

The Rules on International Child Abduction within the EU.

Phd Sylwia Jastrzemska, Poland

The Hague Convention of 25 October 1980 on the civil aspects of International Child abduction (“the 1980 Hague Convention”) has been ratified by all the Member States of the European Union and continues to apply in relation to cases of child abduction between Member States.



However, the 1980 Hague Convention is supplemented by certain provisions of the Regulation, which come into play in such cases. Thus, as regards the operation of the 1980 Hague Convention in relations between Member States, the rules of the Regulation prevail over the rules of the Convention in so far as it concerns matters governed by the Regulation.

Which children are covered by the Regulation?

The Hague Child Abduction Convention applies to children up to the age of 16.

The 1980 Hague Convention and the Regulation share the aim of deterring parental child abduction between Member States. However if this nevertheless takes place, both the Convention and the Regulation seek to ensure the prompt return of the child to her or his Member State of origin.

- Where a child is abducted from one Member State (“the Member State of origin”) to another Member State (“the requested Member State”), the Regulation ensures that the courts of the Member State of origin retain jurisdiction to decide on the question of custody notwithstanding the abduction.
- Once an application for the return of the child is lodged before a court in the requested Member State, this court applies the 1980 Hague Convention as complemented by the Regulation.

- If the court of the requested Member State decides not to order the return of the child on the grounds set out in Article 13 of the Convention, it shall immediately transmit a copy of its decision to the competent court of the Member State of origin (“the court of origin”) which may then examine a question of custody at the request of a party, if it has not already been seised of the question.
- If the court of origin takes a decision entailing the return of the child, this decision is directly recognised and enforceable in the requested Member State without the need for exequatur.

- In cases of **wrongful removal or retention of a child**, the return of the child should be obtained without delay, and to this end **the Hague Convention of 25 October 1980** would continue to apply as complemented by the provisions of this Regulation, in particular Article 11.
- The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases.
- However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention.
- Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.

Article 2 regulation 2201/2003.Definitions.

The term the **term "wrongful removal or retention"** shall mean a child's removal or retention where:

- (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention;

and

- (b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility (paragraph 11 art.2).

Procedure applicable in a non return proceeding.

- Where a court has decided not to return a child on the basis of Article 13 of the 1980 Hague Convention, it should inform the court having jurisdiction or central authority in the Member State where the child was habitually resident prior to the wrongful removal or retention.
- Unless the court in the latter Member State has been seised, this court or the central authority should notify the parties. This obligation should not prevent the central authority from also notifying the relevant public authorities in accordance with national law.

What happens if the court decides that the child shall not return? – Article 11(6) and (7)

1. The competent court shall transmit a copy of the decision on non-return to the competent court in the Member State of origin.
2. Which documents shall be transmitted and in which language (art.11.6)?

A copy of the decision and of the “relevant documents, in particular a transcript of the hearings before the court”. It is for the judge who has taken the decision to decide which documents are relevant.

The other court must receive the documents within one month of the decision. Subject to the procedural law of the State addressed, translation may not be necessary if the case is transferred to a judge who understands the language of the case. If a translation proves necessary, it could be limited to the most important documents. If it is not possible to carry out the translation within the one-month time limit, it should be carried out in the Member State of origin.

The hearing of the child

The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable (paragraph 19 preamble).

The hearing of the child in Poland

Art.576 par.2 of Code of Civil Procedure the court of the person or property of the child will listen to them if

- his mental development,
- health and
- maturity permits,

including where possible the reasonable wishes. The hearing takes place outside the court hall meetings.

The assumption of children do not listen to the courtroom but they should be listened to in a special room. In Poland they are referred to as blue rooms.

Child's statement is treated by law, not as an evidence, but as statement of knowledge.

In Poland in practice, very often the child is hearing through judge or research conducted in the Family Consultation Diagnostic Centres or by probation officers interviewing the child in the place of residence of the child.

Jurisdiction in cases of child abduction

Article 10

- In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:
 - (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;or
 - (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

- (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;
- (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);
- (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);
- (iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

Return of the child

Article 11

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter "the 1980 Hague Convention"), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

- Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

The instruments helpful for the judges.

The judge may find it useful to consult the relevant case-law under this Convention which is available in the INCADAT database set up by the Hague Conference on Private International Law (www.incadat.com), the INCADAT database now also includes cases under the Regulation and also in the CJEU and ECtHR).

The Explanatory Report and the Practice Guides concerning this Convention can also be of use (see website of the Hague Conference on Private International Law-www.hcch.net).

Also the European Judicial Network in Civil Matters has prepared a practice guide giving information about the methods for processing and hearing of the return cases (www.e-justice.europa.eu, content_parental_child_abduction).

The main principles of the rules on child abduction

1. After the wrongful removal or retention of a child, in principle jurisdiction remains with the courts of the Member State of origin,
2. The courts of the requested Member State shall ensure the prompt return of the child , the court shall issue a decision within a six-week deadline, shall always order the return of the child if she or he can be protected in the Member State of origin,
3. If the court of the requested Member State decides not to return the child on any basis set out in Article 13 of the Convention, it must transmit a copy of its decision to the competent court in the Member State of origin, which shall notify the parties. The two courts shall co-operate ,

4. If the court of the Member State of origin decides that the child shall return, exequatur is abolished for this decision and it is directly enforceable in the requested Member State ,

5. The central authorities of the Member State of origin and the requested Member State shall co-operate with each other and assist the courts in their tasks.

Importance of the role of the judiciary

- As a general remark, it is appropriate to recall that the complexity and nature of the issues addressed in the various international instruments in the field of child abduction calls for specialised or well-trained judges.
- Although the organisation of courts falls outside the scope of the Regulation, the experiences of Member States which have concentrated jurisdiction to hear cases under the 1980 Hague Convention in a limited number of courts or judges are positive and show an increase in quality and efficiency.

- International co-operation between family judges has developed increasingly in recent years. There is now a growing network of judges who are able to assist in optimising the functioning of the Convention and the Regulation as concerns child abduction and other issues involving children.
- In many countries liaison judges have been appointed who can assist judicial communication and provide advice and support to colleagues in their own and other States as regards issues arising in such cases.

The Regulation allows for the attribution of jurisdiction to the courts of the requested Member State in two situations only:

Situation 1:

1. The child has acquired habitual residence in the requested Member State, and
2. all those with rights of custody have acquiesced in the abduction.

Situation 2:

1. The child has acquired habitual residence in the requested Member State and has resided in that Member State for at least one year after those with rights of custody learned or should have learned of the whereabouts of the child, and
2. the child has settled in the new environment and one of the four conditions listed below is fulfilled.

The four following conditions which should be fulfilled:

1. the relevant holder of rights of custody has not requested the return of the child within a year after he/she learned or should have learned of the whereabouts of the child or
2. the custody holder has withdrawn a request for return within a year and no new request has been lodged within that time or
3. a court of Member State B (“the requested Member State”) has decided that the child shall not return and has transmitted a copy of its decision to the competent court in Member State A (“Member State of origin”), but none of the parties has requested the latter court to examine the case within the time-scale set by Article 11(7)- three months or
4. upon request of a party, the court of Member State A has issued a judgment on custody which does not entail the return of the child.