The enforcement of judgments imposing a penalty payment in case of breach of rights of access to children

This post has been written by Ester di Napoli.

In a judgment of 9 September 2015 (*Christophe Bohez* v. *Ingrid Wiertz*, Case C-4/14), the European Court of Justice (ECJ) clarified the interpretation of Article 1(2) and Article 49 of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter (Brussels I), corresponding to Articles 1(2) and 55 of Regulation No 1215/2012 (Brussels I*a*), as well as the interpretation of Article 47(1) of Regulation No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II*a*). The questions referred to the Court concerned the enforcement of a penalty payment (*astreinte*) issued to ensure compliance with the rights of access to children granted to one of the parents.

While Article 49 of the Brussels I Regulation states that judgments ordering "a periodic payment by way of a penalty" are enforceable in a different Member State "only if the amount of the payment has been finally determined by the courts of the Member State of origin", no equivalent provision may be found in the Brussels IIa Regulation. The latter merely specifies, in Article 47(1), that the enforcement procedure is governed by the law of the Member State of enforcement.

The case from which the judgment originated may be summarised as follows.

Mr Bohez and Ms Wiertz married in Belgium in 1997 and had two children. When they divorced, in 2005, Ms Wiertz moved to Finland. In 2007, a Belgian court rendered a decision on the responsibility over the children. As a means to ensure compliance with the rights of access granted to the father, the court set at a periodic amount per child to be paid to Mr Bohez for every day of the child's non-appearance, and fixed a maximum amount that the defaulting parent could be

requested to pay under the *astreinte*.

The mother failed to comply with the Belgian decision, so the father sought enforcement of the Belgian order in Finland relying on Article 49 of Brussels I Regulation. The Finnish authorities observed that the amount of the payment had not been determined in the Member State of origin, and added that, in any event, the request did not fall within the scope of the Brussels I Regulation but rather within the scope of the Brussels II*a* Regulation.

The ECJ, seised by the Finnish Supreme Court, pointed out that the scope of Brussels I Regulation is limited to "civil and commercial matters", and that the inclusion of interim measures is determined "not by their own nature but by the nature of the rights that they serve to protect". Thus, since the Brussels I Regulation expressly excludes from its scope "the status of natural persons" (notion "which encompasses the exercise of parental responsibility over the person of the child"), the Court held that Article 1 of Brussels I Regulation must be interpreted as meaning that it does not apply to the enforcement of a penalty payment imposed in a judgment concerning matters of parental responsibility.

The ECJ then moved on to consider the interpretation of the Brussels II*a* Regulation.

It recalled that mutual recognition of judgments concerning rights of access is "a priority within the judicial area of the European Union" and observed that, although the Regulation does not contain any provision on penalties, a penalty payment imposed in a judgment concerning rights of access "cannot be considered in isolation as a self-standing obligation, but must be considered together with the rights of access which it serve to protect and from which it cannot be dissociated". Accordingly, its recovery forms part "of the same scheme of enforcement as the judgment concerning the rights of access that the penalty safeguards and the latter must therefore be declared enforceable in accordance with the rules laid down by Regulation No 2201/2003".

The Court stressed that, in order to seek enforcement of the decision ordering a penalty payment, the amount must have been finally determined by the courts of the Member State of origin. Where the penalty payment has not been determined, "a requirement, in the context of Regulation No 2201/2003, for quantification of a periodic penalty payment prior to its enforcement is consistent with the sensitive

nature of rights of access”.