions of the court and those of the bailiff, the functions of the latter being strictly limited to actual enforcement.

Another significant principle regarding the functioning of bailiffs is the principle of independence and impartiality. Bailiffs may not generally hold other professional positions aside from that of a bailiff, except for academic work and work as a bankruptcy trustee, in particular bailiffs may not be involved in the organs of business entities.

From the perspective of efficient conduct of enforcement proceedings the principle allowing the bailiff to make extensive inquiries on issues necessary for the enforcement proceedings at hand, is also very essential. The right to make inquiries extends to parties of the enforcement procedure as well as to third persons, including financial institutions and state institutions.

The principle of territoriality aims to guarantee sufficient possibilities for effective conducting of enforcement proceedings throughout Estonia. Each appointed bailiff is assigned a specific area of service that coincides with the jurisdictional areas of the courts.

The conduct of enforcement proceedings is a fee-charging service. The expenses of enforcement proceedings include the fee of the bailiff and other expenses associated with conducting the enforcement proceedings including but not limited to fees and expenses
related to gathering information on the assets and personal information of the obliged person, expenses of posting the procedural documents, travelling expenses necessary for the conduct of the enforcement proceedings etc. The exact principles of calculating the expenses of the enforcement procedure are regulated by a regulation of the Minister of Justice. The obligation to compensate for the expenses entailed by the enforcement proceedings lies with the obliged person, the expenses shall be determined by the respective decision of the bailiff at the end of the enforcement proceedings.

Regarding enforcement of family law judgements in particular, the function of bailiffs in enforcement is very limited in practice due to the sensitive and highly personal subject of the judgement. Usually if third party help is needed to enforce the judgement, a social worker is included into the enforcement procedure and if necessary to get the child to the place of residence assigned to him/her by the court police forces may be included as well. Participation of bailiffs is extremely rare in enforcing family law judgement (except for judgements on alimonies), thus it is dubious to talk about enforcement practice of bailiffs in respect of family law judgements as such occasions occur very rarely.

c) practical aspects relevant for the legal position of these organizations

Due to the fact that from 2001 bailiffs are not state employees but instead members of liberal profession and thus their income depends to a large extent on their own activity in performing the duties of as bailiffs, the rate of successful enforcement has made a significant increase. On the other hand, the position of bailiffs as members of liberal profession also causes the claim for bailiffs’ fee to be on the first position when compared to the claim of the person submitting the application for enforcement. Therefore it is not unusual that due to restrictions on the procedure and extent of enforcement procedures (i.e. obligation not to deprive the person of essential items for leading one’s life) the claim of the claimant shall only be partly fulfilled whereas the claim for bailiff’s fee shall be fulfilled completely.

2. Time limits relevant for enforcement proceedings

a) time limits for appeal, both against family law decisions and against decisions supporting their enforcement

Family law cases are decided by court in the course of proceedings on petition (*hagita menetlus*) as opposed to proceedings on action (*hagimenetlus*), meaning that the court has greater investigative powers (Subsections 477(4) and (5) of the Code of Civil Procedure). The outcome of the proceedings on petition is a court order which enters into force on the day it is delivered to the persons concerned and it is subject to immediate enforcement (Subsection 478(3) of the Code of Civil Procedure). In comparison in proceedings on action the outcome of the proceedings on matters of substance is a judgement and on matters of procedural importance is a court order. A judicial decision in proceedings on action enters into force and thus becomes enforceable only if no appeal is available any longer.

The general term of appeal in proceedings on action is 30 days from the day the person concerned was notified of the judgement. The appeal on judgements rendered in proceedings
on action (apellatsioonkaebus) must be submitted to the court of appeal and if the appeal is not satisfied by the court of second instance, the person concerned has the right to turn to the court of cassation – Riigikohus. Court orders made in the course of proceedings on action may be appealed to the court of second instance in 10 days from the time of notification of the order to the person concerned.

However, in family law cases where the judicial decision comes in the form of a court order the right to appeal manifests itself in the form of the right to submit an appeal against the court order (määruskaebus) in 15 days from the day of delivery of the court order to the person concerned. The appeal against the court order shall be submitted to the court of first instance that has made the court order subject to appeal. The court of first instance performs the initial formal control of the appeal and if the appeal is considered to be substantiated the court of first instance can accept the appeal and annul its earlier order. If the court of first instance does not find the appeal to be substantiated, although conforming to the formal requirements, then the appeal shall be sent to the court of appeal for consideration. Should the court of second instance (court of appeal) not satisfy the appeal, the person concerned may submit a further appeal to the court of cassation in 15 days from the day of delivery of the judgement of the court of second instance.

It must be noted that if the issue of parental rights and custody is decided in connection with divorce, then proceedings on action shall be applied resulting in longer time-limits for appeal.

\[b)\] any other time limits that have an effect on enforceability

There are time-bars in substantive law regarding the expiry term of claims to be submitted to the court, which in family law related matters is 30 years (Section 155 of the General Part of the Civil Code Act) – the expiry term is suspended from the moment the claim is submitted to the court. If a court order or a judgement has been issued and the court order or judgement has entered into force, then the claim arising therefrom only expires in 30 years since making of the order or judgement (Section 157 of the General Part of the Civil Code Act) – the term of expiry is suspended from the moment enforcement proceedings based on the respective court order or judgement have been initiated.

It must be noted that with passage of time the circumstances that were relevant to deciding the place of residence of the child and access rights may change from the time of delivering the judgement, undermining the initial reasoning of the court. Therefore, in cases where the judgement of the court is not expressly limited to a certain age of the child already, both parents may turn to court again to change the regulation of access rights and/or place of residence of the child due to new circumstances. Where the parent has turned to court with such a claim the judge may also stop enforcement of the initial judgement for the time of court proceedings to establish a new regulation of access rights.

\[c)\] the effect of appeal on enforceability

Considering that court orders made in family law cases and supporting orders are subject to immediate enforcement, the issue of reconciling that with the right of appeal arises. Section 472 of the Code of Civil Procedure thus prescribes that the court of appeal may suspend the
enforcement procedure, stop the continuance of the enforcement procedure or annul the enforcement procedure that has already taken place upon the substantiated application of the person concerned that has submitted an appeal against the court order which forms/formed the basis for enforcement proceedings. The general rule is that in order to grant the application for suspending or stopping the enforcement procedure the person making such application must provide a sufficient security, the exact conditions of which shall be determined by the court, usually however in the form of depositing a sum of money or securities.

d) the effect of the passing of time on the enforceability of the family law judgement

If a court order or a decision has been issued and the court order or decision has entered into force, then the claim arising therefrom only expires in 30 years since making of the order or judgement (Section 156 of the General Part of the Civil Code Act) – the term of expiry is suspended from the moment enforcement proceedings based on the respective court order or judgement have been initiated.

However, as commented earlier in the study the judgements of the courts regarding the place of residence of the child and/or access rights are sometimes limited in their content to a certain age of the child and after the passing of such age the issue shall be reviewed again by the court to establish whether and to what extent the circumstances relevant for deciding on access rights and custody have changed. Even if the judgement is not expressly limited to a certain age of the child, the parent may still present a claim with a court to change the regulation of access rights and/or place of residence.

e) the effect of change of circumstances on the enforceability

The bailiff can suspend the enforcement proceedings upon occasions such as submitting a judicial decision on the suspension of the enforcement proceedings, but also upon circumstances relating to the person of the obligor such as establishing the limited capacity of the obligor (suspension of proceedings until the appointment of the legal guardian) or the death of close relatives of the obligor (until 30 days from the day of death) or severe illness of the obligor (until improvement of health).

The enforcement proceedings shall be ended, if a judicial decision is made on the annulment of the court order or judgement that was the basis for initiating the enforcement proceedings, also upon the death of the obligor or his bankruptcy (in cases regarding monetary claims) or when the claim of the person initiating the enforcement has been fulfilled or when the person initiating enforcement withdraws his application.

See on the possible impacts of changed circumstances also in subsections b) and d) above.

3. Coercive measures to ensure enforcement

a) measures available by law

Under section 179 of the Code of Enforcement Procedure if the obligated person obstructs the enforcement procedure in family law cases related to the handing over of the child or to the
access rights, the bailiff can make a proposal to the court to fine the person. The obligated person obstructing enforcement must first be given warning before making a decision on fining. There are no limits to the times of implementing the fine if the obligated person persists in obstructing the enforcement procedure. After the first case of fine however, the court may replace fining with arrest of up to 30 calendar days.

It is general principle that in family law cases, in particular regarding cases on the access rights and handing over of the child, usage of coercive measures is not in line with the aims of the enforcement procedure. Therefore force may not be used either by the bailiff not by the police to enforce the judgement, even though the police forces may be present during the enforcement proceedings having a moral effect on the participants of the proceedings and providing for the security.

b) measures usually taken in practice

As commented earlier in the study the usual practice is enforcement of family law judgements by social workers using the help of police forces if necessary and the function of bailiffs in the enforcement of family law judgements is very limited. General practice by the bailiffs regarding enforcement of judgements on handing over of the child or access rights is limited to establishment of the fact that the obligated person resists enforcement and forwarding the application for fining to the court. The bailiff is not obliged to continue the enforcement procedure before the court makes a decision on fining or arresting the obligated person that resisted the enforcement.

c) taking coercive measures when the child opposes enforcement

As already commented in subsection a) above, employment of coercive measures in the enforcement proceedings of family law judgements is not allowed.

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

According to section 58 of the Family Law Act, the court deciding a matter concerning the interests of the child, must take account of the wishes of a child of at least 10 years old. The opinion of a younger child must be taken into account insofar as the level of development of the child justifies it. However, under the Code of Civil Procedure in family law cases before the court a child of at least 14 years that presents sufficient abilities of judgement may appeal independently a court order in a case that concerns him or her (section 553 of the Code of Civil Procedure). Irrespective of independent right of appeal children of at least 7 years have the right to be heard by the court in the court proceedings of family law matters dealing with the appointment of a guardian to the child (Section 556 of the Code of Civil Procedure). In family law cases regarding custody the court shall hear a child of at least 7 years old and of sufficiently sound judgement, if the wishes, the will or the relationships of the child are of significance in making a judgement on the case (section 559 of the Code of Civil Procedure). It is difficult to imagine a case of custody where the wishes, the will and the relationships of the child would not be of significance in deciding the matter, therefore it is common practice to hear the opinion of the child in the court proceedings regarding custody.
PART 2. ENFORCEMENT IN CROSS-BORDER CASES


1. Legal bases for enforcement

There are no specific legislative acts or provisions adopted with regard to enforcement of return orders under the 1980 Hague Convention on the Civil Aspects of International Child Abduction or under the Regulation 2201/2003. General legislative provisions of the Code of Civil Procedure and the Code of Enforcement Procedure apply to the enforcement of such return orders.\(^9\) There are no judicial decisions, practice directives or guides that would govern the enforcement of return orders under the 1980 Hague Convention or under the Regulation 2201/2003.

Pursuant to Subsection 461(1) of the Code of Civil Procedure, Estonian court decisions\(^10\) shall be enforced after they become effective, except for the court decisions which shall be enforced immediately. Court orders rendered in the proceedings on petition (non-contentious proceedings, _hagimenetlus_) are subject to immediate enforcement unless otherwise provided by law. Pursuant to Sections 475 and 550 of the Code of Civil Procedure, most of the family law cases, including child abduction cases, are decided in proceedings on petition. Thus, a return order can be enforced immediately after it is rendered.

The enforcement of a return order takes place in accordance with the Code of Enforcement Procedure. A person seeking enforcement of a return order must turn to a bailiff. Enforcement is carried out by a bailiff operating in the jurisdiction of the first instance court of the residence of the defendant or of the location of his/her property. Enforcement proceedings are initiated upon an application of the person seeking enforcement. If under the execution document (such as a return order) the defendant is obliged to transfer the child, the bailiff must conduct the enforcement procedure at the presence of the representative of a local self-government who is professionally trained to communicate with children, such as a social worker or child welfare/protection officer. If necessary the bailiff may bring forward a question in front of the social worker about temporary placement of the child into the child care institution [Section 179 of the Code of Enforcement Procedure].\(^11\)

Chapter 6 of the Code of Civil Procedure regulates the recognition and enforcement of foreign court decisions. The recognition and enforcement of foreign court decisions is decided in the

\(^9\) Both of the legal acts named are only recently adopted and they entered into force on 1 January 2006, replacing the previous Code of Civil Procedure in force since 1 September 1998 until 31 December 2005 and the previous Code of Enforcement Procedure in force since 31 July 1993 until 31 December 2005. There is no English translation of these new codes available yet.

\(^10\) There are two types of court decisions in Estonia – court judgements and court orders. A court judgment is a decision by which the merits of a matter are decided in the proceedings on action (_hagimenetlus_). By the court orders the court usually solves the procedural matters and conducts the proceedings. However, in proceedings on petition (non-contentious proceedings, _hagita menetlus_) the court decides the merits of the matter also by a court order and not by a judgement as it did before 1 January 2006.

\(^11\) See further above at Part 1 – 1A under point 1 “General rules of enforcement procedure” and “Rules of enforcement for judgements on custody and contact/access rights”.

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proceedings on petition (non-contentious proceedings, hagita menetlus) as well [Subsection 475(1)(14) of the Code of Civil Procedure]. Thus the court order whereby the foreign court decision has been declared enforceable is subject to an immediate enforcement [Subsection 478(3) of the Code of Civil Procedure].

According to Subsection 619(1) of the Code of Civil Procedure, the recognition and enforcement of court decisions rendered by the courts of EU member states in civil matters is regulated by the Regulation 44/2001/EC, Regulation 2201/2003/EC and other relevant EU Council regulations. The Estonian Code of Civil Procedure applies only to the extent the above-mentioned regulations do not regulate the issue or do not provide otherwise.

Other foreign court decisions (i.e. other than court decisions of EU member states) are recognised and declared enforceable pursuant to the Code of Civil Procedure. Subsection 620(1) states the principle that foreign court decisions are to be recognised in Estonia and then lists the exceptions when foreign court decisions shall not be recognised in Estonia.12 Pursuant to Section 621 of Civil Procedure Code foreign court decision shall be enforced in Estonia only if Estonian court has declared the foreign court decision to be enforceable, except otherwise provided for by law or international treaty. The enforcement of a foreign court decision, which has been declared to be enforceable, takes place pursuant to Code of Enforcement Procedure.13

2. Procedure and practice with regard to return orders

The order to be enforced and the aims of enforcement

In Estonia, the courts have made no return orders under the 1980 Hague Convention or under the Regulation 2201/2003 so far. Therefore, there is no practice with regard to enforcement of return orders made under the 1980 Hague Convention or under the Regulation 2201/2003.

In years 2002-2005 there has been altogether four (4) incoming requests for return of a child under the 1980 Hague Convention.14 In three cases the court did not satisfy the request for return of a child.15 In the fourth case the parties came to an agreement, which was confirmed by the court and the child was voluntarily returned.

There have been two other cross-border child abduction cases decided by Estonian courts. However, the 1980 Hague Convention was not applicable in these cases. In one of the cases the 1980 Hague Convention was not applicable under the Article 35 of the Convention. The

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12 Until 1 January 2006, pursuant to the old civil procedure code, the principle of mutual recognition applied to the recognition and enforcement of foreign court decisions. Thus foreign court decisions were recognised and enforced only on the basis of and in accordance with international agreements concluded by Estonia.

13 See further above at Part 1 – 1A under point 1 “General rules of enforcement procedure” and “Rules of enforcement for judgements on custody and contact/access rights”.

14 See statistical information (as at the beginning of the year 2006) with regard to implementation of 1980 Hague Convention in Estonia in years 2002-2005 enclosed (Ministry of Justice, Courts' Department, International Judicial Cooperation Division).

15 One of these decisions was rendered by the City Court of Tallinn on 18 November 2004 in a civil case no 2/23-8939/04 and it is available online at: http://kola.just.ee/docs/public/dokument_278271.pdf.
court applied Estonian law and decided not to return the child.\(^{16}\) In the other case the court ordered surrender of the child to her mother. However, the 1980 Hague Convention was not applicable, since Russian Federation where the child was habitually resident before the abduction is not a party to the 1980 Hague Convention.\(^{17}\) I do not have the information available whether this return order was voluntarily complied with or it had to be enforced.

*Actors involved in enforcement*

To enforce a return order (or any other court decision) a person seeking enforcement shall make an application to the *bailiff*. Thus, it is the applicant who initiates the enforcement proceedings of the court’s return order.

According to the law the enforcement of a return order is the responsibility of the bailiff. As a mandatory rule, in child return cases the bailiff must invite a representative of a local government who is professionally trained to communicate with children, like a *social worker* or *child welfare/protection officer*, to be present [Section 179 of the Code of Enforcement Procedure]. The law does not require the presence of the applicant or his/her representative.

Bailiffs may not exercise any physical force against the child or the defendant (i.e. the person obliged to return the child) when enforcing the return orders. If the defendant refuses to hand over (surrender) the child, the bailiff may on the basis of the application of the applicant turn to the *court* and ask the court to fine the defendant. If imposing the fine does not result in voluntary compliance with the return order the court may instead of imposing a fine on the defendant for the second time decide to arrest the defendant up to 30 days [Section 183 of the Code of Enforcement Procedure].

The bailiff may raise in front of the local government a question of temporary placement of the child into the child-care institution if necessary.

The legal status and disciplinary liability of bailiffs and the bases for remuneration of bailiffs is regulated by the *Bailiffs Act\(^{18}\)*. A bailiff is an independent person who holds an office in public law. A bailiff shall be impartial in the performance of professional acts and appear trustworthy to all persons for whose benefit or with regard to whom he or she performs acts. Bailiffs belong to the area of government of the Minister of Justice who has the right to issue regulations for the organisation of professional activities of bailiffs. Chapter 5 of the Bailiffs Act regulates the supervision and disciplinary liability of bailiffs. According to Article 30 of the Bailiffs Act, supervision over the professional activities of the bailiffs shall be exercised by the Minister of Justice.

\(^{16}\) Decision rendered by the City Court of Tallinn on 28 October 2002 in a civil case 2/3/20-4611/02. There was an appeal against this decision. However, I am not aware of the decision made by the appellate court.

\(^{17}\) Decision rendered by the City Court of Narva on 16 March 2005 in a civil case 2-865/03. Available online at: [http://kola.just.ee/docs/public/dokument_737215.pdf](http://kola.just.ee/docs/public/dokument_737215.pdf).

The decisions and actions of bailiffs may be appealed pursuant to Sections 217 to 223 of the Code of Enforcement Procedure. As a first instance, a complaint against a decision made or act performed by the bailiff must be filed with the same bailiff who took the decision or performed the act under complaint. The complaint must be filed within ten days as of the day on which the complainant becomes or should have become aware of the decision made or the act performed. The bailiff shall review the complaint against the activities of the bailiff in the presence of the participants in the proceedings within fifteen days. The bailiff shall inform the participants in the proceedings of the time of the review of the complaint. Failure of the participants in the proceedings to be present at the review of the complaint does not however constitute an impediment to the review of the complaint. The bailiff shall make a reasoned decision within ten days after the review.

A participant in the enforcement proceedings may file an appeal against the decision of the bailiff made regarding the complaint. The appeal shall be heard by the first instance civil court (county court) within the territorial jurisdiction of which the office of the bailiff is located. An appeal against a decision made or act performed by a bailiff cannot be filed with a court without prior filing of a complaint to the bailiff.

The control over the enforcement procedure goes as described above even if the court of first instance refused return and the court of appeals ordered return.

The actual enforcement procedure

As mentioned above, there is no practice with regard to enforcement of return orders made under the 1980 Hague Convention or under the Regulation 2201/2003. Simply, the courts have made no such return orders in Estonia.

According to the law, however, return orders are subject to immediate enforcement. The person seeking enforcement may turn to the bailiff as soon as the return order has been made without waiting for it to enter into force.

Pursuant to Section 10 of the Regulation on Bailiffs (kohtutäiturimäärustik)19 any enforceable document shall be enforced as quickly as possible without any unjustified delay.

According to the law a period of time for voluntary compliance will always be given. Pursuant to Section 25 of the Code of Enforcement Procedure if the deadline for voluntary compliance has not been determined by the court decision or by the law, the bailiff shall determine such deadline. However, the period of time for voluntary compliance shall not be less than 10 days and not more than 30 days unless the applicant agrees with a longer period than 30 days.

If necessary, the bailiff may decide on temporary placement of the child into the child-care institution. This might be necessary for example to prevent the abductor from taking the child into hiding after the return order has been made or to protect the child against a violent abductor.

19 Adopted by Minister of Justice on 22 December 2005, entered into force on 1 January 2006.
As mentioned above, bailiffs may not exercise any physical force against the child or the defendant (i.e. the person obliged to return the child) when enforcing the return orders. If the defendant refuses to surrender the child, the bailiff may on the basis of the application of the applicant turn to the court and ask the court to fine the defendant. If imposing the fine does not result in voluntary compliance with the return order the court may instead of imposing a fine on the defendant for the second time decide to arrest the defendant up to 30 days [Section 183 of the Code of Enforcement Procedure]. Bailiffs may enter the premises of the defendant against the defendant’s will only if they have the court’s warrant to search. The courts within whose territorial jurisdiction the enforcement takes place are the ones competent to impose fines or to issue a search warrant or arrest warrant.

Costs of enforcement

Pursuant to Section 37 of the Code of Enforcement Procedure enforcement costs consist of a bailiff’s fee and of necessary expenses incurred by a bailiff, by a claimant or by a third party after commencement of the enforcement proceedings to enforce the court decision (or any other execution document). Such necessary expenses are for example fees and expenses related to gathering personal data and information on the assets of the obliged person, delivery expenses of documents connected to the enforcement procedure, expenses related to transportation and storage of assets attached, transportation and accommodation expenses related to the enforcement procedure, expenses of forced attendance of a debtor (defendant), expenses of opening, closing, displacing, dismantling, breaking and tidying of rooms or other things etc. The costs for legal aid used in relation to initiating the enforcement proceeding or during the enforcement proceedings are not deemed as necessary expenses. Also, the administration costs of bailiff’s office are not considered as necessary expenses for enforcement. More specific rules of calculating the expenses of the enforcement procedure are established by a regulation of the Minister of Justice.

The debtor (defendant) shall bear the enforcement costs. The bailiff issues a decision on the enforcement costs which is the basis for collecting the costs from the debtor. The costs are collected from the debtor by the bailiff who makes the decision on the enforcement costs [Section 38 of Code of Enforcement Procedure].

Bailiff’s fee and advance payment

Remuneration of bailiffs is regulated by the Bailiffs Act. Pursuant to Section 21(1) of Bailiffs Act, a fee shall be charged for a professional act of a bailiff. Bailiffs are economically independent. Their only source of income is the bailiff’s fee. They do not get any money from the state. However, the fees are established by the state. A bailiff has the right to charge a fee only to the extent and pursuant to the procedure provided for in the Bailiffs Act. A bailiff is prohibited from entering into agreements to alter the rates of fees or the procedure for the charging of fees provided for in the Bailiffs Act [Section 21(3) of Bailiffs Act].

According to Section 22 the bailiff’s fee consists of a commencement fee of the enforcement proceedings and a principal fee. The rate of a bailiff’s principal fee shall be established as a fixed sum based on the amount of a monetary claim or the content of an enforcement action or both. The amount of a commencement fee depends on the method of delivery of the notice
whereby the debtor is informed of the enforcement proceedings and given a period of time to comply with the decision voluntarily. The commencement fee is considered to cover also the necessary expenses for commencing the enforcement proceedings [Section 2511(1)]. Where the bailiff or his/her assistant in person delivers the notice of enforcement proceedings to the debtor, the commencement fee is 250 kroons (ca 16 EUR). Where the notice is delivered electronically following the rules of Code of Civil Procedure, no commencement fee shall be requested. In other cases the commencement fee is 100 kroons (ca 6.5 EUR), e.g. in case of delivery by regular mail.

Pursuant to Article 24, a bailiff has the right to request advance payment of bailiff’s fee from the claimant prior to the commencement of enforcement proceedings to the extent provided by law. A bailiff may request an advance payment of other necessary expenses of enforcement from the claimant only if extra large expenses of enforcement are foreseeable [Section 40 of the Code of Enforcement Procedure]. Advance payment shall not be requested from a natural person who submits for enforcement: 1) a decision made in the course of court proceedings whereby he or she was released from payment of legal aid or a state fee due to insolvency; 2) a decision made in the course of criminal proceedings by which a claim for compensation for damage caused to the natural person by a criminal offence is satisfied; 3) an alimony decision.

If a claimant fails to make an advance payment of bailiff’s fee, a bailiff is permitted not to commence enforcement proceedings. When a bailiff’s fee is collected from the debtor in full, the bailiff shall return the advance payment to the claimant within 10 days from receiving the money from the debtor [Section 2412(2) of the Bailiffs Act]. The bailiff returns also the advance payment of other expenses when they are fully collected from the debtor.

Pursuant to Article 2513(2) of the Bailiffs Act the bailiff’s main fee for return of a child is half of the minimum monthly wage established by the Government. In year 2006 the minimum monthly wage is 3000 kroons per month (192 EUR). Thus, the bailiff’s fee for return of the child in year 2006 is 1500 kroons (96 EUR). Advance payment of bailiff’s fee for return of a child may not be more than one third of the minimum monthly wage established by the Government. Value added tax shall be added to the bailiff’s fee.

State legal aid
The categories of legal aid ensured by the state and the conditions and procedure for the receipt of such legal aid are prescribed by the State Legal Aid Act20. State legal aid is the provision of legal services to a natural or legal person at the expense of the state on the bases and pursuant to the procedure provided for in the State Legal Aid Act. State legal aid is granted to natural or legal persons in connection with proceedings in an Estonian court or administrative authority or in the protection of their interests in any other manner, if deciding thereon is within the competence of the Estonian court, unless otherwise provided for in Chapter 7 of the State Legal Aid Act. State legal aid is provided by an advocate (attorney)

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pursuant to the Bar Association Act, taking account of the specifications provided for in the State Legal Aid Act [Section 5(1) of the State Legal Aid Act],

Pursuant Section 4(3) of State Legal Aid Act the categories of state legal aid include also representing a person in enforcement proceedings and preparing legal documents.

According to Section 6(1) of State Legal Aid Act, a natural person may receive state legal aid if he or she is unable to pay for competent legal services due to his or her financial situation at the time the person is in need of legal aid or is able to pay for legal services only partially or in instalments or whose financial situation does not allow meeting basic subsistence needs after paying for legal services. Natural persons are entitled to state legal aid only if they reside in Estonia or in any other EU member state at the time of filing the application for state legal aid or if they are citizens of Estonia or any other EU member state. Other natural persons are granted state legal aid only if so provided for in international treaties. Different rules apply for legal state aid in criminal proceedings.

The grant of state legal aid shall be decided on the basis of an application by a person. Upon submission of an application for state legal aid, a state fee shall be paid pursuant to Section 37 (8) of the State Fees Act (i.e. 200 kroons, approx. 13 EUR) if state legal aid is applied for in extrajudicial proceedings and the person does not apply for state legal aid in criminal proceedings as a suspect [Section 9 of the State Legal Aid Act].

An application for state legal aid in the form of representation in enforcement proceedings shall be submitted to the court competent to process an appeal against the activities of a bailiff conducting enforcement proceedings [Section 10(6) of the State Legal Aid Act].

Section 17 of State Legal Aid Act stipulates the continuity of state legal aid, meaning that as a rule a person who has received state legal aid retains the right to receive state legal aid if the matter is transferred to another category of state legal aid prescribed in subsection 4(3) of the State Legal Aid Act and the advocate appointed earlier shall continue to provide state legal aid to the person. A court who has decided on the grant of state legal aid, a court conducting proceedings or a court competent to process an appeal against the activities of a bailiff conducting enforcement proceedings may at any time reassess pursuant to the procedure prescribed in State Legal Aid Act whether the bases for the grant of state legal aid to an applicant which are prescribed in State Legal Aid Act continue to exist and, if the bases for the grant of state legal aid cease to exist, terminate the grant of state legal aid to the person. The court must control the presence of the prerequisites to receive a state legal aid, if a state legal aid in the form of representation in enforcement proceedings is applied for more than one year after the decision to be enforced took effect.

Pursuant to Section 10(3) of the State Legal Aid Act, the Minister of Justice shall establish the standard form application which shall be freely accessible to everyone on the website of the Ministry of Justice and in every court and law office. See the information of state legal aid available on the website of Ministry of Justice: http://www.just.ee/4616
3. Enforceability and legal remedies of return orders

Pursuant to Sections 475 and 550 of Code of Civil Procedure, most of the family law cases, including child abduction cases, are decided in proceedings on petition (hagita menetlus) as opposed to proceedings on action (hagimenetlus).

In the proceedings on petition the court takes the decision on the merits in the form of court order (kohtumäärus). A court order enters into force on the day it is communicated to the persons on whom the decision was made and it is subject to immediate enforcement [Section 478 of the Code of Civil Procedure]. Thus, a return order can be enforced immediately after it is rendered. A person who wants to enforce the return order must file an application to the bailiff pursuant to the Code of Enforcement Procedure. Foreign court decisions must be first declared enforceable by the Estonian court. Only then the bailiff can enforce them. However, Estonian court decisions do not need any special authorisation or other decision (e.g. declaration of enforceability, registration for enforcement etc) for the actual enforcement.

As to the legal challenge against family law judgements see above Part 1 – 1B, point 2 (pages 14-16). The same applies to return orders and non-return orders made under the 1980 Hague Convention. Shortly, return orders are subject to a challenge. The complaint/appeal (määruskaebus) against a return order may be filed within 15 days of the delivery of the court order to the person concerned [Subsections 660(3) and 661(2) of the Code of Civil Procedure]. Should the appellate court not satisfy the appeal, the person concerned may submit a further appeal to the highest court (court of cassation), i.e. Riigikohus.

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

Estonia is a party to the following international conventions besides the 1980 Hague Convention that may have relevance to the enforcement of family law judgements:

- Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption (entered into force in Estonia on 1 June 2002)


There is no implementing legislation. These conventions are applied directly.

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

There are no specific provisions relevant for enforcement of family law judgments in cross-border cases. The provisions of Code of Civil Procedure and Code of Enforcement Procedure apply equally to internal and cross-border cases.

The enforcement of family law judgements emanating from another EU member state takes place in accordance with Regulation 2201/2003/EC and Regulation 44/2001/EC. The Estonian Code of Civil Procedure applies only to the extent the above-mentioned regulations do not regulate the issue or do not provide otherwise.

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

There is no national practice in this matter. There could be only few family law cases, if at all, which include cross-border factor (and are not maintenance cases). I could not find any case law to analyse with this regard.

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

None of the 48 bailiffs we contacted had any practice with regard to the enforcement of family law decisions of another member state in Estonia (except for the maintenance decisions).

In years 2002-2005 there has been altogether six (6) outgoing requests for return of a child under the 1980 Hague Convention. In three of them the child was returned voluntarily. In one case the Italian Central Authority did not accept the application. One of the cases was still

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21 See statistical information (as at the beginning of the year 2006) with regard to implementation of 1980 Hague Convention in Estonia in years 2002-2005 enclosed (Ministry of Justice, Courts' Department, International Judicial Cooperation Division).
pending at the beginning of this year. And only in one case the Helsinki Court of Appeal has made an order for return. However, I do not have any information with regard to the enforcement of this return order.

5. Setting aside or amending of foreign judgments

There is no such case law and therefore we could not tell whether and under which conditions it is possible to “alter or set aside” a foreign decision with a new decision of Estonian court.

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

1. The role of organs and institutions

There are no specific organs or institutions involved in enforcement of foreign family law judgements in Estonia. The enforcement of a foreign court decision, which has been declared to be enforceable, takes place pursuant to Code of Enforcement Procedure.

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

There are no specific rules governing time limits for the enforcement of family law judgements in cross-border cases. See above Part 1 – 1B, point 2.

3. Coercive measures to ensure enforcement

Again, there are no specific rules governing coercive measures other than those as set out at Part 1 - 1B point 3.

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

There are no specific legal or practical obstacles to enforcement other than those as set out at Part 1 - 1B point 4.

5. Issues of specific concern in cross-border cases

The rights granted under family law judgements are not limited in a geographical sense. One can enforce the family law judgement in every country where it is recognised and declared enforceable.

Where the parent seeking to move the child to another jurisdiction has parental responsibility for the child and the other parent with parental responsibility does not object, then there is no need to obtain the approval of the court, provided there is no court order preventing the removal of the child from the jurisdiction without court approval. Where a court has in a family law judgment obliged the parent not to remove the child from the jurisdiction without the court’s prior approval, then the removal cannot occur without such approval.

6. Mediation/Alternative dispute resolution
The new Civil Procedure Code that entered into force on 1 January 2006 includes foresees a possibility for a conciliation procedure by court. However, there is no practice in this regard yet.

According to Section 563 of the Code of Civil Procedure, if one of the parents breaches a court decision on access or contact rights (visiting rights) or otherwise hinders the enforcement of such a decision, the other parent may ask the court to initiate conciliation procedure and to invite both parents in front of the court to solve the dispute by an agreement. The role of the court is to encourage the parents to reach an agreement. The court will discuss with the parents the possible consequences of one parent not being able to contact or see the child to the child’s welfare, it will draw the parents’ attention to possible coercive measures that may be taken to force the parent to obey the court decision on access or contact rights and to the possibility of restricting or depriving the contact rights from such parent and also to the possibility of using the family consultation service. If the parents come to an agreement as to the access or contact rights which is different from that prescribed by the court decision and such an agreement is not in conflict with the interests of the child, the agreement will be recorded in the records of the session and the court approves the settlement by court order which will replace the previous one. If the parents do not reach an agreement in court or in using the family consultation service or if one of the parents does not appear to the court, then the court will make a court order whereby it declares the conciliation procedure unsuccessful and determines a) which coercive measures shall be applied; b) to what extent the court decision on access or contact rights shall be amended; c) what kind of amendments shall be made in parental rights [Section 563(6) of the Code of Civil Procedure].

Consequently, if one parent breaches the court order on contact or access rights, the other parent must first turn to the court for conciliation proceedings and only after unsuccessful conciliation when the court has made an order under Subsection 563(6) of the Code of Civil Procedure to apply coercive measures the parent may turn to the bailiff to enforce the court order and to apply the coercive measures [Subsection 563(7) of the Code of Civil Procedure].

Section 563 of the Code of Civil Procedure is a new provision, entered into force on 1 January 2006. Before that, if one of the parents hindered the enforcement of court orders on access or contact rights, the other parent could directly turn to the bailiff. And the bailiff could (after period of time given for voluntary compliance) ask the court to fine the obliged person. If imposing the fine does not result in voluntary compliance with the return order the court may instead of imposing a fine on the obliged person for the second time decide to arrest the obliged person up to 30 days [Section 183 of the Code of Enforcement Procedure]. In child abduction cases there is no such compulsory conciliation procedure, but the parent seeking enforcement may directly turn to the bailiff for conducting the enforcement.

The same provisions apply in cross-border cases.
II EMPIRICAL STUDY

1. STATISTICAL INFORMATION

a) Please find enclosed statistical information with regard to implementation of 1980 Hague Convention in Estonia in years 2002-2005 as at the beginning of the year 2006. This information has been obtained from the Ministry of Justice, Courts' Department, International Judicial Cooperation Division (contact person and expert – Ms Natalja Nikolajeva, Natalja.Nikolajeva@just.ee, tel. +372 6 208 183).

b) There are no statistics available on the enforcement of family law judgements in domestic cases. The statistics are collected only on enforcement of civil law judgements in general without specifying the subject matter of the case except for the maintenance/alimony judgements, eviction judgements and labour law judgments. We have contacted Ms Monica Vürst from Ministry of Justice (Courts’ Department, Liberal Professions and Legal Registers Division - monica.vyrst@just.ee, tel. +372 6 803 118) who made an inquiry to data system of bailiffs to find the cases in which the enforcement is pending at the moment. She could identify 9 cases on access/contact rights where the enforcement proceedings we initiated in this year. She personally thought that there could be not more than 50 cases altogether in which the enforcement of a family law judgment (i.e. orders on access/contact rights and residence of the child) is pending at the moment.

The difficulties encountered in enforcement of family law judgment relate mainly to the obstructions by the obliged person.

c) There are also no statistics available on the number of orders on contact/access rights or residence of the child rendered by the courts in Estonia. Majority of the family law cases concern maintenance/alimony claims.

2. TELEPHONE INTERVIEWS

According to the study four practitioners active in the area of family law enforcement will have to be interviewed in Estonia. We found it to be best to have different professions represented – bailiff, child protection officer, judge and representative of the central authority. We have a preliminary consent for the interview of the following persons:


b) Ms Katrin Vellet, bailiff, address Jõe str.3, Tallinn 10151, tel: +372 6 814 482, fax: +372 6 814 481; e-mail Katrin.Vellet@taitur.just.ee.

c) Ms Karin Kuslap, Child Protection Specialist (lastekaitse peaspetsialist), Mustamäe District Administration, City of Tallinn - karin.kuslap@tallinnlv.ee, tel. +372 6 457 558, www.tallinn.ee.
d) Judge – will be specified.

However, it cannot be excluded that after having seen the questionnaire for the interviews it turns out to be more practical to change this list of persons.