

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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Cross-border parental child abduction in the European Union

Study for the LIBE Committee





DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

Cross-border parental child abduction in the European Union

STUDY

Abstract

Upon request by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), this study aims at analysing the international, European and national legal framework applicable to cross-border parental child abduction, with a view to proposing recommendations for the improvement of the current system. In light of available statistics and case law, five recurrent scenarios giving rise to child abduction legal disputes have been identified. One common scenario is the wrongful removal of a child, which results in the reversal of the balance previously settled in a judicial decision for the exercise of parental rights. A judicial "fast track" through the "automatic" enforcement of foreign decisions on return prescribed by EU Regulation 2201/2003 can be said to have improved the regime of the existing Hague Convention on Child Abduction. In turn, case law shows that when child abduction takes the form of an "illegal transfer of a child's primary residence abroad" by the primary care-giver, national courts tend to explore more in-depth the "best interests of the child". The development of appropriate structures of mediation in order to organise the transfer of a child's residence abroad with one of the parents should prevent "abductions" and improve, in most cases, the relationship between the parents having joint responsibility for the child. In addition to a preventive mediation scheme, a remedial mediation scheme is proposed. If, despite the preventive and remedial mediation schemes, a request return is brought to court in complex situations, it is important to avoid contradictory decisions by the EU judges in the jurisdiction of the present and the former place of residence of the child and to allow careful analysis of the overall situation of the child. To this end, a "joint-decision" reached through the active cooperation of specialised national courts within the EU is proposed. This involves special judicial training – with language and intercultural skills – for international family disputes.

DOCUMENT REQUESTED BY THE
COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS	11
GLOSSARY	14
EXECUTIVE SUMMARY AND RECOMMENDATIONS	15
A. Statistical data and possible reasons explaining the increasing number of applications for the return of a child	16
B. Case-studies emerging from case-law	17
C. Social changes affecting the operation of the Hague Convention on child abduction	18
D. A more balanced protection of the respective parental rights of former partners	19
E. Recommendations to the European Parliament	20
1. GENERAL INTRODUCTION AND PRESENTATION OF THE METHODOLOGY	28
1.1. Background of the study	28
1.2. Purpose of the study	29
1.2.1. Three Relevant Risk Factors	29
1.2.2. The underlying gender issues	30
1.3. Methodology	32
1.3.1. Research and analysis of statistical data	32
1.3.2. Critical assessment of the legal framework in force at the International and the European level, as well as in each of the Member States researched	33
1.3.3. Comparative law research and comparative analysis of the practical operation of relevant non-judicial tools	34
2. GLOBAL STATISTICAL ASSESSMENT	36
2.1. Presentation and description of available data	36
2.2. Data on marriages and divorces of international couples	37
2.3. Child Abduction Data	44
2.3.1. Statistics submitted to surveys conducted on behalf of Hague Conference on Private International Law 1999-2008	44
2.3.2. Comparisons with more recently collected data	49
2.3.3. Interpreting the statistical patterns	51
3. CRITICAL ASSESSMENT OF THE LEGAL FRAMEWORK APPLICABLE TO PARENTAL CHILD ABDUCTION	54
3.1. Description of the phenomenon	54
3.1.1. The need to differentiate different situations of "abduction"	55
3.1.2. Background, Action, Consequences	56
3.1.3. Five scenarios	56
3.2. The Hague Convention on Child Abduction: critical overview	58
3.2.1. General overview of the Convention	58

3.2.2.	Convergences and Divergences on the characterization of child abduction	61
3.2.3.	The meaning of Child Abduction “for the purposes” of the Hague Convention	67
3.2.4.	The impact of the characterization of illegal transfers of residence as child abduction cases on the exercise of the fundamental freedom of movement within the EU	71
3.2.5.	Implementation of the Convention	73
3.3.	The impact of EU Regulation 2201/2003 in child abduction proceedings	78
3.3.1.	A comparison between the operation of the Regulation and that of the Convention	80
3.3.2.	The “Human Rights test”	83
3.4.	Critical review of the most acute legal difficulties in the implementation of the legal framework	86
3.4.1.	Deterrence v. Best Interest of the Child	86
3.4.2.	Lack of protection of de facto situations, discrimination of non-residential parents	86
3.4.3.	Restriction of the freedom of movement of separated parents	87
3.4.4.	Assimilation of the consent of the primary caregiver with that of the other parent	87
3.5.	Identification of possible solutions to enhance protection against the breach of parental rights of one parent by the other	88
3.5.1.	The different legal interests deserving protection	88
3.5.2.	Mediation and alternative dispute resolution techniques	89
3.5.3.	Cooperation between the courts of the previous and the new habitual residence of the child	94
3.5.4.	Synthetic recommendations to the European Parliament	95
4.	NATIONAL REPORTS	104
4.1.	Belgium	104
4.1.1.	Statistical Assessment	105
4.1.2.	National laws implementing the Hague Convention on child Abduction	106
4.1.3.	Characterisation of parental child abduction in Belgium	108
4.1.4.	Judicial and non-judicial tools available to the parties, including mediation	110
4.1.5.	Existing criminal sanctions	111
4.1.6.	Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages	112
4.1.7.	Judicial, administrative and other authorities competent for child abduction cases	113
4.1.8.	Sensitive issues featured in national case law	114
4.1.9.	Specific characteristics of Belgian policies	117
4.1.10.	Justifications for refusing to return a child relocated to Belgium	118
4.1.11.	On-going projects of future legislation on child abduction	119
4.2.	Czech Republic	120
4.2.1.	Statistical Assessment	120

4.2.2.	The national legal framework	121
4.2.3.	Characterisation of parental child abduction in the Czech Republic	122
4.2.4.	Right of access	124
4.2.5.	Judicial tools	125
4.2.6.	Jurisdiction	126
4.2.7.	Relevant Case law	127
4.2.8.	Existing criminal sanctions	131
4.2.9.	On-going projects of future legislation on child abduction	131
4.3.	Denmark	133
4.3.1.	Statistical Assessment	133
4.3.2.	National laws implementing the Hague Convention	134
4.3.3.	Characterisation of parental child abduction in Denmark	134
4.3.4.	Judicial and non-judicial tools available to the parties, including mediation	136
4.3.5.	Existing criminal sanctions	137
4.3.6.	Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages	137
4.3.7.	Enforcement methods	137
4.3.8.	Sensitive issues featured in national case law	138
4.3.9.	Justifications for refusing to return a child relocated to Denmark	139
4.3.10.	Existing critics and comments of the legal rules in force	140
4.4.	Germany	141
4.4.1.	Statistical Assessment	142
4.4.2.	National laws implementing the Hague Convention	145
4.4.3.	Characterisation of parental child abduction in Germany	146
4.4.4.	Judicial and non-judicial tools available to the parties, including mediation	148
4.4.5.	Existing criminal sanctions	152
4.4.6.	Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages	153
4.4.7.	Enforcement methods	155
4.4.8.	Sensitive issues featured in national case law	156
4.4.9.	Existing critics and comments of the legal rules in force	158
4.4.10.	Justifications for refusing to return a child relocated to Germany	158
4.4.11.	On-going projects of future legislation on child abduction	161
4.5.	Ireland	164
4.5.1.	Statistical Assessment	164
4.5.2.	National laws implementing the Hague Convention	165
4.5.3.	Characterisation of parental child abduction in Ireland	165
4.5.4.	Judicial and non-judicial tools available to the parties, including mediation	170
4.5.5.	Existing criminal sanctions	170
4.5.6.	Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damage	171

4.5.7.	Enforcement methods	171
4.5.8.	Sensitive issues featured in national case law	172
4.5.9.	Existing critics and comments of the legal rules in force	174
4.5.10.	Justifications for refusing to return a child relocated to Ireland	175
4.5.11.	On-going projects of future legislation on child abduction	177
4.6.	Spain	178
4.6.1.	Statistical Assessment	178
4.6.2.	The national legal framework	180
4.6.3.	Characterisation of parental child abduction: civil and criminal aspects	182
4.6.4.	Regional instruments regulating mediation	185
4.6.5.	Existing criminal sanctions	187
4.6.6.	Compensation for the parent left behind	187
4.6.7.	Judicial, administrative and other authorities competent for child abduction cases	189
4.6.8.	Sensitive issues featured in national case law	191
4.6.9.	Justifications for refusing to return a child relocated to Spain	192
4.6.10.	On-going projects of future legislation on child abduction	193
4.7.	France	194
4.7.1.	Statistical Assessment	194
4.7.2.	Characterisation of parental child abduction in France	197
4.7.3.	Judicial and non-judicial tools available to the parties, including mediation	199
4.7.4.	Existing criminal sanctions	200
4.7.5.	Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages	201
4.7.6.	Enforcement methods	202
4.7.7.	Sensitive issues featured in national case law	202
4.7.8.	Existing critics and comments on the legal rules in force	205
4.7.9.	Justifications for refusing to return a child relocated to France	206
4.7.10.	On-going projects of future legislation on child abduction	207
4.8.	Italy	208
4.8.1.	Introduction	208
4.8.2.	Statistical Assessment	209
4.8.3.	Characterisation of parental child abduction	214
4.8.4.	Acknowledged possibilities to reverse the presumption that the child's best interest commands his/her return	217
4.8.5.	Rights of access and child's objection	218
4.8.6.	Judicial and non-judicial tools available to the parties, including mediation	218
4.8.7.	Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages	219
4.8.8.	Existing criminal sanctions	219
4.8.9.	Sensitive issues featured in national case law	220
4.8.10.	Existing critics and comments on the legal rules in force	223

4.9. Lithuania	225
4.9.1. Statistical assessment	225
4.9.2. National laws implementing the Hague Convention	227
4.9.3. Characterisation of parental child abduction	228
4.9.4. Judicial and non-judicial tools available to the parties, including mediation	231
4.9.5. Existing criminal sanctions	232
4.9.6. Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages	233
4.9.7. Enforcement methods	233
4.9.8. Sensitive issues featured in national case law	235
4.9.9. Existing critics and comments on the legal rules in force	243
4.9.10. Justifications for refusing to return a child relocated to Lithuania	245
4.9.11. Criteria to assess the "best interest of the child"	245
4.10. Hungary	247
4.10.1. Introduction	247
4.10.2. Statistical Assessment	248
4.10.3. Sources of the National Regulatory Framework	255
4.10.4. Existing criminal sanctions	257
4.10.5. Characterisation of parental child abduction	258
4.10.6. Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages	260
4.10.7. Judicial and non-judicial tools available to the parties, including mediation	261
4.10.8. Sensitive issues brought to the ECHR	262
4.10.9. Commentary on the National System	263
4.10.10. On-going reforms: the Constitutional Complaint in Family Matters	264
4.10.11. When Removal of a Child is not considered to be Abduction but the exercise of Rights of Free Movement and to Family Life	265
4.10.12. Justifications for refusing to return a child relocated to Hungary: Effectiveness of the Return Mechanism vs. "Best Interests of the Child"	266
4.10.13. On-going projects of future legislation on children	267
4.10.14. Concluding remarks	268
4.11. The Netherlands	270
4.11.1. Statistical assessment	271
4.11.2. National laws implementing the Hague Convention	273
4.11.3. Characterisation of parental child abduction	274
4.11.4. Procedure for child abduction cases	275
4.11.5. Existing criminal sanctions	281
4.11.6. Interaction between Article 10 EU Regulation 2201/2003 and Hague Child Convention 1980	283
4.11.7. Use of exceptions in Hague Convention on Child Abduction in Dutch law	284

4.12.	Austria	293
4.12.1.	Statistical Assessment	293
4.12.2.	National laws implementing the Hague Convention	298
4.12.3.	Characterisation of parental Child Abduction	298
4.12.4.	Judicial and non-judicial tools available to the parties, including mediation	306
4.12.5.	Existing criminal sanctions	307
4.12.6.	Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages	308
4.12.7.	Enforcement methods	310
4.12.8.	Sensitive issues featured in national case law since 2012	311
4.12.9.	Existing critique and comments on the legal rules in force	315
4.12.10.	Justifications for refusing to return a child relocated to Austria	318
4.12.11.	Criteria to assess the “best interest of the child”	318
4.12.12.	The current debate on Child Abduction rules in force	320
4.13.	Poland	322
4.13.1.	Statistical Assessment	322
4.13.2.	National laws implementing the Hague Convention	325
4.13.3.	Characterisation of parental child abduction	327
4.13.4.	Judicial and non-judicial tools available to the parties, including mediation	330
4.13.5.	Existing criminal sanctions	332
4.13.6.	Compensation for the parent left behind	332
4.13.7.	Judicial, administrative and other authorities competent for child abduction cases	334
4.13.8.	Sensitive issues featured in national case law since 2012	335
4.13.9.	Justifications for refusing to return a child relocated to Poland	335
4.13.10.	On-going projects of future legislation on children	337
4.14.	Romania	339
4.14.1.	Statistical Assessment	339
4.14.2.	The National legal framework	340
4.14.3.	Characterisation of Parental Child Abduction	341
4.14.4.	Existing criminal sanctions	345
4.14.5.	Compensation for the parent left behind	346
4.14.6.	Enforcement methods	347
4.14.7.	Sensitive issues featured in national case law	348
4.14.8.	The child’s best interests as “absolute” main goal of the regime	350
4.14.9.	The effectiveness of the return	351
4.14.10.	Criteria to assess the “best interest of the child”	351
4.14.11.	Relevant case law	353
4.14.12.	Existing critics and comments on the legal rules in force	353
4.15.	Slovakia	355
4.15.1.	Statistical Assessment	355

4.15.2.	The national legal framework	356
4.15.3.	Judicial practice and relevant case law	358
4.15.4.	Mediation	361
4.15.5.	Existing criminal sanctions	362
4.15.6.	Civil Law liability	363
4.15.7.	On-going projects on child abduction	363
4.16.	Sweden	364
4.16.1.	Statistical Assessment	364
4.16.2.	The national legal framework	365
4.16.3.	National notion of unlawful parental child abduction	366
4.16.4.	Judicial and non-Judicial tools available to the parent left behind	367
4.16.5.	Existing criminal sanctions	368
4.16.6.	Compensation for the parent left behind	368
4.16.7.	Judicial, administrative and other authorities competent for child abduction cases	369
4.16.8.	Issues more frequently considered in case law concerning the application of the Hague Convention and EU Regulation 2201/2003	369
4.16.9.	On-going projects of future legislation on child abduction	372
4.17.	United Kingdom	373
4.17.1.	Statistical Assessment	373
4.17.2.	The National legal framework	375
4.17.3.	Characterisation of parental Child Abduction	376
4.17.4.	Judicial and non-Judicial tools available to the parent left behind, including mediation	379
4.17.5.	Existing criminal sanctions	380
4.17.6.	Compensation for the parent left behind	381
4.17.7.	Enforcement methods	382
4.17.8.	Sensitive issues featured in national case law	382
4.17.9.	The current debate on Child Abduction rules in force	388
4.17.10.	Justifications for refusing to return a child relocated to United Kingdom	389
4.17.11.	Criteria to assess the "best interest of the child"	390
4.17.12.	Existing critics and comments on the legal rules in force	392
5.	BIBLIOGRAPHY	395

LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union http://www.curia.europa.eu
EU Regulation 2201/2003	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility and repealing Regulation (EC) No 1347/2000 Official Journal L 338, 23/12/2003 P. 0001 – 0029. http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML
Dyer Report	A. Dyer, Report on international child abduction by one parent (“legal kidnapping”), Preliminary Document n. 1 of August 1978; Actes et documents de la XIV ^{ème} session, p. 12
ECHR	European Court of Human Rights http://www.echr.coe.int
EConvHR	European Convention on Human Rights http://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=#n1359128122487_pointer
1980 European Convention on Custody of Children	Luxembourg Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=105&CM=1&CL=ENG .
1996 European Convention on the Exercise of Children’s Rights	Strasbourg Convention on the Exercise of Children’s Rights of 25 January 1996 http://conventions.coe.int/Treaty/EN/Reports/HTML/160.htm
Guide to Good Central Authority Practice	Guide to Good Practice Child Abduction Convention: Part I - Central Authority Practice (2003) http://www.hcch.net/upload/abdguide_e.pdf
Guide to Good Enforcement Practice	Guide to Good Practice Child Abduction Convention: Part IV - Enforcement (2010) http://www.hcch.net/upload/guide28enf-e.pdf
Guide to Good Practice for Implementing Measures	Guide to Good Practice Child Abduction Convention: Part II - Implementing Measures (2003) http://www.hcch.net/upload/abdguide2_e.pdf

Guide to Good Practice on Mediation	Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2012) http://www.hcch.net/upload/guide28mediation_en.pdf
Guide to Good Practice for Preventive Measures	Guide to Good Practice Child Abduction Convention: Part III - Preventive Measures (2005) http://www.hcch.net/upload/abdguideiii_e.pdf
Guide to Good Practice on Transfrontier Contact	Transfrontier Contact Concerning Children – General Principles and Guide to Good Practice ; HCCH; 2008 http://www.hcch.net/upload/guidecontact_e.pdf
Hague Convention on Child Abduction	The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction http://www.hcch.net/index_en.php?act=text.display&tid=21
1996 Hague Convention on Parental Responsibility	Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, adopted on 19 October 1996 http://www.hcch.net/index_en.php?act=conventions.text&cid=70
INCADAT	International Child Abduction database http://www.incadat.com/index.cfm
ISDC, Study on Parental Responsibility, EP study 425.615	Institut suisse de droit comparé (ISDC), The parental responsibility, child custody and visitation rights in cross-border separations, 2010, EP study 425.615 http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/425615/IPOL-PETI_ET(2010)425615_EN.pdf
Lowe's 2011 Statistical Analysis	N. Lowe "A Statistical Analysis of Applications Made in 2008 under The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction", Preliminary Documents Nos 8 A and B (updates of November 2011) and C (of May 2011) for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf
Pérez-Vera Report	Elisa Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, 1982 http://www.hcch.net/upload/expl28.pdf
Preliminary note on international family relocation	Preliminary Document No 11 of January 2012 for the attention of the Special Commission of January 2012 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention http://www.hcch.net/upload/wop/abduct2012pd11e.pdf

Questionnaire
Concerning the Practical
Operation of the Hague
Convention

Permanent Bureau of the Hague Conference on Private International Law - Questionnaire concerning the practical operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children (Prel. Doc. No 1 of November 2010)

<http://www.hcch.net/upload/wop/sc2011pd01e.DOC>

1989 UN Convention on
the Rights of the Child

United Nations Convention on the Rights of the Child of 20 November 1989

<http://www.un.org/documents/ga/res/44/a44r025.htm>

https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en#EndDec

GLOSSARY

For the purposes of the present study, the following expressions are employed with the following meaning:

International Marriage	Unless differently described (for instance infra 2.2.), an international marriage is a marriage between persons of different nationalities
International Divorce	An international separation or divorce, unless differently described, is a separation or divorce of persons of different nationalities
Cross-border parental Child Abduction	Cross-border child abduction in the true sense is the kidnapping of a child by an adult, acting by surprise, resulting in the transfer of the child abroad and affecting his/her habitual residence. Child abduction in the broad sense includes illegal transfers of a child's residence
Illegal transfer of a child's residence	An illegal transfer of a child's residence is the transfer of a child's residence in violation of the other parent's rights and duties in respect of the child (i.e. unlawful relocation with the child)
Parental Responsibility	The right/duty to participate in the upbringing of the child and to take legal decisions concerning the child. It includes financial responsibility and liability for the child
Custody	The right/duty to house the child in the place of the child's primary residence
Inchoate Rights of Custody	The "Rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned" (Re B (A Minor) (Abduction) [1994] 2 Family Law Reports 249).
Primary caregiver	A primary caregiver is a person addressing the child's material needs. The primary caregiver is sometimes named "residential parent", or "custodial parent".
Access rights	The right to spend time with the child and host him or her on the basis of a periodical routine - also called visiting or access rights
Non-residential parent	A non-residential parent is a parent whose primary residence differs from that of the child.
Left behind parent	A left-behind parent is a parent whose rights/duties of parental responsibility have been impaired following a child abduction or an illegal transfer of the child's residence abroad.

LIST OF TABLES (GLOBAL STATISTICAL ASSESSMENT)

TABLE 1

International marriages as a percentage of all marriages in each EU Member State (2000-2007 and 2012) 39

TABLE 2

Divorces of couples in international marriages as a percentage of all divorces in each EU Member State (2001-2007 and 2012) 42

TABLE 3

Return applications received and made by Central Authorities of EU Member States in 1999, 2003 and 2008 46

TABLE 4

Number of international child abduction return requests received by Central Authority of selected countries 2009-2013 49

LIST OF FIGURES (GLOBAL STATISTICAL ASSESSMENT)

FIGURE 1

Average percentage of international marriages as a proportion of all annual marriages across selected EU Member States (2000-2007) 41

FIGURE 2

Overall divorces of international couples as a proportion of all divorces across EU states (2000-2007) 43

FIGURE 3

Return requests received by Central Authorities of EU Member States in 1999, 2003 and 2008 47

FIGURE 4

Proportion of taking parents worldwide who have nationality of destination State 48

FIGURE 5

Incoming international child abduction return requests under the Hague Convention received by selected EU countries 1999-2012 50

EXECUTIVE SUMMARY AND RECOMMENDATIONS

This study was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) in order to provide the European Parliament and the Mediator for International Parental Child Abduction with an analysis of the practical implementation of the legal framework in force, "but also [to] propose additional recommendations as to how to change existing practices and/or legislation in order to solve any identified practical or legal problem".

It aims at clarifying the grounds and the objectives of the available legal framework regulating the phenomenon of "child abduction".

The rich and intricated legal framework in force stems from the 1980 Hague Convention on Child Abduction. The Convention is in force since 1 December 1983 and today is being applied in 93 States of the world, among which all European Member States.

Following a French initiative, EU Regulation 2201/2003 was drafted in order to enhance the "return mechanism" created by the Hague Convention within the European Area of Freedom, Security and Justice. Thus, with the exception of Denmark, European rules are applicable in Member States in addition to the Hague rules.

In addition to ratifying the Hague Convention, several Member States concluded bilateral agreements aimed at easing cooperation to solve child abduction cases. These bilateral conventions have been concluded by EU Member States with several Arab countries: i.e. Belgium has bilateral agreements with Morocco and Tunisia; France with Algeria, Egypt, Lebanon, Morocco and Tunisia; Sweden with Egypt and Tunisia. Furthermore, three Member States – Croatia, the Czech Republic and Romania – also apply the Strasbourg Convention on Contact concerning Children of 15 May 2003, drafted within the Council of Europe.

The analysis of the legal framework in force seeks to assess the efficiency of the "return mechanism" created by the Hague Convention and enhanced by the following legislation, in particular EU Regulation 2201/2003. In light of our findings, several recommendations are proposed to better prevent cross-border parental child abduction, to improve the effectiveness of judicial remedies to child abductions and to promote non judicial remedies leading to an amicable settlement of child abduction cases.

A. Statistical data and possible reasons explaining the increasing number of applications for the return of a child

Statistics point to a constant increase in child abduction legal disputes within the European Area of Freedom, Security and Justice.

The following statistical assessment (chapter 2) has found that, in most countries, the number of requests for the return of children brought or retained abroad by a parent or relative is increasing.

In light of the available data, however, it is not possible to assert if "parental kidnapping" is increasing per se or if the increase concerns simply the number of requests to Central Authorities, since parents are more and more aware of the protection awarded by the Hague Convention on child abduction. Interestingly, the statistical survey highlights a direct correlation between the number of return request treated by Central Authorities, on the one hand, and their experience – also based on the years elapsed since ratification of the Convention – and efficiency in handling Convention applications, on the other hand.

Other correlations exist between the number of incoming and outgoing requests on the one hand and, on the other, the number of foreigners present in a country and, in turn, the

number of international couples and resettlement abroad after the international family's breakdown.

The link between the exercise of the European freedom of movement of workers and child abduction is paradigmatically shown by the national reports of Member States having acceded the EU in 2004: after the enlargement of the European Union in 2004, Central and Eastern European Member States witnessed a very sharp increase in "child abduction" cases.

The increased mobility of families contributes to the increase in divorces and separations with cross-border implications.

In this respect, the first assumption that the study verifies is related to the circumstance that a large majority of child abduction cases rise in the context of high-conflict dissolutions of unions between the father and the mother of one or more children with transnational implications (typically a marriage between citizens of different States).

Accordingly, case law shows that most abductions take place in the course of legal proceedings which involve opposing fathers and mothers of different citizenship litigating over their respective rights and duties over the child.

Other – although less frequent - cases of "qualified" child abduction occur in many other contexts and scenarios.

For a better understanding of the phenomenon – with a view to elaborating preventive measures - the study recommends the collection of information, as some countries already do, on the reasons for the abduction, whether it relates to a previous, intolerable impairment of the taking parent's contact rights, whether the taking parent was seeking to protect the child from domestic violence, etc. This could also be achieved through the development of a European database on child abduction.

Moreover, it is foreseeable that child abduction disputes will increase consistently in connection with the current legal evolution and the sociological context of European countries, in particular as a consequence of the following factors (see *amplius* in paragraph 1.2.1.):

- i) the growing mobility of European citizens (i.e. the "international factor");
- ii) the growing number of transnational family dissolution proceedings (i.e. the "judicial factor"), aggravated by the increased inequivalence of the legal rules applicable to family dissolutions, in its turn linked to the fragmentation of family law in different types of family models (marriage, registered partnership, non-registered partnership);
- iii) the broadening of the legal notion of parenthood and the increasing number of adults to whom rights over a child are awarded (i.e. the "right to maintain contacts with the child").

B. Case-studies emerging from case-law

A first finding of the study consists of identifying typical cases giving rise to disputes characterized as "child abduction" in courts (see the relevant case-law in par. 3.1.2.).

Scenario A – kidnapping or wrongful retention by a relative

A child is kidnapped by a member of his/her family who has no custody, nor parental rights over him (a grandparent, an uncle/aunt).

Scenario B – kidnapping or wrongful retention by a parent

After the dissolution of a family, the child continues to live with one of the two parents and the other parent maintains contacts with the child through the exercise of visiting rights.

During a visit to the non-custodial parent, the child is removed or retained abroad.

Statistics show that, in this scenario, the return request is more often filed by mothers.

Scenario C – transfer of residence abroad before a judicial decision on custody

The child is removed by one of his parents and brought abroad with the intention to resettle without the other parent. The removal coincides with the dissolution of the family, and the rights and duties related to parenthood, in the moment of the removal, are not grounded on a judicial decision but on the law applicable to the parental relation.

Scenario D – transfer of the residence of the custodial parent

After the dissolution of a family, the child continues to live with one of the two parents and the other parent maintains contact with the child through the exercise of visiting rights.

The parent who lives with the child transfers his or her residence with the child abroad.

The reasons to resettle might be linked to a new partner; work-related or be grounded in a better social network, i.e. members of the parent's family who are in a position to support a better work/life balance in the best interest of the child.

Statistics show that, in this scenario, the return request is more often filed by fathers.

Scenario E – flight from domestic violence

In the context of domestic violence – where a violent parent is endangering the physical or psychological health or, indeed the life of the child – the other parent flees abroad illegally with the child.

Statistics show that, in this scenario, the return request is more often filed by mothers.

At present, these five scenarios - extracted from case law – are subject to the same legal rules. It is possible that the following sixth scenario will appear frequently in the future as a variation of Scenarios B and D: where a kidnapping or an illegal transfer of the child's residence takes place in the hypothesis of shared-custody (*garde alternée*).

The behaviour of the person taking the child abroad is wrongful in Scenarios A, B and D, it can be wrongful – depending on the law applicable to parental rights - in Scenario C and it is never wrongful in Scenario E since the fundamental right to self-defence comes into play.

C. Social changes affecting the operation of the Hague Convention on child abduction

In principle, according to the intentions of the drafters of the Hague Convention on child abduction, the phenomenon to be addressed and internationally counteracted was, in the first instance, an "abduction" akin to that featured in Scenarios A and B. In light of that need, the remedy of art. 12, prescribing the return of the child in six-week time set by art. 11, was elaborated.

Moreover, the objective of the Hague Convention was, in the first instance, that of counteracting the disruption – resulting from a kidnapping - of the household and social environment of a child, in violation of a previous judicial - or in any event legal – settlement as regards the residence of the child. For these reasons, and to a certain extent, Scenario C benefits from the protection granted by art. 12.

Art. 12 orders the immediate return of the child, even though it allows the judge to consider any relevant circumstance of the case justifying a deviation from the rule of return.

The Hague Convention also includes, in Art. 21, provisions for the protection of "access rights" of parents in order to prevent (and react to) the impairment of their right to maintain ties with their children.

However, in light of the evolution of family law (see in particular par. 1.2.2. and 3.1.3. below), the protection of the parents having “access rights” has shown itself to be ineffective and has required correction.

It is the implementation of the rules in practice which has corrected the imbalance created by the Hague Convention between the protection of residential and non-residential parents via the assimilation of the aforementioned situations – the kidnapping and the illegal transfer of the child’s primary residence – as “child abductions”.

However, the idea of restoring the status quo ante through the return of the child to his/her original habitual residence only makes sense as a reaction to a kidnapping (especially in Scenario A and B): in those cases, the child is immediately brought back to the residence from which s/he was illegally removed. S/he is thus re-integrated in his/her habitual environment and daily routine.

In Scenarios C and D, if a parent has resettled abroad, moved house, changed jobs and made arrangements for the education of the child, the return mechanism may not always amount to a “return”.

To the contrary, the remedy offered by art. 12 of the Convention forces that parent to re-create a household at his/her previous place of residence: find a new house and, possibly, a new job etc. In this case, the “return” of the child amounts to a “new transfer” and confronts the parent seeking to re-organise his/her life after the previous settlement with the other parent with the need to, again, change his/her residence and re-organise the child’s life in the exercise of his/her rights/duties. It amounts to a forced re-transfer of residence, rather than a return.

These circumstances are taken into account by national courts whenever they are confronted by scenarios C, D and E. However, the evaluation of the overall situation in the best interest of the child has had the side-effect of potentially impairing the operation of the Hague Convention.

This evolution seems, however, unfortunate and the elaboration of appropriate rules addressing on an ad hoc basis the different scenarios emerging from case law would allow a better protection of the best interests of the child.

D. A more balanced protection of the respective parental rights of former partners

An efficient safeguard of the rights of a non-residential parent living abroad must include all aspects necessary to “fill” the distance between the new residence of the child and the residence of the non-custodial parent. In particular, the role of Central Authorities with a view to implementing Art. 21 of the Hague Convention involves addressing the issue of responsibility for the new financial burdens in connection with the transfer of residence; the improvement of inter-cultural communication whenever the linguistic and/or cultural barriers are important; and all necessary measures guaranteeing the non-residential parent de facto active participation in the successful upbringing of the child and similar considerations.

All potential impairments of parental rights need specific attention within the European Area of Freedom, Justice and Security, especially in light of the development of the national rules on custody.

These considerations lead us to identify another possible factor in explaining the increase of child abductions cases in Europe. It can be found in the on-going processes of reform of national rules on custody. These are related to the socio-economic changes that have blurred the distinction between the respective parenting roles of fathers and mothers.

Not all judicial settlements of divorces and separation allow, at present, the making of a clear distinction between a residential and a non-residential parent, especially when a shared residence is ordered in respect to a child.

Moreover, even in those cases in which it is still possible to identify the residential parent and the parent enjoying visiting rights, the "right to determine the child's residence" has been withdrawn from the scope of the right of custody in most European countries. Consequently, the transfer of residence by "residential parents" without the consent of the non-residential parent is characterized as "child abduction", regardless of whether the parent has kidnapped the child or prepared and carried out a transfer of residence abroad.

Many authors have indicated that these developments in the national rules of custody have the indirect consequence of creating a potential obstacle to the mobility of separated and divorced persons, in particular when they are primary caregivers.

A compulsory mediation scheme, with a view to reach an amicable settlement on the transfer of a parent's residence abroad – with or without contextual transfer of the child's residence – could be tested to prevent unilateral and unexpected actions. Moreover, it would allow better organisation of the multiple relevant issues raised by the move (practical and economical).

The legal framework in force, requesting a prompt and immediate return and a restrictive interpretation of the exceptions to return performs well in cases where the removal has reversed a judicially established balance of parental rights and return does not amount to a re-settlement of the child (as in scenarios A and B). In this respect, the effectiveness and timeliness of judicial remedies seem essential for preventing as well as for reacting to the phenomenon.

The automatic return prescribed by art. 11(4) of EU Regulation 2201/2003 is a welcome step forward in this respect. However, the phrase "if adequate arrangements have been made to secure the protection of the child after his or her return" does not provide appropriate safeguards in cases of domestic violence and should therefore be amended (see below).

No deterring effect nor remedies are needed in scenario E, where the removal is apparently wrongful but justified by the exercise of the right to self-defence.

In scenarios where the transfer is illegal but does not reverse the organisation of the care of the child (as, in particular, in scenario D), a more active role for Central Authorities in evaluating non-judicial remedies, including lawyer-supervised agreements and mediation, should be promoted in order to measure the possibility of reconciling the parents and to have them collaborate in parenting.

These conclusions stem from a critical interpretation of the Hague Convention on Child Abduction – with an historical and teleological canon – in conjunction with a critical analysis of the case law, the statistical observations and relevant literature.

E. Recommendations to the European Parliament

The following amendments and recommendations have been elaborated with a view to improving the mechanisms of the Hague Convention on Child Abduction within the European Area of Freedom, Justice and Security, where the principle of mutual trust applies together with the right of Union citizens and their family members to move and reside freely within the territory of the Member States.

In addition to the urgent need for strategies to tackle the issue of cross-border parental child abduction, the following recommendations take into account specific European policies aimed at reducing family litigation through mediation, in conformity with the objectives set in the Stockholm Program of the European Council, in the Commission's Action Plan Implementing the Stockholm Programme and with the EU Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (see 3.5.2.). The latter explicitly acknowledges, in its art. 7, the vulnerability of children involved in judicial proceedings; a concern that is

particularly acute whenever the child's main attachment figures, his or her parents, are pitted against each other.

In conclusion, the study recommends to the EP: to improve scientific research and data collection at EU level (I); to encourage Member States to centralise child abduction cases in specialised courts and, at the same time, to promote specific training for mediators and judges dealing with transnational proceedings involving children (II); to amend Regulation 2201/2003 so as to: prevent "child abductions" via a mediation scheme allowing to organise a licit transfer of the child's residence from one Member State to another; ensure the protection of the best interests of the child through an enhanced cooperation between European judges with the aim of reducing the length of "child abduction" proceedings (III).

I. Improvement of scientific research

I.1. Development of a European public database

The Hague Conference of Private international law has created a "Child Abduction Section" within its website, in order to monitor the implementation of the Hague Convention on child abduction by State Parties as well as, more in general, the phenomenon of child abduction and the legal and judicial responses to it. The Section hosts two notable databases to that end: INCADAT and INCASTAT. In addition the will to introduce "a more efficient system for dealing with international child abduction" led to the creation of the software "ichild". The aim of these databases is to collect, respectively, judicial decisions, statistics and both as regards to child abduction cases. However, these databases are not easy to update since they are mainly based on the work of national correspondents.

In this respect, the EU could build a specific database in order to better acknowledge the number and relative percentage of high-conflict dissolutions of unions between the father and the mother of one or more children with transnational elements on the basis of an exchange of information through national statistical authorities, that are already operating and collecting data at the national level.

Indeed, the study reveals the need to further develop the collection of data by Central Authorities and the harmonisation of their publication.

On the one hand, a categorization of the requests according to the reasons for abduction would allow a better understanding of the "typical cases". On the other hand, possible correlations between migratory patterns and child abduction applications need to be highlighted.

A public database updated in real time or a 2.0 platform available to Central Authorities would be useful to monitor the evolution of the socio-economic reality of the phenomenon.

II.2. Development of a strategy to prevent high-conflict separations, divorces and the disruption of families with children

As a second step, it would be important to identify the most frequent reasons behind the escalation of "judicial violence" between former partners, in the context of which child abduction takes place.

This study suggests that gender studies and studies on intercultural communication may offer, in this respect, key elements in order to identify situations at risk and elaborate a strategy to prevent high-conflict dissolution of families.

A deeper knowledge of the phenomenon would improve mediation schemes and allow recourse to mediation before a potential child abduction or an illegal transfer of a child's residence occurs, in high risk situations.

II. Development of specialised courts and creation of a network of trained mediators for transnational proceedings involving children

II.1. Development of a European network of specialised mediators

In order to counteract child abduction and to solve child abduction cases, private persons have created NGOs and associations of "family mediators" that are, to a certain extent, already grouped in transnational networks (see e.g. the network of cross-border mediators initiated by the Belgian NGO Child Focus, the German Mikk and the Leuven Institute of Criminology of the Katholieke Universiteit Leuven).

After the adoption of the European code of conduct for mediators on 2 July 2004 and Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, a network of EU-trained and/or EU-authorized mediators for transnational proceedings involving children could be specifically developed and act under the auspices of the European mediator for child abduction. The network could serve the following different purposes.

First, as suggested above, it would be important to propose – in the context of family dissolution proceedings and whenever it is possible to assess risks of unilateral actions impacting the right of the child to maintain contacts with both parents – a mediation scheme, with a view to reach an amicable settlement on the transfer of a parent's residence abroad – with or without contextual transfer of the child's residence. The number and importance of the issues at stake in case of a transfer abroad requires communication between the parents. Communication supervised by mediators could prevent unilateral action and facilitate the relationship between the persons involved in the upbringing of the child.

Secondly, after the illegal transfer of a child's residence from one Member State to another, expert mediators from the countries involved in the move could offer professional help with a view to finding an amicable settlement with regard to the residence of the child and the modalities to exercise parental rights.

II.2. Judicial training and development of specialised courts

The elaboration of strategies preventing family litigation shall include specific training to lawyers and judges assisting transnational judicial proceedings arising in the context of family dissolutions, in order to prevent aggressive judicial litigation.

In this respect, those Member States that do not yet have specialised courts for the implementation of the Hague Convention on Child Abduction should be encouraged to centralise litigation in a few specialised courts.

The training of judges sitting in such Courts shall include: the development of appropriate language skills favouring the communication between them and foreign judges specialised in child cases; the ability to cooperate with each other without national and gender prejudices (intercultural communication skills); the capacity to deal expeditiously with child abduction cases and with cases of illegal transfers of a child's residence; the ability to cooperate with recognised mediation centres.

III. Changes in the legislation in force

III.1. Developing a two-track strategy in order to address timely child abduction and to promote cooperation among Member States' judges

In order to ease the identification of the most serious breaches of the rights of parents and children, a dividing line needs to be made between cases where the best interest of the child to return may be presumed (fast track) and cases where the best interest of the child requires in concreto analysis and prevention of implicit discrimination based on nationality.

In doing so, hypothetical national biases interfering in a negative manner with justice administration within the EU and with the rights of the child need to be explored.

To illustrate these biases, let us take one recurrent case: that of a German woman marrying a Spanish man, as in the cases *Aguirre Zarraga v. Simone Pelz* (C-491/10 PPU, of 4 December 2010) and *Bianca Purrucker v Guillermo Vallés Pérez* (C-256/09, of 15 July 2010 and C-296/10, of 9 November 2010).

In both of these cases a German woman had moved to Spain to live with a Spanish man. In both cases, children were born to the couple, the couple broke up and the German women involved were willing to resettle in Germany with the Spanish-German children.

Judicial proceedings were pending in Spain and in Germany. It seems obvious that a Spanish man living in Spain has a deeper knowledge of the Spanish language, culture and legal system when compared to a German woman recently immigrated; he is certainly better integrated in his home country. The same can be said for the German woman bringing her case to a German court. These differences create a *de facto* inequality of arms throughout the whole process of litigation; from finding a suitable lawyer to explaining the complexity of the family situation to the judge.

This inequality is “reciprocal”, so to say, since it benefits citizens in their homeland and *de facto* harms foreigners in the partner’s land.

A second factor creating a national bias concerns the position of the judge.

As shown by case law, whenever the case is not that of Scenario A and B above, the judge tends to take into account the circumstances of the case more in detail. There is no need or any intention to cast a malicious doubt on the impartiality of European judges: it suffices to observe that the point of view of a Spanish judge is that of the Spanish legal order and there is no guarantee that his German colleague – interpreting the same facts from a German perspective – would pronounce the same decision.

These circumstances have been acknowledged by the European Parliament and the Council having led to art. 15 of EU Regulation 2201/2003 which prescribes the judge to “consider [if] a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child: (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or (b) request a court of another Member State to assume jurisdiction [...]”.

This mechanism may be adapted in order to allow a joint or bi-national decision whenever the dispute between parents involves, at the same time, two opposing European legal orders.

To this end, the courts of Member States involved in the family dispute should cooperate from the early stages of the judicial proceedings, in particular through the channel of the European Judicial network.

Moreover, a binational task force of mediators could be actively engaged in the process of encouraging an amicable settlement of the dispute (below at III.2). If mediation fails, the best guarantee to find a fair solution is to allow a joint-decision by the courts of Member States involved in the move.

If the binational court is not able to agree on a co-decision of the case, only the decision of a supranational court, such as the General Court of the European Union, could solve the dispute between parents from a perspective that is equally distant from the parties.

Details on the content of recommended amendments follow.

III.2. Suggested amendments to EU Regulation 2201/2003

In light of the above, Arts. 2, 10 and 11 of EU Regulation 2201/2003 should be amended and two new articles should be added, as suggested in bold:

Article 2

Definitions

For the purposes of this Regulation:

1. the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;
2. the term "judge" shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation;
3. the term "Member State" shall mean all Member States with the exception of Denmark;
4. the term "judgment" shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;
5. the term "Member State of origin" shall mean the Member State where the judgment to be enforced was issued;
6. the term "Member State of enforcement" shall mean the Member State where enforcement of the judgment is sought;
7. the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;
8. the term "holder of parental responsibility" shall mean any person having parental responsibility over a child;
9. the term "rights of custody" shall include rights and duties of the holder of parental responsibility who is entrusted with the care of the person of a child, and in particular the right to house the child in his or her primary residence in conformity with a judgment or by operation of law or by an agreement having legal effect under the law of the Member State where that residence is;
10. the term "rights of access" shall include in particular the right to take a child to a place other than his or her habitual primary residence for a limited period of time;
11. the term "illegal transfer of a child's residence" is the transfer of the primary residence of a child by the parent having a right of custody in breach of rights of another holder of parental responsibility.
12. the term "child abduction" shall mean the removal or retention of a child in a Member State other than the one of his or her primary residence in breach of rights of custody.

~~"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.~~

New article * [between art. 2 and 3 of Regulation 2201/2003]

Mediation and Cooperation between courts in cases of transfer of a child's residence from one to another Member State

1. Central Authorities of Member States shall see to the establishment of a network of experts and institutions that are in a position to provide

advice, to carry out conciliation or mediation, to represent individual children, and that are capable of acting expeditiously, when requested to prevent, organise or remedy the breach of parental rights in conformity with arts. 9, 10 and 11.¹

2. Where proceedings relating to child abduction or transfer of a child's residence between the same parties are brought before courts of different Member States, the courts shall cooperate with a view to ensuring the child such protection and care as is necessary for his or her well-being in conformity with art. 3 of the Convention on the Rights of the Child.

To this end, they shall, acting directly or through their respective Central Authorities, take all appropriate steps to:

(a) collect and exchange information:

(i) on the situation of the child;

(ii) on the reasons behind the will or the action of taking the child abroad;

(iii) on decisions taken concerning the child;

(b) facilitate agreement between holders of parental responsibility through Central Authorities, mediation or other means, and facilitate cross-border cooperation to this end.²

New article ** [between art. 9 and 10 of Regulation 2201/2003]

Lawful transfer of the child's residence

1. Where the holder of custody rights plans to move the primary residence shared by him or her with the child from one Member State to another and another holder of parental responsibility does not authorise the transfer of the child's residence, a request may be filed to the Central Authorities of the Member States affected by the move [that of the present residence and that of the planned new residence].

2. The Central Authorities requested shall appoint a committee of certified mediators belonging to both Member States within [2] weeks from the request [nb. authorities to be entrusted to certify and appoint].

3. The bi-national committee of certified mediators shall:

a) hear [all persons] involved in the dispute over the transfer of residence of the child;

b) request the parties to reach an amicable settlement as regards the residence of the child and the organisation of parental rights and duties thereof;

4. In case an amicable settlement is reached, it shall be immediately enforceable in both countries.

In case an amicable settlement is not reached within [six weeks] from its appointment, the bi-national committee of mediators issues a report on the case.

5. The party seeking the transfer of the child's residence may notify the report to the competent courts [that of the habitual residence or that of the planned new residence]. Paragraphs 8 and 10 of art. 11 shall apply.

¹ Inspired by art. 3 of the Swiss "Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults" of 21 December 2007, unofficial translation in English available at <http://www.admin.ch/ch/e/rs/2/211.222.32.en.pdf>

² From art. 55 of EU Regulation 2201/2003.

Article 10

Jurisdiction in cases of child abduction

In case of ~~wrongful removal or retention of the child~~ abduction, the courts of the Member State where the child was habitually resident immediately before the ~~wrongful removal or retention of the child~~ abduction 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.

Article 11

Procedure in cases of child abduction and illegal transfer of a child's primary residence

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 10 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.

In child abduction cases, 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.

In cases of illegal transfer of a child's primary residence, paragraphs 8 to 10 shall apply.

4. A court cannot refuse to return a child victim of child abduction 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~~ unless the removal is grounded on the right to self-defense.

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~~ abduction 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.~~

8. The court seised by the return request in conformity of paragraph 1 or by the transfer request in conformity of art. ** shall, except where exceptional circumstances make this impossible, issue an interim decision on the temporary residence of the child no later than [six weeks] after the application is lodged.

9. The interim decision shall be immediately notified to the court of the other Member State having jurisdiction according to par 5 of art. **. The court shall be requested to assume joint jurisdiction. Art. 15, par. 2 shall apply.

10. With the collaboration of Central Authorities, the courts seised of a return request shall entrust a bi-national committee of mediators. Paragraphs 2 to 5 of art. ** shall apply.

11. The courts shall issue a final decision on the return request or on the transfer request jointly within [three months] from the submission of the report by the bi-national committee of mediators, except where exceptional circumstances make this impossible.

The decision shall concern the respective rights and duties of the holders of parental responsibility with a view to ensuring the child such protection and care as is necessary for his or her well-being in conformity with art. 3 of the Convention on the Rights of the Child.

12. If the judges sitting in the two courts fail to take a joint decision, the case shall be decided by the General Court of the European Union within [four months].

1. GENERAL INTRODUCTION AND PRESENTATION OF THE METHODOLOGY

1.1. Background of the study

This study focuses on the impact on European Fundamental Freedoms of the rules concerning “cross-border parental child abduction” provided by EU Regulation 2201/2003 and the Hague Convention on Child Abduction. These rules take into account the 1980 European Convention on Custody of Children and the 1996 Hague Convention on Parental Responsibility.

The study takes into account the interaction of the rules on international cross-border child abduction with the 1989 UN Convention on the Rights of the Child and the European Convention on Human Rights (EConvHR).

The heterogeneous rules applicable to cases traditionally qualified as “child abduction cases” have been studied per se and in their implementation within the 17 countries of the European Union listed in the aforementioned service contract, namely Belgium, Czech Republic, Denmark, Germany, Ireland, Spain, France, Italy, Lithuania, Hungary, the Netherlands, Austria, Poland, Romania, Slovakia, Sweden and the United Kingdom (England and Wales, Scotland and Northern Ireland).³

The complexity of the legal framework has proved to be an obstacle to its consistent application by national courts.

This is one of the reasons possibly explaining the increasingly frequent intervention of the CJEU and the ECHR in cases of parental child abduction. As a consequence, both Courts have developed additional legal principles.⁴ Because of its heterogeneity, judicial practice,

³ The Member States are listed alphabetically using the spelling of their source language in conformity with the protocol order.

⁴ E multis: P.R. Beaumont, The jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction, in (2008) 335 *Collected courses of the Hague Academy of International Law*, at p. 51-71; P.R. Beaumont and P. E. McElevay, *The Hague Convention on International Child Abduction*, Oxford Monographs in Private International Law, 1999; A. Cannone, L'interesse del fanciullo nelle convenzioni internazionali dell'Aja, in *Divenire sociale e adeguamento del diritto. Studi in onore di Francesco Capotorti*, II, Milano, 1999, p. 549 ss.; R. Di Chio, La Convenzione dell'Aja sugli aspetti civili della sottrazione internazionale di minori nella giurisprudenza della Corte europea dei diritti dell'uomo, in G. Carella (ed.), *La Convenzione europea dei diritti dell'uomo e il diritto internazionale privato*, Torino, 2009, p. 91 et seq.; H. Fulchiron, D. Perben, (ed.), *Les enlèvements d'enfants à travers les frontières: actes du colloque organisé par le Centre de droit de la famille*, Lyon 20 et 21 novembre 2003, Bruxelles, Bruylant, 2004; E. Lamarque, I diritti dei figli, in M. Cartabia, *I diritti in azione, Universalità e pluralismo dei diritti fondamentali nelle Corti europee*, Bologna, 2007, p. 283 ss.; T. Lindhorst, J. L. Edleson, *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention*, Northeastern 2012; M. Marchegiani, *Rispetto della vita privata e familiare e sottrazione internazionale di minori nella giurisprudenza recente della Corte europea dei diritti dell'uomo*, in *Riv. dir. int. priv. proc.* 2011, p. 987 et seq.; L. Mazenauer, *Internationale Kindesentführungen und Rückführungen: eine Analyse im Lichte des Kindeswohls*, Zürich, Schulthess, 2012; Ph. Reymond, *Convention de La Haye et Convention de Strasbourg: Aspects comparatifs des conventions concernant l'enlèvement d'un enfant par l'un de ses parents*, in *Revue de droit suisse*, 100 (1981), p. 329-345; N. Rusca-Clerc, *L'enlèvement d'enfants: recherche de justice et d'humanisme*, in *Aus der Werkstatt des Rechts*, Basel, Helbing & Lichtenhahn, 2006, p. 65-75; M. Schaefer-Altiparmakian, *Aspects juridiques de l'enlèvement d'enfants par un parent: le conte de fées à rebrousse-poil: étude systématique du phénomène d'enlèvement d'enfants*, Thèse Fribourg, 1999; Rh. Schuz *The Hague Child Abduction Convention: A Critical Analysis*, Hart Publishing, 2013; F. Sturm, *Neue Abkommen zum Schutz entführter Kinder: Möglichkeiten und Grenzen der Europäischen und der Haager Konvention*, in *Beiträge zum internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit: Festschrift für Heinrich Nagel*, Münster, Aschendorff, 1987, p. 457-473; S. Vigers, *Mediating International Child Abduction Cases: The Hague Convention*, Hart Publishing, 2011.

at both the national and the supranational level, adds to the complexity of the legal treatment of “parental child abductions”.⁵

1.2. Purpose of the study

The present study aims to enable the European Parliament to properly address the phenomenon of parental child abduction and elaborate measures with a view to: preventing cross-border parental child abduction; improving the effectiveness of judicial remedies neutralising the abduction of a child; and promoting non judicial remedies such as mediation in order to avoid or decrease litigation in family crisis.

1.2.1. Three Relevant Risk Factors

The first risk factor is the “international element”. The Dyer Report refers to the existence of an “international family” and “significant cultural differences” between the former cohabitants.⁶ The international factor may explain the increase of “child abductions” as a direct consequence of the “freedom of movement of workers”. Therefore, child abduction may take place even in a typical “national family”, i.e. two parents living in the country of their common citizenship. If – before or after the disruption of the relationship between them – one of the two adults decides to accept a job offer abroad, the international element will come into play.

The second is the “judicial factor”. In this respect, it is useful to recall that EU Regulation 2201/2003 was adopted following an initiative of the French Republic based on the following assumptions:

“2) The European Council meeting in Tampere on 15 and 16 October 1999 highlighted the need to establish a genuine European judicial area in which, amongst other things, judgments relating to rights of access in the case of the children of separated or divorced couples would be directly enforceable in the Member States.

(3) In the event of the loosening or the dissolution of matrimonial ties, a child’s fundamental right to maintain regular contact with both parents must be able to be guaranteed, whatever the parents’ place of establishment in the Community.

(4) The proper functioning of the internal market entails the need to improve and simplify the free movement of judgments on the subject and the effective cross-border exercise of rights of access in the case of the children of couples whose divorce or legal separation has been granted in the Community.

(5) Children of separated couples will not be able to move more freely within the Union until judgments relating to them are able to move more freely, which will be brought about by mutual recognition of the enforceability of these judgments and a strengthening of cooperation mechanisms.

[...]

(13) The interests of the parent with custody must also be safeguarded. Such parents must be able to have a guarantee that the child will return after its stay abroad, which means, firstly, that apart from any urgent need to protect the child, the authorities of the Member State where the child is staying may not take jurisdiction during the child’s stay to amend the foreign judgment

⁵ The author is grateful to Professors Luigi Mari, University of Urbino “Carlo Bo” and Gian Paolo Romano, Université de Genève, to whom she owes precious comments and feedbacks.

⁶ See Dyer report, p. 20.

which is being enforced and secondly, that they should have circumscribed powers to order the child's return.

(14) The objectives of this Regulation also necessitate the establishment of close cooperation between the central bodies responsible for implementing mutual administrative and judicial assistance.

(15) To ensure compliance with the judgments referred to in this Regulation, the central bodies are to exchange information and use any means at their disposal under the internal law of their States to encourage voluntary exercise of rights of access or to guarantee enforcement of those rights by recourse to coercive means.

(16) The central bodies must be accessible to the parents concerned, whether they are claiming rights of access or are required to grant them."⁷

The preparatory documents of EU Regulation 2201/2003 link the phenomenon of child abduction to the international divorce and separation proceedings and decisions taken within a Member State's jurisdiction.

However, this link has subsequently disappeared. Recital n. 5 of Council Regulation n. 2201/2003 states that, "in order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding".

However, case law shows that transnational proceedings for divorce and separation constitute the highest risk factor.⁸

The third risk factor is the growing production of legal rules on the "right of the child to maintain regular contact with both parents".

In this respect, there is a trend consisting in recognising legal rights over the child not only to his/her parents, provided they have a qualified relationship with the child (typically grandparents⁹ or former partners having lived in the same household of a child).¹⁰

In light of this fact, it could be observed that there seem to be a shift in the application of the aforementioned principle, since it is being used to award a right to adults over the child.

The growing number of adults having the capacity to bring claims for keeping contacts with the child undoubtedly carries the side-effect of increasing litigation involving children.

1.2.2. The underlying gender issues

In order to identify the most appropriate measures to counteract the phenomenon of child abduction, it would be appropriate to also consider it in a socio-economic context.

In this respect, several statistical surveys have provided researchers with a list of the reasons which have induced parents to abduct their children.¹¹ Among these surveys, a

⁷ OJ No C 234 of 15.8.2000, p. 7 ff.

⁸ See R. E. Emery, *The truth about children and divorce: dealing with the emotions so you and your children can thrive*, 36 (2004), note 22, at 37; R. D. Enright & R. P. Fitzgibbons, *Helping Clients Forgive: An Empirical Guide for Resolving Anger and Restoring Hope* 212 (2000); M. Goodman et al., *Parent Psychoeducational Programs and Reducing the Negative Effects of Interparental Conflict Following Divorce*, 42 *FAM. CT. REV.* 263, 266-67 (2004).

⁹ See the new art. 317 bis of the Italian Civil Code, introduced in 2013, granting to grandparents the right to maintain significant contacts with their grandchildren through a new specific claim.

¹⁰ According to the Explanatory Report of the Convention on Contact concerning Children signed in Strasbourg, on 15 May 2003, p. 9: "Where there has been a certain period of family life together, persons who have lived in the same household as the child may belong to this group (e.g. former foster parents, a spouse or former spouse of a parent, a person who has cohabited with a parent)."

¹¹ The most important statistical survey is by far Nigel Lowe's 2008 Statistical Analysis.

large majority seeks to understand the phenomenon in light of the scientific findings on gender issues. However, the conclusions of these studies appear to either be deliberately underestimated in order to avoid taking sides, or, rather to the contrary, are overemphasized, thereby resulting in an ideological conflict between advocates of mothers' and fathers' rights.¹²

This is a direct consequence of a trend towards treatment of gender bias in the same manner as any other bias, for instance the skin-color bias: i.e. denying the relevance of those asserted qualitative differences at the origin of the discrimination.¹³

It is true that in the case of sexual orientation, skin-color and nationality biases, the eradication of discrimination commands the denial of any juridical relevance of the differences between the persons belonging to the favoured group and those belonging to the discriminated group.

However, this approach does not seem fruitful with regard to gender bias and it has been put forward that gender differences need to be, on the contrary, properly recognised and addressed in order to guarantee equal opportunities to men and women.¹⁴

In other words, the objectives of guaranteeing equal dignity and equal opportunities to men and women are best achieved through assessing the differences between them.

The specificity of the gender bias explains the reason why such bias may be detrimental to both genders.¹⁵ Therefore, instead of engaging in ideological "gender wars",¹⁶ gender discrimination affecting mothers and fathers needs to be simultaneously studied in order to understand and properly counteract the underlying discrimination dynamics that create favourable conditions for high-conflict divorces.¹⁷

The 2008 statistical survey¹⁸ has shown clear differences between - and trends among - "abducting mothers" and "abducting fathers" that deserve further inquiry.

In particular, abducting mothers represent a significantly large majority of the primary caregivers illegally transferring the residences of their children, whereas most abducting fathers are non-residential parents.¹⁹

These data are not surprising if read in concomitance with the motivations for abduction recurrently advocated respectively by mothers – namely, an extrema ratio to escape domestic violence – and by fathers – namely a measure of last resort in order to have the significant contact with their children otherwise actively impeded by mothers.²⁰

¹² For instance, R. Schuz, *The Hague Child Abduction Convention*, 2013, p. 58 holds that "the response to the challenges thrown up by [the] developments [of gender studies] has not been uniform and it is therefore not surprising that claims of discrimination have been voiced both by advocates of women's rights and by fathers' groups".

¹³ See Hill Kay H., *Models of Equality*, 1985 U. ILL. L. REV. 39. "In a just society, the assimilationist view holds that racial differences - primarily skin color - ultimately can be dismissed as irrelevant. The assimilationist view, however, must be modified in the case of sexual equality, for dismissing sex differences as irrelevant would not lead to a just society. Instead, a just society needs to recognize and accommodate sex differences in order to neutralize them as barriers to equal opportunity for personal achievement".

¹⁴ See Hill Kay H., *Models of Equality*, 1985 U. ILL. L. REV. 39, passim.

¹⁵ Lamont, R., *Mainstreaming gender into European family law? The case of international child abduction and Brussels II revised*, 2011 [11] *European Law Journal: Review of European Law in Context*, pp. 366-384.

¹⁶ Rhoades H., *Children's needs and Gender Wars: the Paradox of Parenting Law Reform* (2010) 24 *Australian Journal of Family Law* 160 ff.

¹⁷ Maldonado S., *Cultivating Forgiveness: Reducing Hostility and Conflict after Divorce*, *Wake Forest Law Review*, 2008, 441-504.

¹⁸ See Lowe's 2011 *Statistical Analysis*, Part I, p. 5 ff. spec. p. 15.

¹⁹ *Supra*, statistical survey, fig. 4.

²⁰ See also R. Schuz, *The Hague Child Abduction Convention*, 2013, p. 58-61.

The two main gender issues concerning mothers seem to be gendered domestic violence²¹ and gendered economic inequality.²²

The major claim for discrimination voiced by fathers concerns restrictions of their right/duty to participate actively in the successful upbringing of the child.²³

These data are relevant since an efficient, preventive, supranational strategy to counteract the phenomenon of child abduction needs to tackle the injustices created by the above-mentioned gender biases regarding mothers and fathers respectively.²⁴

1.3. Methodology

For the present study, different research methods have been used.

The framework designed by the service contract requested preliminary non-legal research consisting of the taking of a stock of statistical data presumably relevant in order to assess the importance and the substance of the phenomenon of child abduction; a legal analysis based - on one hand - on the presentation and interpretation of the legal framework in force at the international, European and National level and - on the other hand - on the existing international legal literature; and, finally, a presentation and interpretation of the practice at the national level.

1.3.1. Research and analysis of statistical data

The European Union, the Hague Convention and Members States collect and publish statistical data on a certain number of issues.

The factors taken into account for the purpose of elaborating statistics are, however, different.

²¹ M. Kaye, *The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four*, (1999) 13 *International Journal of Law, Policy and the Family* 191, 194; L. Silberman, "The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues", (2000) 33 *New York University Journal of International Law and Politics*, 221, 241; Shetty S. & J. L. Edleson, *Adult Domestic Violence in Cases of International Parental Child Abduction, Violence Against Women*, (2005) 11, 115 ff. Salter M., *Getting Hugged: The impact of international law on child abduction by protective mothers*. *Alternative Law Journal*, Vol. 39, No. 1, Mar 2014, online at <http://search.informit.com.au/documentSummary;dn=430878643980482;res=IELHSS>.

²² R. Schuz, *The Hague Child Abduction Convention*, 2013, p. 59 and note 47 stresses that the refusal of a permission to relocate abroad with the child "exacerbate the economic disadvantage invariably suffered by mothers as a result of structural socio-economic inequalities ... as a result of labour market discrimination against women and/or child rearing responsibilities which have impaired career development". See also *Preliminary Note on International Family Relocation*, p. 11, n. 28 ff.

²³ See D. L. Forman, *Fathers, Gender Conflict, and Family Law: A Multidisciplinary Perspective: Symposium on fathers and family law*, in 40 *Fam. L.Q.* 149. In the USA, the impact of the transfer of residence of the "residential parent" has received wide attention and has led authors to draw the following conclusions: 1. It has been deplored that the non-relocating parent's mobility is seldom taken into account in relocation applications whereas it is an essential factor to guarantee gender equality; 2. It has been argued that the mobility of any parent having parental responsibilities for the child - even the non-primary caregiver - should be restricted with the aim of guaranteeing access to his/her caregiver(s) by the child. See *Preliminary Note on International Family Relocation*, p. 11, n. 30. These conclusions are based on M.H. Weiner, "Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation", 40(5) *University of California Davis Law Review*, Vol. 40, 2006-2007, p. 1797; P. Parkinson "Family Law and the Indissolubility of Parenthood", *Family Law Quarterly*, Vol. 40, No 2, Summer 2006, p. 263; M. Freeman, "Relocation Research: Where are we now?", *International Family Law*, June 2011, p. 138.

²⁴ It would be interesting to analyse data relevant to the question of whether child abductions following upon disruption of cohabitation amongst same-sex couples confirms the existence of gender-specific "trends" in stated motivations for abductions and/or transfers of household abroad.

The European Union collects various demographic data as regards to European citizen. The Hague Convention collects specific data on child abduction, relying on information received by States parties to the Hague Convention on Child Abduction. Member States collect – with different methods and purposes – various demographic data in general and – for the purpose of implementing the Hague Convention data on child abduction.

Not all Member States publish the data on Child Abduction collected for the purposes of the Convention.

In light of the above, a first assessment of the data available at the international level refers to the interpretation of those data that the Hague Conference on Private International law publishes within the “Child Abduction Section” of its website.²⁵

Among these, Nigel Lowe’s 2011 Statistical Analysis represents the most important effort of assessing the reality of the phenomenon.²⁶

Secondly, the statistical data collected by the national reporters of each of the 17 Member States researched in the present study have been compared.

While most of statistical data are publicly available on-line for free, in some Member States data collected by the national statistical body are diffused upon specific request and subject to the payment of a fee (e.g. in Sweden).

1.3.2. Critical assessment of the legal framework in force at the International and the European level, as well as in each of the Member States researched

The legal analysis starts with the collation of the large number of applicable rules incorporated in the multiple international instruments applicable to child abduction cases.

Those rules have been organised and their interpretation co-ordinated, with the aim of identifying the regime in force and the possible weaknesses in its implementation.

A first issue that has appeared problematic is the lack of a legal definition of child abduction within the European legal framework and, in turn, the broadening – operated by case law - of the Hague Convention’s notion of child abduction.

At present, the definition of “child abduction” for the purpose of applying the Hague Convention and EU Regulation 2201/2003 lies in an interpretation of case law - both at the national²⁷ and international level (ECHR, CJEU).

In this respect, the research has sought to identify the different phenomena to which the international “child abduction” regime applies, in order to verify if different regimes could be conceived in order to specifically address each of those phenomena.

Secondly, the research seeks to identify the potential impairment of certain Human Rights as a consequence of the implementation of the legal framework in force. First, it addresses art. 8 EConvHR,²⁸ on whose grounds the ECHR has condemned Member States having applied the Hague Convention. Secondly, it suggests that implementation of the Convention

²⁵ http://www.hcch.net/index_en.php?act=text.display&tid=21.

²⁶ See also the statistics and their comments by Th. Kruger, *International Child Abduction: The Inadequacies of the Law*, Hart Publishing, 2011, K. Trimmings, *Child Abduction within the European Union*, Hart Publishing, 2013.

²⁷ E.g. *Abbott v. Abbott* 130 Supreme Court 1983, 176 L. Ed. 2d 789 is frequently relied upon for a definition of “child abduction” for the purposes of the Hague Convention.

²⁸ Art. 8 EConvHR: “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

may hypothetically interfere with arts. 3 (ex Article 2 TEU)²⁹ and art. Article 45 of the TFEU,³⁰ and with art. 2 EConvHR on the right to self-defence.

1.3.3. Comparative law research and comparative analysis of the practical operation of relevant non-judicial tools

The third part of the study consists of a comparative analysis of national reports.

In order to compare national laws and practices of the countries reported, a questionnaire has been distributed to national reporters, requesting enquires in three main areas.

First, reporters were asked to collect existing data concerning cross-border parental child abduction and international marriages and divorces.

Secondly, reporters were asked to illustrate the nature, structure and content of the legal framework authorising national authorities to deal with international parental child abduction.

Finally, the report had to examine the implementation of the existing legal instruments – using judicial and non-judicial tools – in order to identify the possible weak links in the chain and to offer suitable recommendations.

Accordingly, each national report provides a statistical assessment divided in two parts: the first part is the only one enabling a comparison because it has been created from international and European databases: Eurostat and Incastat. The second one, specific to each report, takes account of all public data provided by national governments and authorities.

In particular, the data refer to international marriages, international dissolutions of marriages involving children and to registered parental child abduction.

The statistical assessment aims to determine the chronological and geographical trends of the phenomenon and in particular the incidence of the risk of a child abduction after the interruption of cohabitation of parents having different nationalities.

Meaningful trends have proved not easy to establish, given that “litigation over a child” may arise in various situations and not necessarily as a direct consequence of the interruption of cohabitation, nor in connection with the different nationalities of the parents.

The second part of each report describes the relevant national legal framework. This includes rules and principles of public international law, private international law of international, European or national origin, civil law (family law) of international, European or national origin and criminal law. The judicial practice, both at the national level and the level of the European Court of Human Rights and the Court of Justice, is also described in this part.

The effectiveness of judicial and non-judicial tools and existing critical literature in parallel with the analysis of practices at the national level form a third part.

²⁹ Art. 3, TEU: “1. The Union’s aim is to promote peace, its values and the well-being of its peoples. 2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime” (Consolidated version 2012).

³⁰ Art. 45, TFEU: “Freedom of movement for workers shall be secured within the Union. Such freedom of movement shall entail [...] the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission” (Consolidated version 2012).

Aside from the aforementioned guiding lines, reporters have been able to freely structure their respective country reports, with the aim of providing the general reporter with a specific and original reconstruction of the phenomenon of "child abduction" in each national legal order.

A comparison of national experiences has highlighted recurrent cases which may be characterised as typical – at present, regrettably reduced to "child abduction cases".

Also, the improvements introduced by EU Regulation 2201/2003 are verified, together with the decisions of the CJEU clarifying its mechanisms and with the judgments of the ECHR having led to condemnation of Member States for violations of art. 8 EConvHR.

2. GLOBAL STATISTICAL ASSESSMENT

KEY FINDINGS

- Despite some statistical information having been compiled at the international level (EUROSTAT on conclusion and dissolution of international marriages; INCASTAT on different aspects of the implementation of the Hague Convention) and especially at the national level, it is not easy to derive meaningful trends from the aggregation of the available statistical data. This is to some extent due to the fact that “litigation over a child” may arise in various situations and not necessarily as a direct consequence of an interruption of cohabitation, nor in connection with the different nationalities of the parents, or their residence in different countries.
- In spite of the limitations of the available data and considerable variations between States, there are indications that, while the number of international marriages was relatively stable overall, the number of international separations and the number of child abductions (or return requests) grew in the period between 2000 and 2007/2008, and continues to increase today.

2.1. Presentation and description of available data

Eurostat provides statistics concerning international marriages and divorces for the years 2000-2007, as well as additional limited data for year 2012. This is complemented by statistics we have obtained from a number of national authorities in respect of more recent years. Unfortunately, the data made available by EU countries is not always comparable with data delivered by other EU countries or with the data collected by Eurostat. In particular, the collection of statistics, the relevant data and the periods covered vary from country to country and do not easily permit comprehensive comparisons.

To the best of our knowledge, there exists neither statistical data, nor a comprehensive European study on the involvement of children in international separations / divorces.³¹

As to data on child abductions, “INCASTAT”, a database created by the Hague Conference on Private International Law for monitoring the implementation of the Hague Convention, centrally collects the relevant data. INCASTAT collects information through questionnaires distributed to National Central Authorities of the States Parties. The statistics which have been collected³² to date do not go beyond 2008, although some data has been obtained from a number of countries in respect of more recent years.

Based on this limited information, the following assessment will present the available information on marriage and divorces (refer below, to section 2.2) as well as on child abductions (section 2.3).

³¹ See Institut suisse de droit comparé (ISDC), The parental responsibility, child custody and visitation rights in cross-border separations, 2010, EP study 425.615, freely available online at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/425615/IPOL-PETI_ET\(2010\)425615_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/425615/IPOL-PETI_ET(2010)425615_EN.pdf) (11.02.2014).

³² Philippe Lortie, First Secretary of the Hague Conference responsible for statistics under the Hague Convention, confirmed (on 30.12.2013) that the most recent statistics available are those collected for the year 2008 by Professor Nigel Lowe of Cardiff University and the Permanent Bureau (Secretariat of the Hague Conference) and published in the Child Abduction Section of the Hague Conference Website: http://www.hcch.net/index_en.php?act=text_display&tid=21

2.2. Data on marriages and divorces of international couples³³

In accordance with the terms of reference for this Study, available data on international marriages celebrated every year in Europe as well as statistics on international separations/divorces each year is presented and examined below.

While it is recognised that statistics on international unions and their dissolution are relevant to the patterns in the incidence of cross-border parental child abduction, their importance as an explanatory factor must be treated with caution. As will be seen below, only in around 60% of cases of cross border parental child abduction is the “taking” parent destined for their country of citizenship. It cannot therefore be assumed that the prevalence of international child abductions can be attributed to patterns in the numbers of marriages and divorces of such “international” couples alone. Other potential factors are considered below in the examination of child abduction data.

The concept of an “international marriage” (and, in turn, the dissolution of such a marriage), for our purposes, includes both a marriage between a national of, and a foreigner (or “foreign citizen” – i.e., not necessarily foreign-born) in, a particular country (often known as a “mixed marriage/divorce”) and a marriage between two foreigners in a particular country (referred to as a foreign “foreign marriage/divorce”). By contrast, a “national marriage” is one involving two individuals of the nationality of the country in which the marriage takes place. If it is to be assumed that the risk of cross border child abduction is higher where the child’s parents are a national and a foreigner of the state in the country where the child has been born and raised, the same assumption must apply to parents who are both foreigners in the country of residence.

Even taking into account these types of partnerships, the resulting statistics are of limited value in assessing their impact on cases of cross-border parental child abduction: of the countries studied, none appear to record reliable data on the numbers of dissolutions of such international marriages which involve children,³⁴ and statistics collected clearly do not include unmarried partnerships, many of which will involve children as part of the family unit.³⁵

Statistics relied on for illustrating international marriages and divorces across European States are based on Eurostat research for the years 2000 to 2007. After this period, no consistent centrally-collected data is available, apart from that pertaining to a limited

³³ Statistics for 2000-2007 based on data kindly shared by Mr. Giampaolo Lanzieri of Eurostat. See also “Merging populations: a look at marriages with foreign-born persons in European countries”, Eurostat Statistics in Focus, 29/2012, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-12-029/EN/KS-SF-12-029-EN.PDF.

³⁴ Two countries do however record some data in this regard: France’s National Institute of Statistics and Economic Studies (“Insee”) does record statistics on the number of annual births to parents of mixed and foreign nationality, as well as according to the birth place of parents (see France national report); and Sweden’s Population and Welfare Department provided us with numbers of children involved in dissolved international marriages (see Sweden national report).

³⁵ Indeed, as pointed out by Giampaolo Lanzieri of Eurostat in his paper “A comparison of recent trends of international marriages and divorces in European countries” (Eurostat, August 2011), p. 4., data relied on by Eurostat is based on international definitions of marriage and divorce, and does not include forms of union that are not formally established in accordance with local laws. They do not include cohabitations or any de facto relationship, while data on registered partnerships for both same-sex and opposite-sex couples (as well as corresponding dissolutions) are not included. Statistics on marriages and divorces according to citizenship may further be skewed given that they include events occurring in the country, regardless of the usual residence of the spouses within the same country. Lanzieri further points out that citizenship is not a permanent characteristic of a person and that the practices of countries in relation to the acquisition of citizenship are varying, with the result that mixed marriages/divorces may actually be referring to persons of which one had previously acquired the national citizenship by naturalisation, or national marriages/divorces may refer to couples both originally of foreign citizenship and later naturalised.

number of European countries for the year 2012, available on the Eurostat database.³⁶ Statistics authorities in many of the countries examined collect data on mixed unions on an annual basis, but the type of information recorded varies significantly, and for the most part, does not lend itself to a like-for-like comparison.

Member States such as the UK, for example, simply do not collect data on marriages and divorces; Germany only reports on "international marriages" which include one German national, rather than two foreigners. Also, most countries treat foreigners not as those who are "foreign born" but as those who are non-citizens. Given that the practices of countries for the acquisition of citizenship vary and that people may change their citizenship as well as having one or more nationalities, countries whose data is based on citizenship for defining mixed marriages, for example, may include individuals who have acquired nationality by naturalisation.

Despite these discrepancies and gaps in the data relied on, reference is nevertheless made to the statistics, where available, produced in individual countries, in order to identify particular – and potentially illustrative – patterns in the data, on a State-by-State basis.

The number of international marriages (and divorces) varies widely from country to country and naturally corresponds to the size of the population of a given State. For this reason, data on the mere quantity of international unions and divorces is of limited value for a meaningful, comparative analysis. The number of marriages (and divorces) between couples of different nationalities as a proportion of total marriages in a particular country can, however, provide a useful common index for comparing countries.

Table 1 shows the number of international marriages in each EU Member State at the time, expressed as a percentage of the total number of marriages for each year over the period 2000 to 2007. More recent data for 2012 is also included, where available. It illustrates how, at one extreme, in some (usually smaller) European Member States such as Luxembourg, up to two-thirds of all marriages are between spouses of different nationalities. In other countries, such as Hungary and Romania, such marriages constitute well below 10% of the total number of marriages celebrated each year. The large majority of countries report that international marriages annually represent between five and 20% of all marriages.

For most countries, the number of international marriages as a proportion of total marriages remains fairly steady, with no particular pattern showing consistent growth or decline over the period examined. Exceptions to this are (i) Italy, which saw a steady increase in the number of international marriages, doubling as a proportion of total marriages during the 2000-2007 period and continuing to grow as recently as 2012, (ii) Sweden, where the proportion of international marriages grew by nearly 5% between 2000 and 2007 (although such unions had apparently dropped dramatically by 2012 to levels last seen before 2000) and (iii) Portugal, which experienced the most rapid year-on-year increases in international marriages as a proportion of all marriages, from 2.9% in 2000 to 14.4% in 2007. According to latest available figures, international marriages rose just as fast in the five intervening years, representing, by 2012, more than a quarter of all marriages taking place in Portugal.

The most recent data collected on a common basis – in 2012 – tends not to reveal any particular consistent patterns when compared to 2000-2007. Some countries, like Austria, Belgium, Bulgaria, Germany, Denmark, Estonia, France, Hungary and Sweden, show broadly decreasing numbers of international marriages as a proportion of all marriages; in some cases, such as Estonia, Denmark (compared to levels at the start of the period) and Sweden, the drop is significant. In other countries, the percentage of

³⁶ Eurostat, Population (Demography, Migration and Projections), Marriages and divorces data, Database, available at <http://ec.europa.eu/eurostat/web/population-demography-migration-projections/marriages-and-divorces-data/database>.

international marriages has increased fairly consistently, such as in **Finland, Italy, Poland** and **Portugal**, while others, like **Latvia** and the **Netherlands**, show apparent huge increases between 2007 and 2012.

Table 1: International marriages as a percentage of all marriages in each EU Member State³⁷ (2000-2007 and 2012)

Country	2000	2001	2002	2003	2004	2005	2006	2007	2012*
AT	20.4	25.1	28.1	30.9	32.2	30.4	25	23	23.1
BE	19.6	20.6	22.5	23.4	24.6	23.8	23.6	n/a	17.2
BG	10.6	10.4	10.3	12.2	13.8	13.1	12.2	8.1	7.1
CZ	9.6	8.4	8.7	9.6	9.8	8.8	8.6	8.7	9.5
CY	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
DE	17.5	18.5	18.8	18.5	16.5	15.2	14.5	13.8	13.5
DK	18.4	20.6	19.1	15.2	14.7	15.5	16.5	15.7	11.7
EE	36.8	39.8	33	26.8	36.7	38.6	37.2	35.4	15.2
ES	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	17.5
FI	6.8	7.2	6.7	6.7	7.4	7.7	8.1	8.3	9.8
FX**	13.8	16.3	18.8	20.1	18.8	18.4	17.4	16.4	16.6
FR***	13.7	16.3	18.6	19.9	18.6	18.3	17.4	16.4	n/a
GR	n/a	n/a	n/a	n/a	12.7	12.1	13.5	12.1	16.7
HU	4.7	5.1	4.8	5.2	5.8	5.4	5.3	4.5	3.0
IE	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
IT	7	8.1	9.5	10.5	12.3	13.3	14	n/a	14.8
LT	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	14.3
LU	53.1	55.5	57.1	60	58.5	56.7	58.3	57.5	58.0
LV	7.3	6.8	6.6	6.9	6.6	6	6	5.9	23.2
MT	20.9	22.7	27.3	34.6	32	32.7	36	35.5	n/a
NL	17.5	18.9	19.5	18.9	20	18.5	16.8	14.7	30.2
PL	n/a	n/a	n/a	n/a	n/a	n/a	1.6	1.6	1.9
PT	2.9	3.6	5.4	7.4	8	8.9	11.9	14.4	27.4
RO	2.3	3	2.5	3.2	6.4	7.2	5.6	2.9	4.2
SK	n/a	n/a	n/a	n/a	11.8	14.8	14	13.3	13.7
SI	n/a	n/a	n/a	n/a	n/a	n/a	n/a	14.8	20.6
SE	16.9	18.6	18.9	19.5	19.5	18.8	20	20.6	12.2
UK (****)	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

* 2012 figures are derived from Eurostat's database, but where unavailable, come from national statistical authorities, where provided. Figures in italics denote cases where such data may have been collected on a different basis to that used by Eurostat. See individual country reports for more detail.

** France (metropolitan)

*** France (metropolitan + over-seas departments)

**** (includes England & Wales, Scotland and Northern Ireland)

³⁷ Including both marriages between a national of and a foreigner in a particular country and marriages between two foreigners in a particular country.

One particular pattern to emerge from a simple accumulation and averaging of the percentages in those 16 states for which full data is available³⁸ is that, from 2000 to 2003-2004, EU countries witnessed an overall steady increase in the proportion of international marriages compared to total marriages. After this point, the number of international marriages as a percentage of all marriages consistently declined. This is illustrated by the bar chart featured in Figure 1, which relies on statistics from those 16 countries which were able to provide a full set of data for the 2000-2007 period (including newly acceding EU Member States).³⁹ The line chart shows the percentages produced by an accumulation and averaging of actual numbers of marriages in the EU states featured. This is less sensitive to the large proportions of international marriages seen in some smaller countries and gives a more accurate picture of the situation across the EU as a whole.

Referring back to Table 1, it can be seen that this broad pattern, whereby the proportion of international marriages in 2004 was greater than that recorded for both the years 2000 and 2007, was reflected in Austria, Belgium, Bulgaria, the Czech Republic, France, Hungary, Luxembourg, the Netherlands and Romania: in other words, almost half of the Member States for which full data was provided.

Data aggregated in this way does not permit an in-depth analysis of the reasons for cross-border patterns over time of the proportion of international marriages and divorces.⁴⁰ Nevertheless, the presence of foreigners and the variety of migration patterns experienced by different European countries is bound to have an influence on the incidence of mixed marriages. Following the accession of 10 countries to the EU in 2004, it might be expected that increasing migration between Member states would bring with it a higher rate of international marriages across the EU, including marriages between two foreigners and between foreigners and nationals of the destination state. The data on marriages does not indicate that this is necessarily the case, with international marriages as a proportion of all marriages across the EU, broadly declining overall in the period from 2004 to 2007, as illustrated in Figure 1.

However, other research undertaken on behalf of Eurostat shows that there is, nevertheless, a high correlation between the average quota of foreigners in European countries between 2004 to 2009 and the proportion of international marriages taking place between 2007 and 2009.⁴¹ When Cyprus is removed from the equation (owing to the high quota of marriages celebrated there by non-residents), the presence of foreigners compared to international marriages across the European states for which data was available reveals a correlation of almost 77%.

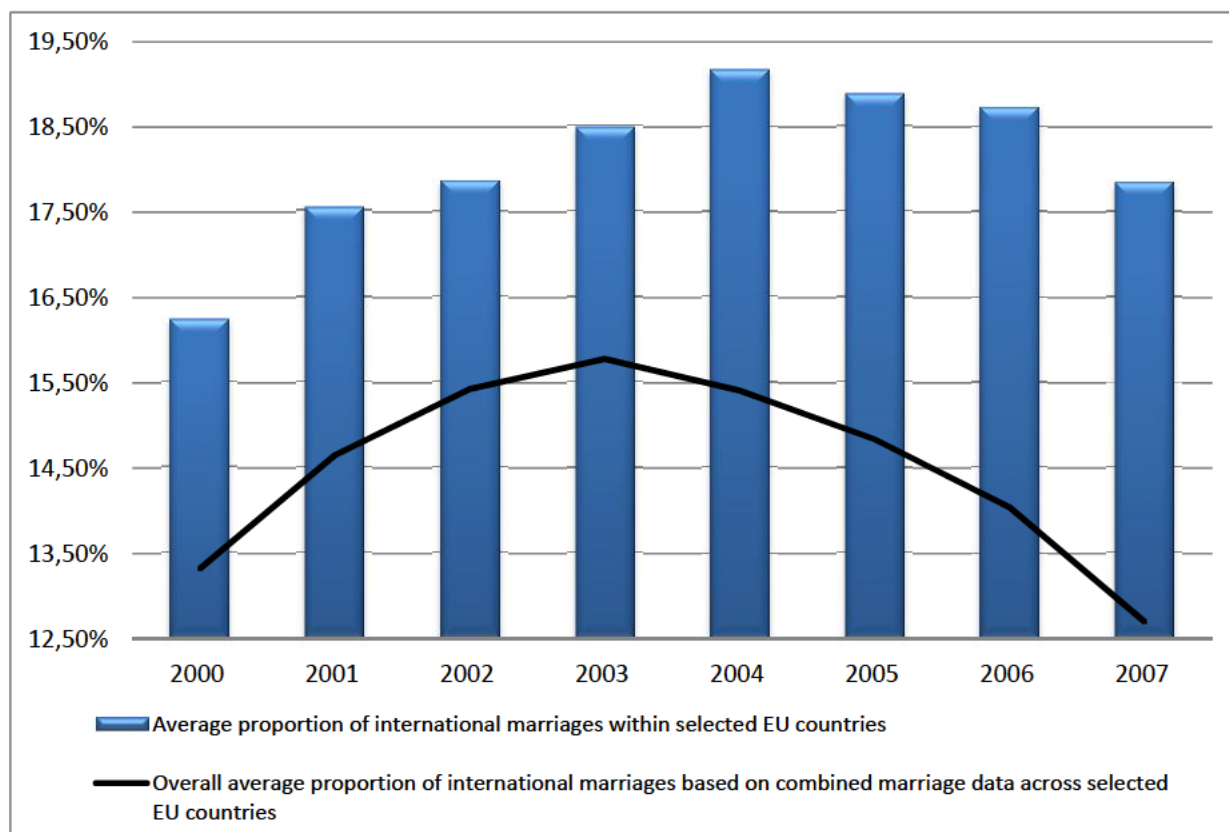
³⁸ France Metropolitan and over-seas excluded. Although such an accumulation of the percentages (for international marriages, and international divorces – see Fig. 2 below) is based on the artificial assumption that each Member State is of equal statistical value, this exercise is simply designed to illustrate the pattern in the average proportion of international marriages in a Member State over the period concerned; the actual proportions shown do not purport to illustrate the overall EU picture. A similar exercise using the raw data on marriages across this sample of EU states is illustrated by the line plotted in Fig.1, revealing a similar overall trend.

³⁹ 2012 data are not illustrated since some countries with full data for 2000-2007 did not produce statistics for 2012. Where such countries are included by applying the hypothetical assumption that the proportion for 2012 is identical to that reported for 2007, the average overall percentage is approximately 16.6% (i.e., a small increase on 2007).

⁴⁰ According to G. Lanzieri in his paper, A comparison of recent trends of international marriages and divorces in European countries, op. cit., p. 33.

⁴¹ Ibid, p. 33.

Figure 1: Average percentage of international marriages as a proportion of all annual marriages across selected EU Member States⁴² (2000-2007)



Data in respect of divorcing international couples (“international divorces”), based on divorces of a national from a foreigner in an EU Member State and of two foreigners in the Member State, similarly vary from country to country. Again, the **number of international divorces in a country, expressed as a proportion of total divorces**, offers a more useful index for identifying trends.

The picture is mixed, but it appears that, in the majority of countries for which at least some data is available, the **proportion of international divorces has grown**. This was the case in **11 of the 15 countries for which at least two years of statistics were provided**, when comparing the proportion in the latest year for which data was recorded with the first year in which statistics were available. Some countries are worthy of particular mention. In **Austria**, for example, the proportion of international divorces almost doubled over the seven-year period covered by the statistics. Figures since obtained for the period 2008 to 2012 indicate that international divorces they continue to consistently represent around a quarter of all divorces. **Italy**, which experienced year on year growth in the rate of international marriages between 2000 and 2007, witnessed a corresponding increase in international divorces. Latest data obtained from the national authority for the period 2008 to 2012 shows that this consistent rise in international divorces is continuing. The figures for newer Member States, such as **Hungary** and **Estonia** and **Romania**, revealed no particular significant changes up to 2007, but Estonia had experienced a dramatic fall in the proportion of international divorces by 2012. The

⁴² Percentages are based only on the 16 EU Member States for which data was available during the 2000-2007 period. Certain countries produced no data, or data only for particular years. The bar chart represents a simple accumulation and averaging of the percentages for these Member States; the line chart represents the percentages produced by the actual numbers of marriages when accumulated and averaged.

only State not showing any consistent increase in the proportion of international divorces was **Denmark**, where international divorces fell from more than one fifth of all divorces in 2000, to 12.9% by 2012. Latest figures from the relevant statistical authority for 2013, however, show that the proportion has more or less returned to earlier levels, now standing at 19.7%.

Overall however, the **data provided by relevant authorities on international divorces since 2007 is extremely limited**, and in many cases, was simply not made available. Accordingly, no meaningful assessment can be made of the patterns in international divorce in recent years.

Table 2: Divorces of couples in international marriages as a percentage of all divorces in each EU Member State (2001-2007 and 2012)

Country	2000	2001	2002	2003	2004	2005	2006	2007	2012*
AT	13.3	13.7	12.5	14	16.5	20.4	23	24.9	25.3
BE	12.9	14	14.5	15.2	15.8	16.4	17.4	n/a	17.4
BG	3.2	3.3	3.8	3.5	3.6	5.4	7.3	4.2	5.6
CZ	3.4	3.3	3.8	4.2	4.6	5.3	6	6.9	7.2
CY	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
DE	14.6	15.5	16.1	16.4	17.3	17.6	18.7	18.2	15.7
DK	21.3	20.3	20.4	18.7	19.8	19.9	18.5	16.6	12.9
EE	38.2	38.5	32.9	27.5	36.5	34.2	33.2	34.4	13.8
ES	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	15.7
FI	8.7	9.7	9.3	11.1	10.9	10.7	10.9	10.6	11.5
FX**	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
FR***	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
GR	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
HU	1.6	1.4	1.6	1.5	1.7	1.6	1.8	2	2.3
IE	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
IT	2	2.1	2	2.3	2.4	2.5	2.4	n/a	8.9
LT	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	7.7
LU	41.7	40.5	42.3	43.4	46.3	45.2	47.2	48.1	n/a
LV	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
MT	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
NL	16.4	15.9	16.9	17.7	18.2	18.5	18	17.9	n/a
PL	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	0.5
PT	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
RO	0.6	0.6	0.6	0.8	0.9	1	1	1.1	1.5
SK	n/a	n/a	n/a	n/a	1.6	1.7	1.6	2.1	2.7
SI	n/a	n/a	n/a	n/a	n/a	n/a	n/a	10.3	14.6
SE	22.3	21.9	22.1	22.4	23.7	24.9	26.7	27.3	21.6
UK (****)	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

* 2012 figures are derived from Eurostat's database, but where unavailable, come from national statistical authorities, where provided. Figures in italics denote cases where such data may have been collected on a different basis to that used by Eurostat. See individual country reports for more detail.

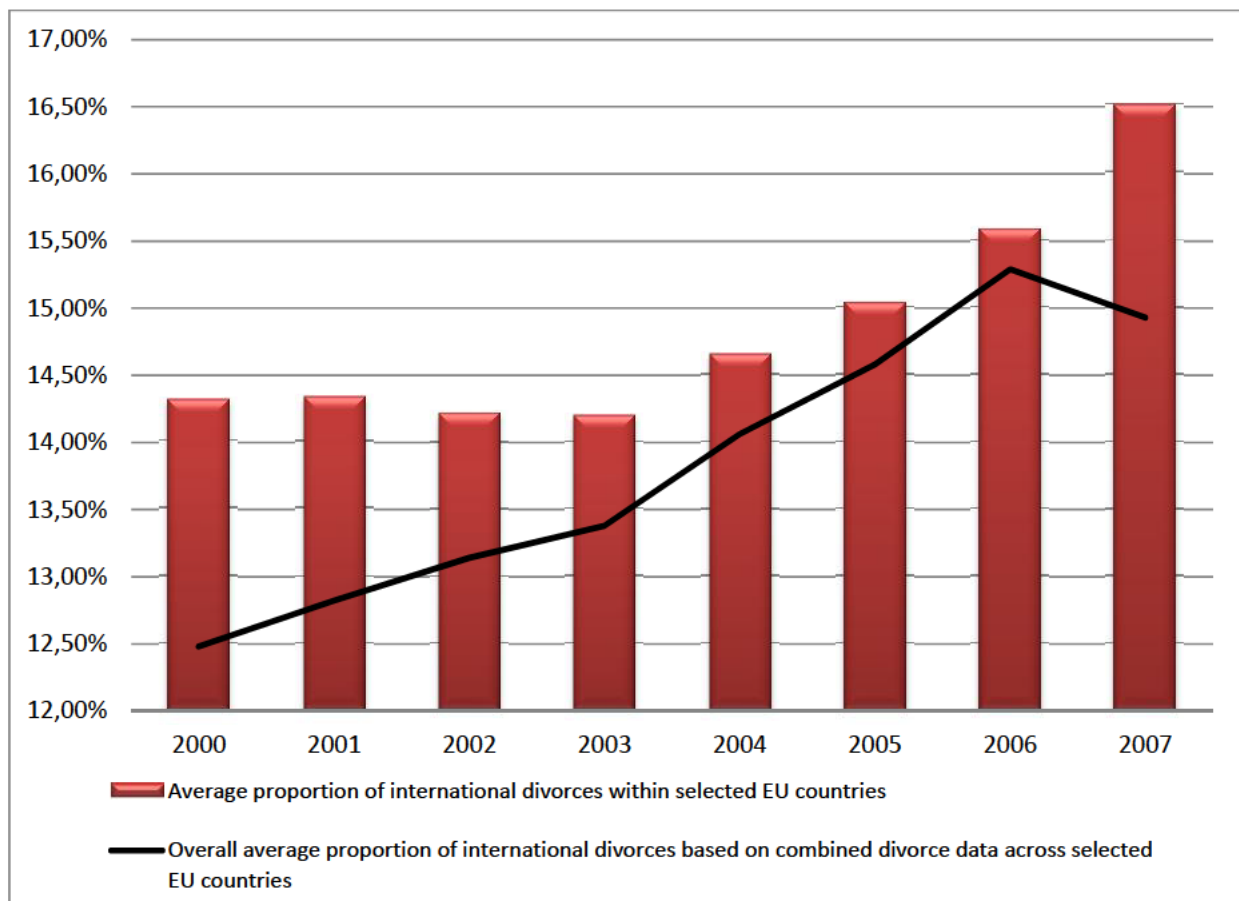
** France (metropolitan)

*** France (metropolitan + over-seas departments)

**** (Includes England & Wales, Scotland and Northern Ireland)

The bar chart in **Figure 2**, which is based on a simple accumulation and averaging of the percentages from those 12 countries for which full data was available,⁴³ clearly shows that the average number of divorces of international couples, as a proportion of all divorces, has, on a country-by-country basis, grown year on year since 2003. In fact, in accumulating and averaging the actual numbers of divorces and international divorces across this particular sample of countries (as shown by the line graph), it is revealed that the overall average proportion of international divorces has been consistently rising since 2000, and perhaps even earlier. Although this percentage reduced in 2007, the accumulated numbers indicate that this is principally due to small drop in international divorces across these particular States and a corresponding increase in total divorces. Although data for 2012 relying on different countries cannot provide a like-for-like comparison, the broad indication is that the 2007 level of international divorces as a proportion of all divorces is maintained, and has neither dropped nor grown significantly.

Figure 2: Overall divorces of international couples as a proportion of all divorces across EU states (2000-2007)⁴⁴



⁴³ Note that the bar chart in Fig. 2 is based on the same artificial assumption as made in Fig.1, and furthermore contains a line graph indicating the percentages based on an accumulation and averaging of the raw data in the 12 countries concerned. 2012 data is also not relied on due to the absence of statistics from some of the countries concerned for that year.

⁴⁴ Percentages are based only on the 12 EU Member States for which data was available during the 2000-2007 period. Certain countries produced no data, or data only for particular years. The bar chart represents a simple accumulation and averaging of the percentages for these Member States; the line chart represents the percentages produced by the actual numbers of marriages when accumulated and averaged.

Insofar as the involvement of children in international divorces is concerned, there is, as mentioned above, no evidence, save for Sweden, that such data is recorded by the statistical authorities of the countries studied. Data provided by Statistics Sweden does not reveal the number of divorces of international couples involving children, but does show the number of children involved in such divorces. Between 2008 and 2012, this had grown from 5531 to 6421.

Clearly, the numbers and rate of international divorces will, like international marriages, depend to a great extent on the presence of foreigners in the countries concerned. Eurostat research looking at the period 2006-7 shows that, taken as a percentage of nationals and of foreigners respectively, it is foreigners who have considerably higher rates of marriage than nationals, with rates for divorce even greater still.⁴⁵

It can therefore be said that, broadly, the rates of marital dissolution in marriages involving at least one foreigner are higher than those for marriages involving only nationals. Findings show that of the European countries examined, only in Germany, Greece, Latvia and Spain were the rates of marrying nationals on comparable levels to those for foreigners.

The reasons for this trend are various and will of course depend on the country in question. Certainly, the extent to which marriages take place between nationals and foreigners or between nationals and between foreigners is partly due to the level of integration and/or assimilation in the host country. This factor naturally also has a role to play in the propensity of dissolutions of international marriages, in particular those between nationals and foreigners. Other factors may include any number of challenges which go hand in hand with a union involving individuals of contrasting ethnicities from different cultures, and backgrounds. A sociological analysis of this phenomenon is however, beyond the scope of this study.⁴⁶

2.3. Child Abduction Data

2.3.1. Statistics submitted to surveys conducted on behalf of Hague Conference on Private International Law 1999-2008

The principal data which is available for illustrating the number of international parental child abductions taking place across the EU, is that setting out the number of requests received by Central Authorities of EU Member States for the return of a child or children. This is shown in Table 3.

These statistics, collected in 1999, 2003 and 2008, were compiled on behalf of the Hague Conference on Private International Law as part of targeted surveys to the countries concerned. They represent the most recent data available for enabling a comparative assessment of the countries concerned in this study, but are, nevertheless, limited in statistical value.⁴⁷ Statistics beyond 2008 have been obtained by us, where available,

⁴⁵ G. Lanzieri in his paper, *A comparison of recent trends of international marriages and divorces in European countries*, op. cit., p. 34.

⁴⁶ More in-depth analysis of the data using statistical models can be found in the publication of G. Lanzieri, *A comparison of recent trends of international marriages and divorces in European countries*, ibid.

⁴⁷ As stated in Lowe's 2011 Statistical Analysis: "Figures only relate to applications under the Hague Convention routed through Central Authorities and not to child abduction overall. In particular they do not include abductions within State boundaries; and they do not include all abductions even as between Contracting States to the Hague Convention. For example, some applications may have been made under the European Convention (Luxembourg) on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children 1980, or under various bilateral or multi-lateral agreements, such as the Inter-American Convention on the International Return of Children, or made under the Hague Convention but directly to the national courts concerned and not through the Central Authorities." (Lowe's 2011 Statistical Analysis, Preliminary Document No. 8A, Para. 29.3, pp.8-9).

from the relevant Central Authorities of the countries examined, and these are referred to below, in this section, for the purpose of determining more recent patterns in child abduction. However, a number of countries simply do not periodically report on return applications under the Hague Convention, and where they do, the basis on which this information is collected by respective Central Authorities varies from country to country. The results do not necessarily correspond to the basis on which data was obtained for Lowe's 2011 Statistical Analysis (and corresponding earlier studies), and must therefore be treated with caution.

Statistics on requests received in 1999 were not available for seven of what are now the EU Member States, but full statistics have been produced for the years 2003 and 2008. In 18 out of 26 EU Member States (including the UK, treated as three separate Member States for this purpose), the number of requests received in one of those years had either grown or remained the same compared to the previous year. This can be seen more clearly in Figure 3. In only eight "Member States" did the number of return requests drop during the study period, but five of these (England and Wales, Romania, Ireland, Northern Ireland and Scotland) experienced a subsequent increase in requests received in 2008, often well beyond the number received nine years earlier.

In the period for which full statistics are available, between 2003 and 2008, the number of return requests received by EU Member States rose by 56% overall. In many cases, the level of increase in return requests received over this period is significant, even for countries which already received a relatively large number of return requests at the beginning of the period. In Germany and France, requests increased by 44% and 81% respectively. In many of the newer EU Member States, particularly those of Central and Eastern Europe, the increase was even more considerable. The Polish Central Authority reported a 372% increase in requests, Bulgaria moved from no requests in 2003 to 21 in 2008 and Romania, which acceded to the EU in 2007, had more than seven times more return requests in 2008 than it recorded in 2003.

The United Kingdom consistently received significantly more return requests than any other EU Member State. Even on a global comparison, England and Wales lies second, behind only the United States, in terms of the number of return applications received.⁴⁸ Almost all other large or medium-sized EU Member States experienced an overall increase in return requests across the entire period studied.

⁴⁸ Lowe's 2011 Statistical Analysis, Preliminary Doc. 8A, para. 34, p.10.

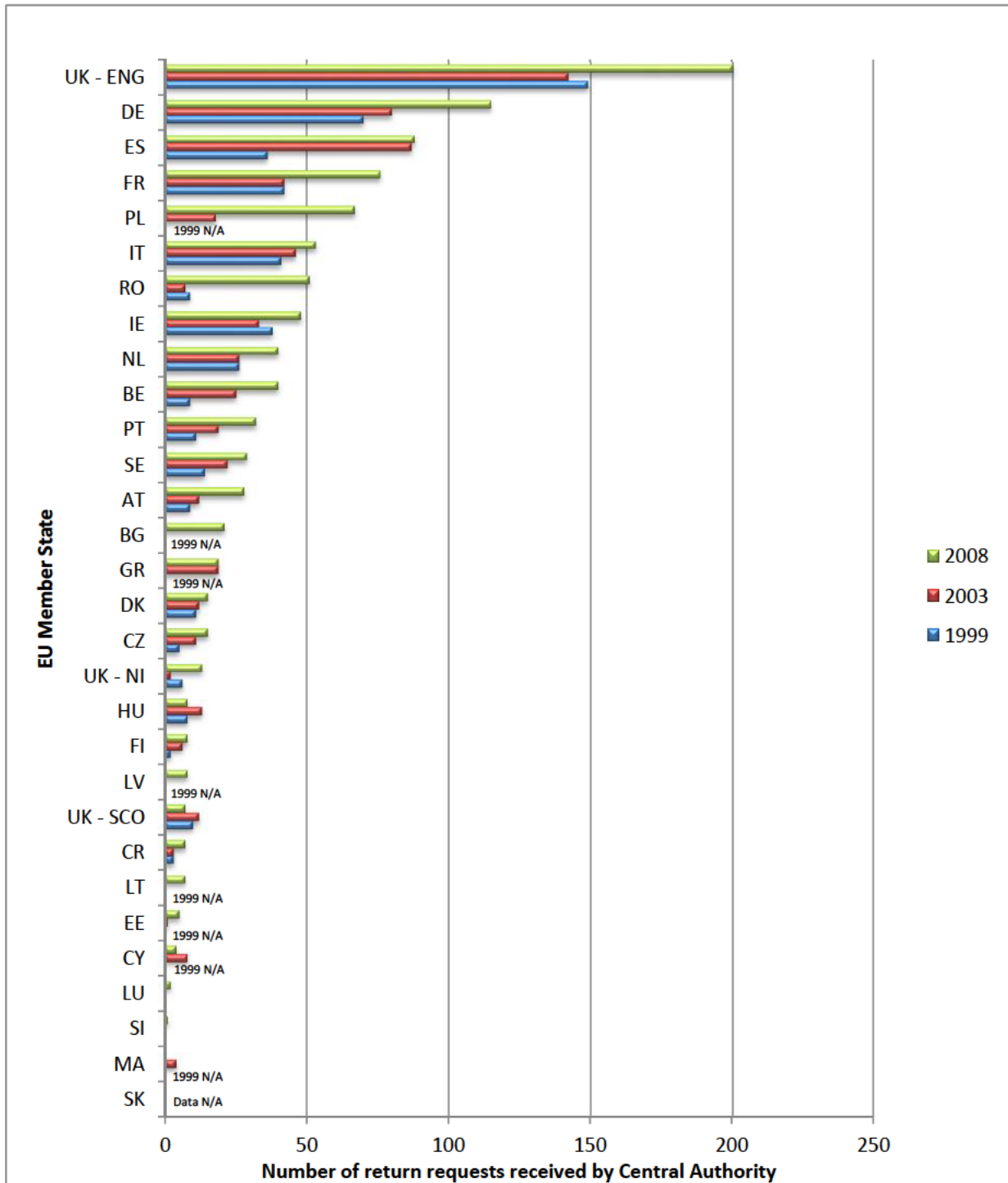
Table 3: Return applications received and made by Central Authorities of EU Member States⁴⁹ in 1999, 2003 and 2008

Country	1999		2003		2008	
	Requests received	Requests made ⁵⁰	Requests received	Requests made	Requests received	Requests made
UK – Eng. & Wales	149	n/a	142	124	200	158
Germany	70	n/a	80	109	115	146
Spain	36	n/a	87	34	88	92
France	42	n/a	42	58	76	68
Poland	n/a	n/a	18	16	67	74
Italy	41	n/a	46	53	53	127
Romania	9	n/a	7	3	51	16
Ireland	38	n/a	33	26	48	50
Belgium	9	n/a	25	30	40	50
Netherlands	26	n/a	26	45	40	50
Portugal	11	n/a	19	17	32	27
Sweden	14	n/a	22	32	29	24
Austria	9	n/a	12	11	28	15
Bulgaria	n/a	n/a	0	0	21	12
Greece	n/a	n/a	19	18	19	16
Denmark	11	n/a	12	8	15	19
Czech Republic	5	n/a	11	7	15	15
UK - N.I.	6	n/a	2	6	13	10
Hungary	8	n/a	13	12	8	16
Latvia	n/a	n/a	0	0	8	13
Finland	2	n/a	6	11	8	3
UK - Scotland	10	n/a	12	5	7	9
Croatia	3	n/a	3	4	7	9
Lithuania	n/a	n/a	0	0	7	12
Estonia	n/a	n/a	1	2	5	8
Cyprus	n/a	n/a	8	6	4	7
Luxembourg	0	n/a	0	7	2	1
Slovenia	0	n/a	0	1	1	1
Malta	n/a	n/a	4	0	0	3
Slovakia	n/a	n/a	n/a	n/a	n/a	n/a
TOTAL	499	n/a	650	645	1007	1051

⁴⁹ Lowe's 2011 Statistical Analysis, Part I, p.11 and p.13. Figures for 1999 and 2003 were obtained from corresponding surveys conducted in 1999 and 2003. All publications are freely available at http://www.hcch.net/index_en.php?act=conventions.publications&dtid=32&cid=24 (15.01.2014).

⁵⁰ While the figures for requests received are accurate, the figures showing the number of requests made is based on a compilation by each Central Authority of the source of the requests received. It does not therefore necessarily reflect the actual number of outgoing requests made by a Central Authority. It is nevertheless included for comparative purposes.

Figure 3: Return requests received by Central Authorities of EU Member States⁵¹ in 1999, 2003 and 2008



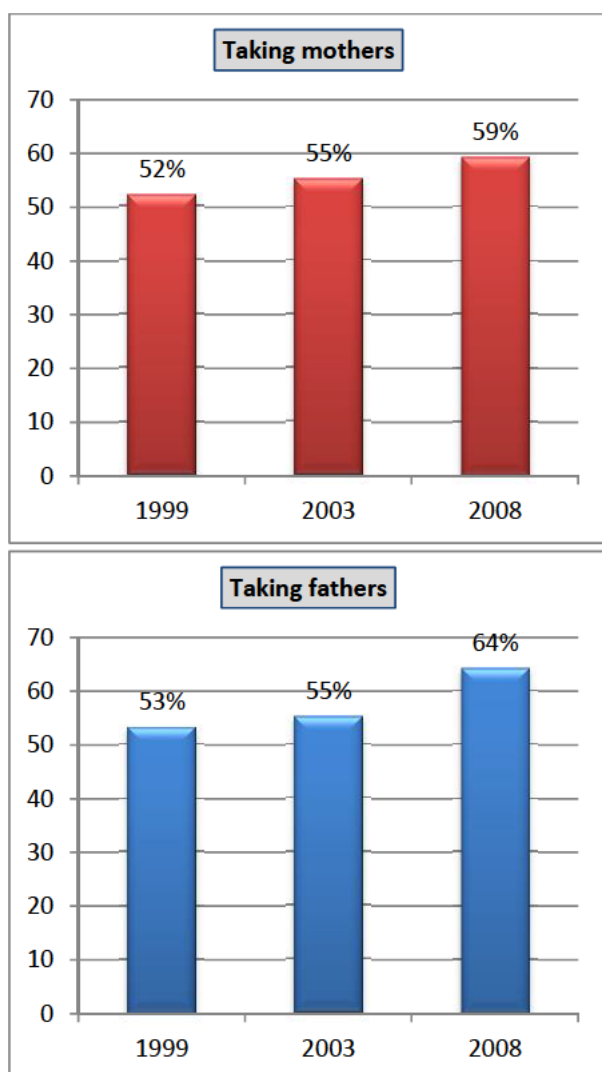
Statistics compiled on behalf of the Hague Convention take into account the **nationality of the "taking person"** (i.e. the parent having taken his or her child to another country) in order to determine whether the parent and child were **"going home"** – the assumption

⁵¹ Lowe's 2011 Statistical Analysis. Note that the absence of data may denote zero returns, or that no information was available for the particular year concerned.

being that they went to the jurisdiction in which the parent was brought up. This data relies on the accumulated results of responses to the questionnaire by Central Authorities of all countries worldwide, rather than just in Europe. Nevertheless, with more than half of the responses emanating from European States in 1999 and 2003 and around half in 2008, the data can be said to at least partly reflect European trends.

The results broadly show that **just over half of all "taking persons" were nationals of the requested country.** Figure 4 shows that, in 1999 and in 2003, similar numbers of mothers and fathers went to a State of which they were nationals. This grew only slightly in both cases, but in 2008, the proportion of "taking fathers" who "went home" rose relatively dramatically - to 64%. The number of "taking mothers" heading with their children to what is assumed to be their home also continued to rise, though not as sharply.

Figure 4: Proportion of taking parents worldwide who have nationality of destination State⁵²



⁵² Statistics based on Lowe's 2011 Statistical Analysis, Preliminary Document No. 8A, pp. 16-17. "Destination State" refers to the State which received the application for return. Percentages represent global figures based on 1,961 return applications received by 54 States in 2008, 1,259 return applications received by 45 states in 2003 and 954 received by 30 states in 1999. However, it should be noted that the nationality of the taking person was not known in respect of 431 applications. Country by country breakdown of data was not available.

2.3.2. Comparisons with more recently collected data

The Central Authorities of **only a limited number of countries collect, on a periodic basis, data in relation to requests sent and received under the Hague Convention.** Where they do, such data is not necessarily given on the same basis as that which was provided in response to the surveys conducted on behalf of the Hague Conference in the three years examined above. Some of the figures may include non-Hague Convention requests, they may combine return and access requests and/or may not just reflect new requests made in a particular year, but can instead include ongoing cases carried over from the preceding year(s).

The data shown in **Table 4** represents the information on incoming return requests made available by the Central Authorities of countries examined for the period **2009 to 2013.** Examined countries whose Central Authorities did or do not provide any data for this period are not included. In any event, in light of the unreliability of the data and the variety of methods by which it is recorded, it is **reproduced here only for the purposes of examining the evolution of child abduction requests in individual States,** rather than for comparative purposes.

Table 4: Number of international child abduction return requests received by Central Authority of selected countries 2009-2013

COUNTRY	2009	2010	2011	2012	2013
Austria	27	n/a	n/a	n/a	n/a
Belgium	55	40	38	29	28
Denmark	18	18	20	23	18
England & Wales	193	226	244	229	n/a
France	87	105	114	121	96
Germany	n/a	n/a	147	152	169
Hungary	27	48	59	54	69
Rep. of Ireland*	n/a	n/a	n/a	45	45
Lithuania	n/a	n/a	4	9	10
N. Ireland	9	8	10	14	11
Poland	71	53	79	76	72
Slovakia**	32	56	41	61	25
Spain***	86	91	99	81	92

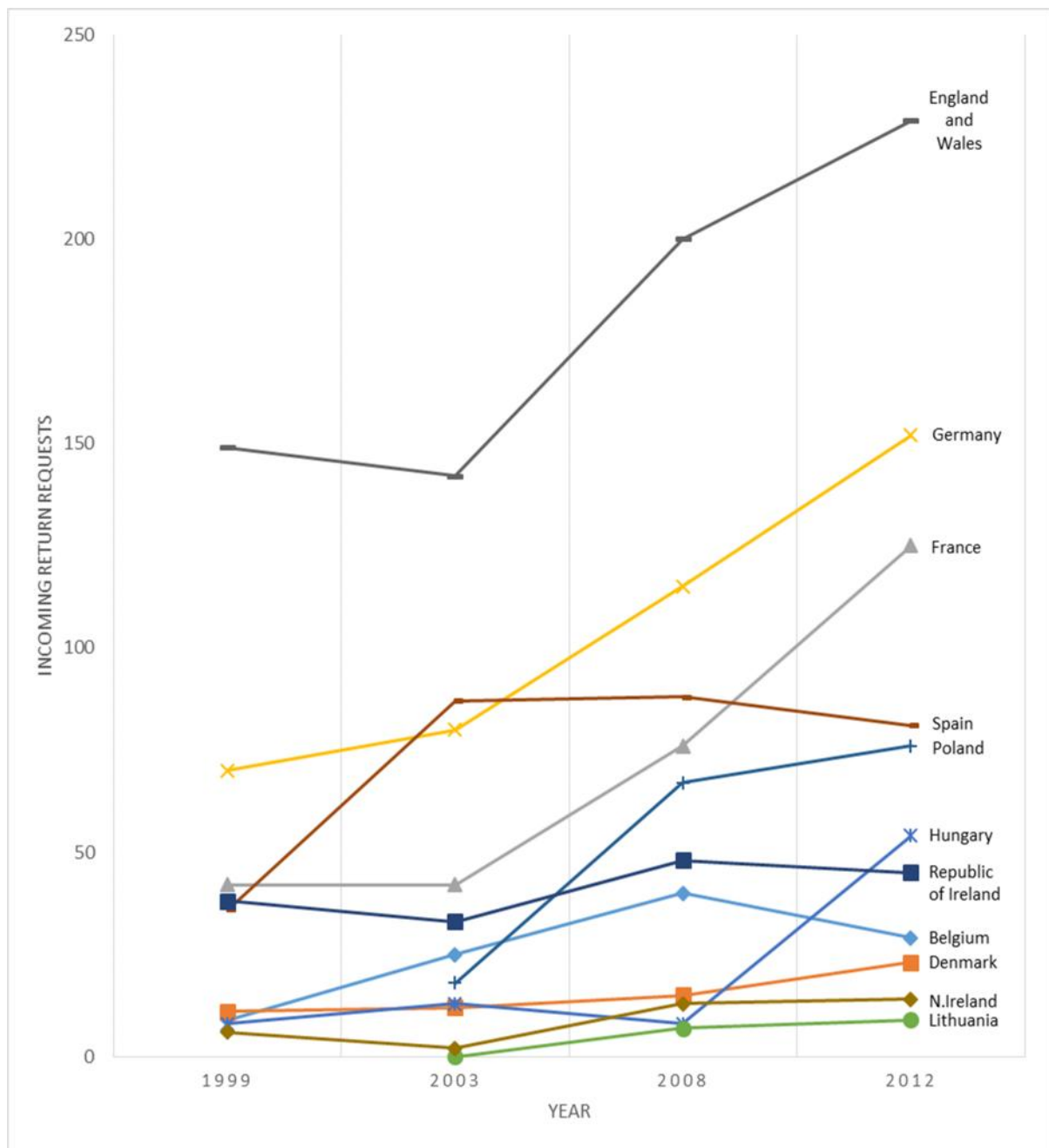
* Figures presented for new cases in the years 2009-2011 include Access Requests as well as return requests, and so are not reproduced here

** Statistics provided refer to instances of international "kidnapping" and do not necessarily represent Hague return requests; they should therefore be treated with caution and are restated here only for illustrating nationwide patterns in international child abduction.

*** This data includes access requests; the Spanish Central Authority was not in a position to separate access requests from return requests. It is restated here only for illustrating nationwide patterns in international child abduction.

In **almost all of the countries** included in Table 4 (save for the Republic of Ireland and Belgium), the **number of return requests recorded for the most recent year for which data is provided is higher than that recorded in 2009** or in the earliest year for which data exists. However, only in four countries of those featured (Germany, Hungary, Lithuania and Spain) is the most recent number of return requests also the highest recorded for the 2009-2013 period. In all other cases, a peak in the number of return requests occurred in an earlier year. Although only limited comparable data was available for the Republic of Ireland, it can be seen that annual return requests in 2008 were higher than those received most recently.

Figure 5: Incoming international child abduction return requests under the Hague Convention received by selected EU countries 1999-2012



In order to provide a longer-term overview of trends in international parental child abduction, the available numbers from 2012⁵³ of incoming return requests received by a majority of the EU states examined have been plotted alongside earlier figures submitted to the Hague Conference studies in 1999, 2003 and 2008 and reproduced in Lowe's 2011 Statistical Analysis. This is illustrated in Figure 5.

⁵³ Data for outgoing and incoming return requests – understood to have been collected on the same basis as that data provided for Lowe's 2008 Statistical Analysis. The year 2012 is the most recent year in which the fullest sets of reliable and comparable statistics were available across all countries studied. See Table 4 for exact data values for incoming return requests, and Country Reports for outgoing return requests.

The overall picture is that, in most countries, Central Authorities continue to receive more and more return requests when compared to earlier periods. However, for the majority of these, the dramatic growth in cases of child abduction witnessed between 2003 and 2008 has since slowed down, and in some countries, such as Spain, the Republic of Ireland and Belgium, has even dropped below 2008 levels. Some larger states, such as England and Wales and Poland, still see growing numbers in applications received, but not at the same pace as previously. However, other big countries such as Germany, France⁵⁴ and Hungary, show big rises at the same or even greater levels than before. 2013 figures for Germany and Hungary indicate that the total number of new requests received continues to rise year on year, although France did experience a drop in applications back to almost 2009 levels.

Trends in outgoing return requests, namely those sent by Central Authorities where a child has been abducted from the country to a foreign jurisdiction, follow a similar pattern. Although the data is not as complete or reliable as that which exists for incoming applications, an examination of the available data between 2003 and later periods for each country shows a near universal continuing increase in applications made by Central Authorities to foreign counterparts over the long term. As with incoming requests, the numbers do however indicate that the growth in outgoing applications has, in many cases, slowed or even dropped in recent years, with the volume of requests sent out annually broadly remaining at levels seen in the years immediately following 2008.⁵⁵

2.3.3. Interpreting the statistical patterns

Neither the statistical analysis made on behalf of the Hague Conference in the three years in which surveys were conducted, nor national Central Authorities themselves, offer any particular explanations for the trends in parental child abduction illustrated in the above charts. Indeed, to the extent that commentaries have been provided on the data previously collected, this is largely confined to observations about statistical value of the recorded figures.

This can possibly be attributed to the limitations of the type of data collected. To our knowledge, Central Authorities do not, for example, record information on the specific reasons for the abduction in a given case, such as, for example, whether it relates to previous impairment of the taking parent of his or her rights of access to the child, whether the taking parent was seeking to protect the child from the other parent or if the taking is connected to a failed relocation of the family unit to another country. There is evidence that data is collected by judicial authorities in most countries about the reasons for particular outcomes of return applications, but the information retained generally only goes so far as confirming the category of overall outcome (e.g., rejection, return by consent or not, refusal) or the legal provision relied on for judicial refusal. In the absence of such information, patterns in the underlying reasons for parental child abduction cannot therefore readily be identified. Until a targeted study using truly comparable and relevant data and accompanied by a socio-economic analysis is performed, it is only possible to speculate on the reasons for the overall trends revealed by existing statistics.

Looking, in the first instance, at the overall quantity of return applications received by Central Authorities on a country-by-country basis, it can immediately be seen that there is, naturally perhaps, a certain correlation between the broad population size of a country and the number of return requests made and received. The Central Authorities of countries such as Germany, Spain, France, England (& Wales) and, more

⁵⁴ Although it is understood that French data may also include access requests.

⁵⁵ Refer to individual Statistics section of individual country reports for available data during this period. Notable exceptions include France

recently at least, Poland, are all extremely active, while the smallest States may handle only a few requests each year.

One particular anomaly might be England & Wales, which has consistently dealt with considerably more requests than other larger States. One possible explanation for this is not that it experiences, in reality, more abduction cases than other countries, but that the jurisdiction and its system are hugely experienced in handling Convention applications, and are efficient and expeditious in processing them to a conclusion. A dedicated Child Abduction Unit passes on almost all applications within 24 hours to a recognised panel of expert legal practitioners and a specialist high level family court prioritises Convention cases.⁵⁶ Such an efficient framework may offer one reason why the central authorities of the countries in which the left-behind parent remains have few reservations about submitting a return request to the England & Wales Central Authority. The efficiency of the system may also help explain why such a large number of return requests are sent by the same Central Authority, especially when it is also considered that free legal representation is available in the UK to all applicants regardless of means or merits.

If this is to go some way towards explaining why so many applications are handled by the England and Wales Central Authority, it may, by the same token, partially account for the proportionally fewer applications handled by less experienced Authorities and judicial systems in other countries. A lack of experienced experts could mean that the need to make an application may simply not be identified, or that there is less faith in the system itself, leading to a reluctance by potential applicants to rely on it.

A simple link may of course also be drawn between the number of foreigners present in a country and the number of requests made and sent. A closer examination of migratory patterns and child abduction applications would be helpful in this regard.

Potentially of more relevance however, is the connection between international couples and parental child abduction statistics. Greater international mobility combined with increasing numbers of international marriages and non-marital partnerships and higher rates of relationship breakdown have resulted in a substantial increase in the number of relocation disputes in which one parent wishes to relocate, and the other opposes the move.⁵⁷ Unfortunately, the relevant UK authorities do not retain data on marriages and divorces, and so the extent to which this explains the disproportionately high number of applications witnessed in England & Wales cannot be examined further. However, it does merit further investigation in relation to other countries to determine its influence as an explanatory factor.

The extent to which statistics on international marriages and divorces can account for overall increases in parental child abduction over the past 15 years is limited. Not only does the data not reveal how many such unions also involve children, but it does not include parents in non-marital relationships. Added to this, as seen above, the statistics themselves are mainly dated, not complete and are often not capable of a like-for-like comparison, being collected by the statistical authorities of different countries under different criteria. Nevertheless, the overall trends in available, broadly comparable figures, do point at least to some connection between the breakdown in international marriages and the rise in child abduction applications. As seen above, although international marriages, as a proportion of all marriages across most EU states, has gradually fallen, international divorces – until 2007 at least – continued to rise.

⁵⁶ Sarah Armstrong, *Is the jurisdiction of England and Wales correctly applying the 1980 Hague Convention on the civil aspects of international child abduction?*, *International and Comparative Law Quarterly*, vol. 51, April 2002, p.428.

⁵⁷ Rhona Schuz, *The Hague Child Abduction Convention, A Critical Analysis*, Hart Publishing 2013, p.72, with reference to the Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of Child Abduction, para. 7.3.

Parental child abduction applications also rose significantly during broadly the same period.

A number of assumptions must be made to enable conclusions to be drawn: first, that such couplings will often involve children, and that the picture is similar for non-marital relationships; secondly, that it will often be the case that one parent will then wish to relocate, taking the couple's child(ren) with them. Indeed, it is said that research studies show that the main motive for relocation is the applicant's desire to return home to be near family and friends.⁵⁸ Further evidence of this can be found in the graphs at Fig. 4 above which indicate that worldwide, an increasing majority of parents who take children are returning to the country of their citizenship. It is not clear whether this result is reflected across Europe, nor do we know how many "taking" parents were relocating after the dissolution of their marriage. Nevertheless, where such assumptions are made, it can be said that the trends in cases of parental child abduction and in the breakdown of international marriages are not coincidental.

The extent to which migratory patterns and increased mobility alone can account for growing numbers of child abduction cases – especially within a much expanded European Union – is not clear, and further research is needed. Other motives for taking a child may have nothing to do with marital breakdown, but can simply relate to better work prospects abroad for one parent or a simple desire by one partner to be near family and friends following a failed relocation: something which is not necessarily accompanied by a breakdown in marriage. The indications revealed by the limited data available must therefore be treated with great caution.

⁵⁸ Ibid, p. 73, with reference to NJ Taylor and M. Freeman, *International Research Evidence on Relocation: Past, Present and Future*, (2010) 44 *Family Law Quarterly* 317, p.330.

3. CRITICAL ASSESSMENT OF THE LEGAL FRAMEWORK APPLICABLE TO PARENTAL CHILD ABDUCTION

KEY FINDINGS

- Available statistics and case law show that many different types of conduct may be qualified as typical cases of “child abduction” and lead to judicial proceedings with the aim of obtaining the return of a child to the country of his/her previous residence
- The study identifies risk factors and five typical scenarios where the transfer of a child’s residence abroad is characterized as a “child abduction”
- Differences in the substance of the five scenarios lead to the elaboration of a preventive strategy and of a new approach to the solution of “child abduction” cases
- First, a dichotomy is proposed between child abductions and illegal transfers of a child’s residence
- Secondly, since case law offers examples where the disagreement between the parents as regards to the place where the child should have his or her residence, is, at the same time, a disagreement between two Member States a solution is proposed with a view to having a timely decision immediately enforceable in both Member States disagreeing on the decision over the residence of the child
- Following the mechanism introduced by art. 15 of EU Regulation 2201/2003, we propose to enhance cooperation between the courts of the previous and of the new residence of the child, who could and should eventually agree on a decision, immediately enforceable in both States

3.1. Description of the phenomenon

Several empirical studies have dealt with the motivations for abduction,⁵⁹ the risk factors leading to abduction and the psychological consequences for the children and the parents, without coming to straightforward conclusions which could allow legislators to draft homogeneous and secure schemes of deterrence.

This heterogeneity calls for a classification of different typologies of abductions, after having identified its recurrent elements.

⁵⁹ The sociological aspects have been object of the Questionnaire on international child abduction by one parent drawn up by Adair Dyer. See Dyer report p. 9 for the questionnaire and p. 18 ff. for the analysis. Some of the sociological assumptions on which the Dyer report is based are outdated as shown by subsequent statistics and underlined by – e multis – R. Schuz, *The Hague Child Abduction Convention*, 2013, p. 56. See also G.L. Greif and R.L. Hegar, *When Parents Kidnap: The Families behind the Headlines*. New York, NY: The Free Press, 1993, p. 286 ff.; reunite Research Unit, *The Outcomes for Children Returned Following an Abduction*, September 2003, in the website of the UK charity at www.reunite.org, T. Kruger, *International Child Abduction: The Inadequacies of the Law*, Oxford: Hart Publishing, 2011, p. 66.

3.1.1. The need to differentiate different situations of “abduction”

Statistics reveal the existence of a link between the breakdown of international marriages and the rise in child abduction applications. However, in the context of a family crisis, it seems very important not to rely on the generic and stigmatising terms “abduction” or “kidnapping”. The term “abduction” has “emotive force”⁶⁰ and may generate an altered description of reality if used to describe very different situations.

In the specific case of parental abduction, the underlying legal aspects of the phenomenon to be regulated may be concealed by the emotional impact of the topic. Therefore, in order to clarify the different, relevant aspects of the phenomenon, any supranational regulation of “child abduction” should start with a clear and understandable definition of the phenomenon to be addressed.

In this respect, we will provide the context of “litigation about the child’s residence” in order to identify the legal means and the policy measures to deal with this situation. The aim of any such measure, in our opinion, should first of all be to protect the child from the negative consequences of the interruption of cohabitation of his/her caregivers with each other (and, as a consequence, with him).⁶¹ In doing so, the interests of the parents in deciding on their residence and the residence of the child also need to be taken into account.

This wider perspective seems crucial in the European legal framework, since the transfer of a family abroad is an expression of one of the European Union’s fundamental freedoms: the free movement of workers and persons in general.

Whereas there can be no doubt that the kidnapping of a child by a stranger needs to be prevented or remedied by all possible means, including the heaviest criminal sanctions, that is not necessarily true of every “parental child abduction”, as the Hague Convention recognizes in Articles 12, 13 and 20 by providing for exceptions to its basic return mechanism.⁶²

Secondly, the preparatory documents of the Convention on Child Abduction illustrate that the Convention is based on a distinction between a parental cross-border child abduction and the illegal transfer of a household by a child’s primary caregiver.

While ensuring a very strong protection against the first phenomenon - Arts. 8-20 - the Convention provides very weak protection against the latter – in Art. 21. As a result, non-residential parents have often sought and obtained the stronger protection of Arts. 8-20 in cases which – according to the working documents of the Hague Convention – would have fallen within the scope of Art. 21.

As a result, the dividing line between a cross-border parental child abduction and a family relocation abroad is nowadays blurred and some transfers are characterised as “abductions” but upheld, judged to have been carried out in the best interests of the child.

However, the negative values of an illegal change of residence by his/her primary caregiver, on the one hand, and a change of residence contextual to the deprivation of his or her primary caregiver, on the other hand, are different.

⁶⁰ See the Dyer report, p. 21.

⁶¹ M. Antokolskaja, Shared Residence from a Comparative Perspective: A Solomon’s Judgement New-Style, in *Festschrift für Ingeborg Schwenzer*, Berne 2011, t. I, p. 69-82 criticizing the characterization of the issue of the child’s residence as a question of the “rights” of the non-residential parent, rather than as a question of the right of the child. See Carol Bruch’s *Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, *Family Law Quarterly*, Volume 40, Number 2, Summer 2006, p. 281-314 on gender differences in parenting and her critique of the abuse of social science research to advocate restrictions on the custodial parents’ ability to enjoy freedom of movement.

⁶² A. Bucher, *The New Swiss Federal Act on International Child Abduction*, 2008, in *Journal of Private International Law*, p. 144-145; P. Ripley, *A defence of the established approach to the Grave Risk Exception in the Hague Child Abduction Convention*, in *Journal of Private International Law*, 2008, p. 464-469.

3.1.2. Background, Action, Consequences

Child abduction typically occurs following a prior dissolution of the household of two adults that makes it impossible for their child/ren to continue to live with both of them (1). The abductor must be one of the two former joint-caregivers (2); s/he must have acted unilaterally – i.e. without the consent of the holder of custody rights and in breach of custody rights (3); his/her action must result in the permanent transfer of the child's residence abroad (4).

These elements may be more extensively described as follows:

(1) A prior or contextual interruption of cohabitation between two adults with whom the child used to live and – as a necessary aftereffect – the interruption of cohabitation between the child and both adults.

This pre-condition embraces the traditional case of legal or factual separation and divorce between the mother and the father of the child and other cases where the care-takers of the child are not his/her parents.

(2) The existence of a qualified relationship between the abducted child and the other persons involved in the child abduction triangle: the abductor and the so-called "left-behind parent". The relationship between the two adults and the child is characterized by the duty of the former to guarantee the upbringing of the child both financially and pedagogically.

(3) A deteriorated, inexistent or extremely conflictual relationship between the adults having the right/duty to care for the upbringing of the child.⁶³ The lack of communication between the caretakers of the child makes it impossible for them to jointly take the daily decisions necessary for the upbringing of the child, as well as other more important decisions.⁶⁴

That disagreement between the parents - as regards to the residence of a child - is less likely to happen in the context of a relation of mutual respect, where the parents actively collaborate for the well-being of each other and of the child.

(4) The unilateral action of one parent transferring his/her residence and that of the child abroad.

3.1.3. Five scenarios

Scenario A – kidnapping or wrongful retention by a relative

A child is kidnapped by a member of his/her family who has no custody, nor parental rights over him (a grandparent, an uncle/aunt).

In an Italian case, two children had been given by Swiss authorities to the care of a foster family in Switzerland. During a visit to their grandfather in Rome, he planned to transfer their residence and keep them with him. The foster family requested their return in Switzerland and filed judicial proceedings. Eventually, Italian courts, including the Italian

⁶³ The Dyer report, p. 20, identifies as a risk factor, not the disruption of communication between the parents but, rather, the frustration and the fears that may determine the frustrated parent to abduct.

⁶⁴ The Dyer report, p. 20, mentions three further elements of risk, namely the existence of an opportunity to abduct (i.e. attendance at school); the awareness that the abductor will gain custody in "his" courts either because these favour or protect their nationals in child abduction proceedings or because such courts give "an advantage, or even an irrefutable right, to one parent because of his or her sex"; a lack or incapacity to prevent abduction by the other parent.

Supreme Court, ordered the return of the children to Switzerland in application of the Hague Convention on child abduction.⁶⁵

Scenario B – kidnapping by a parent

After the dissolution of a family, the child continues to live with one of the two parents and the other parent maintains contact with the child through the exercise of visiting rights.

During a visit to the non-custodial parent, the child is removed or retained abroad.

Statistics show that, in this scenario, the return request is more often filed by mothers.

In a case opposing Austria and Denmark, a child was lawfully brought to Austria by his mother who had sole custody over him according to Danish law. Subsequently, the father obtained in Denmark custody rights and, by virtue of those, requested the return of the child to Denmark. Austrian courts refused to return the child, since the transfer of his residence to Austria was lawful⁶⁶. Subsequently, the father kidnapped the child and brought him back to Denmark. A criminal case was filed by the mother in Austria, as well as a return request.⁶⁷

In another case, an unmarried mother had transferred her residence from the Czech Republic to Austria as a consequence of professional achievements. Subsequently, she registered her two children as permanently residents in Austria. The father made an application to the Czech court for the 'arrangement of relations with minor children' with a view to being granted custody of the children and maintenance. During the proceedings, he retained the children in the Czech Republic after a holiday visit. A provisional measure adopted by the Czech court allowed the children's return to Austria.⁶⁸

Scenario C – transfer of residence abroad before a judicial decision on custody

The child is removed by one of his or her parents and brought abroad with the intention to resettle without the other parent. The dissolution of the family coincides with the removal of the child. The rights and duties related to parenthood are not grounded on a judicial decision but on the law applicable to the parental relation.

The mother of a child born in Poland in 2011 transfers her residence and that of the child in Belgium in 2012, where the British father of her child lived. The family did not live together, but the father visited his son frequently. In 2013 the parties participate to a mediation program in order to reach an agreement on contact rights. Before reaching an agreement and without informing the father, the mother transferred her residence and that of the child to Poland. The Belgian court seized by the father, taking into account the persistent refusal of the mother to allow contact between the father and the child, awarded custody of the child to the father, with the consequence that his residence in Ireland began to be characterized as "wrongful" for the purposes of the Hague Convention on child abduction.⁶⁹

In another case, a Hungarian woman was married to an Italian man and they lived in Italy with their two daughters. When the daughters were still toddlers, she travelled to Hungary with them and subsequently refused to return to Italy, in breach of Italian family law.⁷⁰

Some cases are also attested where a family sought to transfer the residence to one of the parents' homeland but, after a short stay, the other parent changed his or her mind,

⁶⁵ Cass. civile 07/03/2007 n. 5236

⁶⁶ See OGH 6 Ob 103/11g, SZ 2011/93.

⁶⁷ 6 Ob 217/12y, JBI 2013, 190, iFamZ 2013/78 with note Fucik.

⁶⁸ See CJEU, 12 November 2014, L v M, interveners: R, K, in Case C-656/13.

⁶⁹ See CJEU, 9 January 2015, Bradbrook v. Aleksandrowicz, in case C-498/14 PPU.

⁷⁰ ECHR, 28 October 2014, case of Cavani v. Hungary, Application no. 5493/13.

whereas the other continued to stay in the country.⁷¹ In these cases, the wrongfulness of the transfer of residence might be particularly difficult to assess.

Scenario D – transfer of the child's residence by the custodial parent

After the dissolution of a family, the child continues to live with one of the two parents and the other parent maintains contact with the child through the exercise of visiting rights.

The parent who lives with the child transfers his or her residence with the child abroad.

The reasons to resettle might be linked to a new partner; work-related or be grounded in a better social network, i.e. members of the parent's family who are in a position to support a better work/life balance in the best interest of the child.

Statistics show that, in this scenario, the return request is more often filed by fathers.

In a Spanish case a divorced woman having custody of her child moved her domicile (and the domicile of the child) abroad without obtaining the agreement of the father. As a consequence, the father was prevented from exercising his rights of access.⁷²

In a recent case, the transfer of the child's residence from France to Ireland was not wrongful nor opposed by his father, a non-custodial parent with access rights, but the subsequent continuous failure of the mother to allow the exercise of those access rights, led to a French judicial decision reversing the previous settlement and awarding the father custody rights and the mother access rights. As a consequence, French courts ordered the return of the child characterizing his stay in Ireland as a "wrongful retention".⁷³

Scenario E – flight from domestic violence

In the context of domestic violence – where a violent parent is endangering the physical or psychological health or, indeed the life of the child – the other parent flees abroad illegally with the child.

Statistics show that, in this scenario, the return request is more often filed by fathers.

In a UK case, a mother, victim of domestic violence resulting in a fragile psychological health, anxiety and depression brought her child illegally from Australia to the UK. Return was refused on the basis of clear evidence of the father's recent alcohol and drug abuse, threats of suicide and serious violence against the mother.⁷⁴

It is possible that the following sixth scenario will appear in the future as a variation of Scenarios B and D: where a kidnapping or an illegal transfer of the child's residence takes place in the hypothesis of shared-custody (*garde alternée*).

3.2. The Hague Convention on Child Abduction: critical overview

3.2.1. General overview of the Convention

The Convention on the Civil Aspects of International Child Abduction was adopted on 24 October 1980. It is one of the most successful pieces of legislation adopted by the Hague Conference, since it is in force in 93 States around the world.

⁷¹ See the Italian cases Cass. civile 02/07/2014 n. 16648 and Cass. civile 16/06/2009 n. 13936.

⁷² Audiencia Provincial de Madrid (Sección 1ª) Auto num. 645/2012.

⁷³ See CJEU, 9 October 2014, C v M, in case C-376/14 PPU.

⁷⁴ Re S (A Child)(Abduction: Rights of Custody), [2012] UK Supreme Court 10.

On the website of the Hague Conference on Private International Law it is possible to view the complete status table of the Convention (dates of signature, ratification, accession or succession and entry into force) and all the Declarations and Reservations made by States in respect of their ratifications.⁷⁵

France was the first State to ratify the Convention - together with Portugal and Canada - and has accumulated over thirty years of practice in its implementation. Shortly afterwards, the Convention was ratified by Hungary, the United Kingdom, Spain, Austria and Sweden. All the other countries reported upon ratified the Convention during the '90s, with the exception of Slovakia and Lithuania, where the Convention entered into force only in 2001 and 2002, meaning that those States now have barely 12 years' experience with its implementation. All EU Member States are party to the Convention.

The rules of the Hague Convention on Child Abduction are not all self-executing and require the establishment in each country of a Central Authority with administrative duties and functions.⁷⁶ The structure and human resources of the different Central Authorities vary considerably from country to country, thus affecting their respective capacity to respond to the various requests addressed.⁷⁷

Besides designating a Central Authority, many countries have introduced in their civil procedure laws and codes a special procedure for the implementation of the Convention.⁷⁸ In addition, because of their membership of the European Union, all of the countries reported upon in the present study – except Denmark – are also subject to the direct application of the EU Regulation 2201/2003.

EU Regulation 2201/2003 entered into force on 1 August 2004 and is applied since 1 March 2005. Its art. Article 60 prescribes that:

In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

(a) the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors;

(b) the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages;

(c) the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;

(d) the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children;

and

(e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

These include all EU Member States.

Moreover, all these countries have ratified and apply the 1989 UN Convention on the Rights of the Child, the 1980 European Convention on Custody of Children and the 1996 Hague Convention on Parental Responsibility (with the notable exception, for the latter, of Italy, where ratification is in process).

⁷⁵ Declaration and Reservations mainly concern the languages in which it is possible to address a return request to a contracting State and the costs of the procedure. See http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=24

⁷⁶ See especially Bruch, Carol S., *The Central Authority's Role under the Hague Child Abduction Convention: A Friend in Deed*, 28 *Fam. L.Q.* 49 (1994-1995).

⁷⁷ See, for a first impression, the annexes to the national reports, *infra*, at chapter 4.

⁷⁸ See *infra*, 3.4.

Less successful has been, up to now, the 1996 European Convention on the exercise of Children's rights, which is only in force in six of the seventeen countries considered in this report (Austria, Czech Republic, France, Germany, Italy and Poland).

The objective of the Hague Convention on child abduction is, on the one hand, to prevent and at the same time to react to the removal of a child – a person under 16 years old - from the family and social environment in which his/her life has developed.

The a priori on which the Convention is grounded is:

"the presumption generally stated is that the true victim of the "childnapping* is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives".⁷⁹

The legal mechanism redressing child abduction is that of ordering the restoration of the status quo, imposing "the prompt return of children wrongfully removed to or retained in any Contracting State".

The Convention aims, on the other hand, at securing through international cooperation the exercise of access rights.

The levels of protection awarded for child abduction is different, however, from that awarded for the impairment of rights of access.⁸⁰

Immediate return is the most appropriate measure for preventing and reacting to the removal of the child from his/her primary residence, or his/her retention. Instead, a scarce protection is provided by the Convention to victims of impairment of access rights.

The unfairness of this balance has encouraged the enlargement of the protection against child abduction beyond its original scope.

Such expansion has been carried out through the characterization of cases that ought to be characterized as "violation of access rights" within the meaning of art. 5b as "child abduction" cases.

Welcomed by many authors,⁸¹ these developments have ultimately led to an extensive interpretation of the exceptions to the obligation to order the return of the child.

Consequently, the assimilation of child abduction cases and illegal transfers of a child's residence has widened the object of the judicial proceedings: imposing to judges to verify – in the six weeks' time-limit set by art. 11 of the Convention – not only the existence of a "kidnapping" but, moreover:

- a) the habitual residence of the child;
- b) the existence of custody rights including the right to determine a child's residence according to the law of the habitual residence;
- c) the defences invoked by the abductor

⁷⁹ Dyer Report, p. 21.

⁸⁰ This gap is considered an unjustified privilege in favour of the first-named parent by M. Bailey, *The Right of a Non-Custodial Parent to an Order for Return of a Child under the Hague Convention*, 13 Can. J. Fam. L. 287 (1996).

⁸¹ See, for instance, Reynolds SE, *International Parental Child Abduction: Why We Need to Expand Custody Rights Protected Under the Child Abduction Convention*, Family court review, 2006, pp. 464 ff.

In cases where the return amounts to a new transfer of the child and not merely his or her “reintegration” to a previous household, courts tend to explore how the return of the child with the custodial parent could be organised.

The widening of the scope of the return mechanism has potentially impaired the timeliness of the judicial proceedings governed by the Hague Convention and the EU Regulation 2201/2003.

3.2.2. Convergences and Divergences on the characterization of child abduction

One of the main obstacles to a coherent implementation of the Convention is the use of a private international law technique in order to define “child abduction”. The characterization of a behaviour as “child abduction” depends on the application of specific national law provisions on custody rights, since the “removal or retention” is “wrongful” when it is in breach of rights of custody under the law of the State in which the child was habitually resident immediately before the removal or retention. Consequently, the same behaviour may be characterized as “child abduction” if it takes place in one State and as a “legitimate transfer of residence” if it takes place in another State. Vice versa, “child abduction” may embrace very different behaviours: kidnappings in the true sense, as well as the removal of children in their best interest.

3.2.2.1. The notion of habitual residence of the child

The determination of the habitual residence of the child, in accordance with the provisions of the Convention, has been the subject of various studies and of reasoning found in various decisions of the CJEU.⁸²

In synthesis, the determination of the habitual residence depends on various factors. Despite the recurrent assertion that the notion of “habitual residence” is a de facto notion, physical presence as such is not sufficient to establish it, in the absence of other factors proving some degree of integration by the child in a social and family environment.⁸³ In this respect, the intention of the parties as regards to where to locate and settle their household is always investigated.⁸⁴

In the case of new-borns babies and small children, the test for determining whether a child was habitually resident in a place has regard to the state of mind of his/her primary

⁸² See, in particular, Recital 12 and 17, Art. 9-12 of the Brussels II bis Regulation and the CJEU decisions of 9 October 2014, *C v. M*, in Case C-376/14 PPU, of 1st October 2014, *E v. B*, in Case C-436/13, of 19 February 2011, *Mercredi*, in case C-497/10 PPU, of 22 December 2010, *Aguirre Zarraga*, in case C-491/10 PPU, of 4 December 2010, *J. McB. v L. E.*, in case C-400/10 PPU, of 9 November 2010, *Purrucker* in cases C-256/09, of 15 July 2010 and C-296/10, of 9 November 2010, *Povse* in case C-211/10 PPU, of 23 December 2009, *Deti ek*, in case C-403/09 PPU, 11 July 2008, *Rinau*, in case C-195/08 PPU, of 16 July 2009, *Hadadi*, in case C-168/08, of 2 April 2009, *A*, in case C-523/07, of 29 November 2007, *Sundelind Lopez*, in case C-68/07. See T. Heine, *Home State, Cross-Border Custody, and Habitual Residence Jurisdiction: Time for a Temporal Standard*, in (2011) 17 Annual Survey of International and Comparative Law 9; S.I. Winter, *Home is Where the Heart is: Determining “Habitual Residence” Under the Hague Convention on the Civil Aspects of International Child Abduction*, (2010) 33 Washington University Journal of Law and Policy 351; T. Vivatvaraphol, *Back to Basics: Determining a Child’s Habitual Residence in International Child Abduction Cases Under the Hague Convention*, (2009) 77 Fordham Law Review 3325; C. Lizotte, *Case Comments, International Law – The Hague convention on the Civil Aspects of International Child Abduction – Shared Parent Intent to Abandon Prior Home State Determines Child’s Habitual Residence – Holder v. Holder*, 392 F.3d 1009 (9TH CIR. 2004), (2006) 29 Suffolk Transnational Law Review 363; C.D. Davis, *The Gitter Standard: Creating a Uniform Definition of Habitual Residence Under the Hague convention on the Civil Aspects of International Child Abduction*, (2006) 7 Chicago Journal of International Law 321.

⁸³ See for instance the UK Report at 14.17.3. on “the principle that habitual residence is a question of fact to be decided by reference to all the circumstances of any particular case”.

⁸⁴ Contra, the Polish Report at 4.13.2.2.

attachment figure, the mother in most cases, i.e.: whether or not s/he intended to settle down in the place where the baby was at the time of the abduction.⁸⁵ In the case of an older child, it is his/her own state of mind during the period of residence in a particular place that has to be taken into account, together with his/her degree of integration into a social and family environment.⁸⁶ In sum, the judge of fact needs to take into account not merely the amount of time and the "habitual" character of the residence but, in the first place, the nature and quality of that residence.

The criteria relied upon by national courts are the existence of a "home", school attendance, church attendance, habitual paediatricians and doctors, cultural and extracurricular activities, friends and every other aspect allowing identification of the "centre of gravity of the child".⁸⁷

In this respect, the frequency of stays in a particular country is irrelevant, if it stands alone.⁸⁸

Belgium, Denmark, the Czech Republic, Germany, Poland and Sweden are countries that have upheld the defence based on acquisition of a new habitual residence, especially in cases of illegal transfers of residence abroad.⁸⁹

The CJEU has recently further explained the criteria to assess the existence of a habitual residence in its decision of 9 October 2014, *C v. M*, in Case C-376/14 PPU:

50 As regards the concept of "habitual residence", the Court has previously stated, in interpreting Article 8 of the Regulation in the judgment in *A* (EU:C:2009:225) and Articles 8 and 10 of the Regulation in the judgment in *Mercredi* (EU:C:2010:829), that the Regulation contains no definition of that concept and has held that the meaning and scope of that concept must be determined in the light of, in particular, the objective stated in recital 12 in the preamble to the Regulation, which states that the grounds of jurisdiction established in the Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity (judgments in *A*, EU:C:2009:225, paragraphs 31 and 35, and *Mercredi*, EU:C:2010:829, paragraphs 44 and 46).

51 In those judgments the Court also held that a child's habitual residence must be established by the national court, taking account of all the circumstances of fact specific to each individual case (judgments in *A*, EU:C:2009:225, paragraphs 37 and 44, and *Mercredi*, EU:C:2010:829, paragraphs 47 and 56). The Court held in that regard that, in addition to the physical presence of the child in a Member State, other factors must also make it clear that that presence is not in any way temporary or intermittent and that the child's residence corresponds to the place which reflects some degree of integration in a social and family environment (judgments in *A*, EU:C:2009:225, paragraphs 38 and 44, and *Mercredi*, EU:C:2010:829, paragraphs 47, 49 and 56).

52 The Court explained that, to that end, account must be taken of, inter alia, the duration, regularity, conditions and reasons for the stay in the territory of a Member State and for the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State (judgments in *A*, EU:C:2009:225, paragraphs 39 and 44, and *Mercredi*, EU:C:2010:829, paragraphs 48, 49 and 56). The Court also held that the intention of the

⁸⁵ CJEU, 19 February 2011, *Mercredi*, in case C-497/10 PPU.

⁸⁶ See the UK Report, under 4.17.3. at note 19 quoting *Dickson v Dickson*, 1990 Scottish Civil Law Reports 692 at 703A per Lord President Hope.

⁸⁷ See the Belgian Report at par. 4.1.3; Czech Report at par. 4.2.3.; the German report at 4.4.11.; the Irish Report at 4.5.8. and 4.5.10; the Spanish Report at 4.6.8.; the French Report at 4.7.2. and 4.7.9.; the Lithuanian Report at 4.9.8.; the Hungarian Report at 4.10.5.; the Dutch report at 4.11.6.; the Austrian Report at 4.12.5.; the Polish Report at 4.13.3.; the Romanian Report at 4.14.2.; the Swedish Report at 4.16.7. ; the British Report at 4.17.3.

⁸⁸ See the Belgian Report at 4.1.8.

⁸⁹ See, inter alia, the Swedish Report at 4.16.7.

parents or one of them to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in that Member State, may constitute an indicator of the transfer of the child's habitual residence (see the judgments in *A*, EU:C:2009:225, paragraphs 40 and 44, and *Mercredi*, EU:C:2010:829, paragraph 50).

53 In paragraphs 51 to 56 of the judgment in *Mercredi* (EU:C:2010:829), the Court held that the duration of a stay can serve only as an indicator, as part of the assessment of all the circumstances of fact specific to each individual case, and set out the factors which are particularly to be taken into account when the child is young.

54 The concept of the child's "habitual residence" in Article 2(11) and in Article 11 of the Regulation cannot differ in content from that elucidated in the abovementioned judgments with regard to Articles 8 and 10 of the Regulation. Accordingly, it follows from the considerations set out in paragraphs 46 to 53 of this judgment that it is the task of the court of the Member State to which the child has been removed, when seised of an application for return on the basis of the 1980 Hague Convention and Article 11 of the Regulation, to determine whether the child was habitually resident in the Member State of origin immediately before the alleged wrongful removal or retention, taking into account all the circumstances of fact specific to the individual case, using the assessment criteria provided in those judgments.

3.2.2.2. The notion of custody rights and the progressive incorporation of custody rights in the concept of parental responsibility

In the majority of countries all persons vested with parental responsibility are deemed to have "rights of custody" for the purposes of the Convention.⁹⁰

Similarly, public institution and even a judicial court may have such "custody rights".⁹¹

The notion of "custody right" is not formalistic: the Supreme Court of the United Kingdom has given relevance to the de facto exercise of custody rights and has set down criteria to identify "inchoate" custody rights.⁹²

The relevance of de facto situation is confirmed by Art. 13, par. 1-a) allowing the judge to refuse return in case of "no real breach" of custody rights due to the non-exercise of these before the removal.⁹³

3.2.2.3. Redressing "child abduction" through well-founded defences

An illegal transfer of residence abroad may only be characterized as "child abduction" and lead to a return of the child to his/her previous residence if the author of the transfer cannot prove the well-founded of one or more of the justifications provided for in the text of the Hague Convention. National courts insist on the necessity to give a restrictive interpretation of the defences but, in practice, trends may be sketched and certain countries may be classified as extensive interpreters of the four main defences: acquisition of a new habitual residence, the absence of a real breach of custody rights, the acquiescence and a grave risk of harm.

Although only the last of these defences necessarily leads to a discretionary evaluation by the judge, all of the defences are considered to be subject to the paramount principle of the best interest of the child in concreto.⁹⁴

⁹⁰ See the UK report at 4.17.3.

⁹¹ See the UK report at 4.17.3.

⁹² *Re K (A Child) (Reunite International Child Abduction Centre intervening)* [2014] 2 Weekly Law Reports 1304; *INCADAT cite HC/E/UKn 1259*; *Re B (A Minor) (Abduction)* [1994] 2 Family Law Reports 249, quoted in the UK report at 4.17.8.

⁹³ *Infra* at 3.2.2.3. sub b)

⁹⁴ The statement is recurrent in the reports, see, for instance the UK report at 4.17.8.

This statement suggests the characterization of each of the defences as mere criterions to assess which - between the residence in the country a quo and that ad quem – is most likely to ensure that the decision of the judge on the return request meets the best interest of the child.

a) Acquisition of a new habitual residence

If the request has been filed one year or more after removal, it is possible for the respondent to raise, as an objection, the child's integration into the new environment.

According to Art. 12, the integration of a child into a new environment may justify a legitimate refusal to return the child.

National case law testifies of various cases of successful objections to the return of the child in his/her previous habitual residence. Even in cases where the new settlement was in part due to the length of the judicial proceedings consequent to the application for return, and even when the abducting parent had obstructed the left-behind parent from discovering the new habitual residence of the child.⁹⁵

Reference is especially made to the language spoken by the child and to the family relations and support existing in the new habitual residence, as compared to the language and family relations in the other country. All other aspects of the child integration are taken into account.

As shown by a Danish-French case the amount of time spent in the country ad quem is a mere criterion – among others, to assess the integration in a new environment.⁹⁶

This defence has a greater successful rate when joint to other defences as that of Art. 13 par. 1-b) – the grave risk of harm – and when the hearing of the child proves a firm opposition to return.⁹⁷

b) Non-exercise of custody rights prior to the removal

Art. 13, par. 1-a) allows refusing return whenever the “abductor” proves that the person requesting the return of the child was not actually exercising “prior to the allegedly unlawful removal, the rights of custody which he now seeks to invoke, or if he had subsequently consented to the act which he now seeks to attack”.

The defence based on Art. 13, par. 1-a) confirms that the Hague Convention on Child Abduction had the objective, in the mind of its drafters, of protecting a de facto situation. It states that the transfer of a child's household abroad should not be reversed where the “return” of the child would not amount to a re-integration into the child's household and affective environment.⁹⁸

A de facto disinterest discernible from the overall attitude of the parent has been interpreted by a Belgian Court as “non effective exercise” of custody rights.⁹⁹

⁹⁵ See the Belgian Report at par. 4.1.3; Czech Report at par. 4.2.3.; the German report at 4.4.11.; the Irish Report at 4.5.8. and 4.5.10 ; the Spanish Report at 4.6.8.; the French Report at 4.7.2. and 4.7.9.; the Lithuanian Report at 4.9.8.; the Hungarian Report at 4.10.5.; the Dutch report at 4.11.6.; the Austrian Report at 4.12.5.; the Polish Report at 4.13.3.; the Romanian Report at 4.14.2.; the Swedish Report at 4.16.7.; the British Report at 4.17.3.

⁹⁶ B-2346-08, Superior Appellate Court (Østre Landsret) ordered a return of a child considering his stay in Denmark as a sequence – although frequent - of holiday periods. Czech case Case No. 20 Co 297/2012-173 from 24.4.2012. quoted in the Report at par. 4.2.7.1., considers the one year time to file a petition for return decisive.

⁹⁷ Ibidem.

⁹⁸ See the Austrian Report at par. 4.12.3 at note 53 ; the German Report at 4.4.3. at notes 38-41.

⁹⁹ See the Belgian Report at par. 4.1.3. in fine.

c) Acquiescence or permission

Fluctuations between a restrictive interpretation of consent and an extensive interpretation leading to a non-return are also highlighted by a comparative analysis of the national reports.

The consent of a parent has been paramount especially in cases of “double” child abduction, not infrequent in practice. In a case where a child had been illegally brought to Italy, where he then lived for two years, and was eventually kidnapped and brought back to Belgium, the acquiescent attitude of the father after the first illegal transfer and the opposing attitude of the mother during the seven months stay of the child in Belgium led to a return of the child to Italy.¹⁰⁰

A restrictive interpretation of the defence based on Art. 13 par. 1-a) demands that the consent of the parent left behind to the child’s transfer of residence must rest on unequivocal declarations or explicit statements.¹⁰¹

However, in Denmark, the consent of the left-behind parent has been presumed on the basis that, the lack of significant cultural differences between the country of origin and the country of abduction allowed the left-behind parent to oppose the removal and he had not done it.¹⁰²

This defence, however does not take into account the best interests of the child, over which the parents may not agree.

d) Grave risk of harm

A very discretionary exception to the obligation of “prompt return” is provided by Art. 13 par. 1-b) and refers to securing a child from a “grave risk” to which his/her return would expose him/her.

A dichotomy may be found in the literature concerning the effect and importance to be attributed to the “grave risk exception”. Certain authors¹⁰³ propose to adopt the narrowest possible interpretation of the exception; others¹⁰⁴ conversely emphasize its importance. The reasoning of the European Court of Human Rights, as compared to that of the Court of Justice of the European Union, has been analysed¹⁰⁵ as a function of these narrow and broad interpretations of the return mechanism.

The distance between these two poles is partially explained by the fact that the defence is often relied upon by the taking parent and thus rarely believed by courts. It seems that the defence is most successful when proposed in connection with Art. 12.¹⁰⁶

It is also worth recalling that it has been put forward that, in all those cases in which the “abduction” has not been traumatic for the child, the judicial proceedings following it may

¹⁰⁰ See the Belgian Report at note 21.

¹⁰¹ See the Dutch Report at 4.11.7.4., the UK Report at 14.17.8.

¹⁰² See the Danish Report at 4.3.3. at note 10.

¹⁰³ For example, N. L. Browne, *Relevance and Fairness: Protecting the Rights of Domestic Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction*, (2011) 60 *Duke Law Journal* 1193.

¹⁰⁴ For example, M.S. Wills, *Interpreting the Hague Convention on International Child Abduction: Why American Courts Need to Reconcile the Rights of Non-Custodial Parents, The Best Interests of Abducted Children, and the Underlying Objectives of the Hague Convention*, (2006) 25 *Review of Litigation* 423.

¹⁰⁵ L. Mari, *L’interesse superiore del minore nel quadro dello spazio giuridico europeo (a proposito di recenti casi di sottrazione internazionale di minori)*, *Studi in onore di Augusto Sinagra*, Roma, Aracne, 2013, pp. 295 et seq.; P.R. Beaumont, *The jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction*, in (2008) 335 *Collected courses of the Hague Academy of International Law*, 9.

¹⁰⁶ See the UK report at 4.17.9. and 4.17.10.

in fact cause him/her harm and this harm could even be greater, in this case, when the proceedings lead to a "return".¹⁰⁷

The factors taken into account by national courts are the following: the existence of a risk of physical harm – for instance when the removal of the child is linked to previous incidents of domestic violence; the existence of a grave risk or psychological harm.

Some jurisdictions, and the CJEU as well, have put forward that a mere inconvenience is not considered an obstacle to the fulfilment of the obligation to return the child.

On the other hand, it has also been acknowledged that

"in the context of domestic violence, the position of the child is vitally affected by the position of the mother. If the effect on the mother of the father's conduct is severe, it is, in my judgment, no hindrance to the success of an Art 13(b) defence that no specific abuse has been perpetrated by the father of the child."¹⁰⁸

Even when a subjective risk of harm doesn't exist as regards to the family context in which the child would have to return; objective risks of harm may exist in connection with the social and political context of the country from which the child has been removed.

Sometimes a risk of harm has been successfully proved also with reference to objective circumstances occurring outside the family, e.g. in case of grave political instability (e.g. civil war)¹⁰⁹ or catastrophic situations (e.g. extreme hunger) in the country of the former habitual residence of the child.¹¹⁰

Although it refers to the child, a risk of harm concerning the abducting parent (criminal punishment in the country of the former residence of the child) indirectly affects the child and may lead to a successful defence.¹¹¹

Whenever the "abduction" is an illegal transfer of the habitual household of the child, attested by the purchase or lease of a residence, attendance at school etc., a "return order" amounts to a "relocation" of both, the parent and the child. In these cases, whenever the mobility of that parent is problematic, the objection has been raised on the basis that return would provoke the separation of the child and his/her attachment figure.¹¹²

To the same extent, the separation of the child and one or more siblings has proved to be a legitimate ground for refusing the return of a child.¹¹³

e) Objection of the child

Moreover, Art. 13 par. 2 allows the judge to refuse to order a return in order to respect the will of a mature child, refusing to return to his/her previous household.

In this respect, any objection of the child to his/her return to the country of origin is taken into account, even of very young children.¹¹⁴ The successful rate of a child's objection is proportional to his/her age and maturity. It may be observed that, in most

¹⁰⁷ See the Irish Report, in fine, suggesting the substitution of judicial proceedings with alternative dispute resolution of child abduction cases.

¹⁰⁸ [2004] England and Wales Court of Appeal Civil Division 1366 at [49] quoted by the UK Report at 4.17.8.

¹⁰⁹ E.g. the Belgian Report quotes the opposition to return a child to the country of Israel. However the Belgian Cassation decided to return the child in Israel, to his mother. Tribunal of first instance, Brussels, 17 April 2003, INCADAT HC/E/BE 547.

¹¹⁰ See the Dutch Report at 4.11.7.5.

¹¹¹ Ibidem.

¹¹² See the German Report at 4.4.13.

¹¹³ See the Dutch Report at 4.11.7.5.2.6.

¹¹⁴ The UK Report, at 4.17.8. quotes case law where the objection of a six years old has been taken into account in 2010 : see *W v W* (Abduction: Acquiescence: Children's Objections) [2010] England and Wales High Court 332 (Family Division).

countries, a child over 12 years old will be heard in proceedings, whereas children between the age of 8 and 12 are heard with the intervention of a third party or the assistance of the Central Authority.

A three stage approach has been suggested by an Irish Court, in this respect:

“[60] Where a child’s objections are raised by way of defence, there are of course three stages in the court’s consideration. The first question to be considered is whether or not the objections to return are made out. The second is whether the age and maturity of the child are such that is appropriate for the court to take account of those objections (unless that is so, the defence cannot be established). Assuming a positive finding in that respect, the court moves to the third question, whether or not it should exercise its discretion in favour of retention or return.”¹¹⁵

Reliance upon the child’s objection has nevertheless been the subject of criticism, especially in Germany.¹¹⁶

In this respect, there seem to be a risk of abusive defences, raised on the grounds of the child’s objection and used as a delaying tactic.¹¹⁷

f) **Ordre public**

Art. 20 prescribes the non-return of the child when such return “would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms”.

It has been argued that this defence allows the judge to address cases of flagrant violation of the right to a fair trial in the previous attribution of the allegedly violated custody rights.¹¹⁸ In cases of gendered domestic violence and sexual abuse, the relevance of the human rights exception in Art. 20 has also been debated.¹¹⁹

In light of the above, a return of the child must be ordered, according to the Convention, only after verification of the overall situation in which the child was prior to the removal and in which s/he is after the removal.

3.2.3. **The meaning of Child Abduction “for the purposes” of the Hague Convention**

Every national legal order is confronted with multiple legal definitions of “child abduction”. Some definitions are purely internal and are included in criminal provisions. Criminal provisions punish different kinds of conduct, all assimilated by their wrongfulness. The parameter of wrongfulness consists in the “breach of custody rights” or, at any rate, of parental rights.

According to the Explanatory Report to the Hague Convention on Child Abduction:

“The Convention reflects on the whole a compromise between two concepts, different in part, concerning the end to be achieved. In fact one can see in the preliminary proceedings a potential conflict between the desire to protect factual situations altered by the wrongful removal or retention of a child, and that of guaranteeing, in particular, respect for the legal relationships which may underlie

¹¹⁵ See the Irish Report at 4.5.8.

¹¹⁶ See the German Report at 4.4.11.

¹¹⁷ See the comments of Baroness Hale in *Re D (A Minor)/(Abduction: Rights of Custody)*, *ibid*, at [61], referred to in the UK Report at 4.17.8.

¹¹⁸ *State Central Authority of Victoria v. Ardito*, 29 October 1997, Family Court of Australia (Melbourne) [INCADAT HC/E/AU 283] found that the circumstance that the mother was denied the right to appear during the proceedings for the attribution of custody was contrary to all concepts of fairness as regards to Australian fundamental principles.

¹¹⁹ *D.T. v. L.B.T.* [2010] EWHC 3177 (Fam.) [INCADAT HC/E/UKe 1042].

such situations. The Convention has struck a rather delicate balance in this regard. On the one hand, it is clear that the Convention is not essentially concerned with the merits of custody rights (article 19), but on the other hand it is equally clear that the characterization of the removal or retention of a child as wrongful is made conditional upon the existence of a right of custody which gives legal content to a situation which was modified by those very actions which it is intended to prevent".¹²⁰

The "delicate balance" struck by the Convention is based on a clear distinction between the two legal notions of custody and access rights. The first is the notion defined in Art. 3 and its content depends on the law of every State party to the Convention; the second is the autonomous notion of custody and access rights that is peculiar to the Convention.

The Hague Convention on Child Abduction establishes in Art. 3 that the attribution of custody rights is a matter that falls outside its scope of application and is a prerogative of the State of the habitual residence of the child.

Once it has been established, however, that a parent, according to the law applicable to custody rights, holds legitimate custody rights or legitimate rights of access, the exact content of such rights in the law according to which they have been awarded should become irrelevant for the implementation of the Convention.

A two-steps approach in the verification of the wrongful character of a removal is acknowledged by international jurisprudence on the implementation of the Convention.¹²¹

In fact, if the notion of "child abduction" had to be determined by reference to the legal notion of custody in all States Parties, such notion would be variable.

The operation of the Convention has been undermined whenever the characterization of child abduction for the purposes of the Convention has relied on the content of national laws instead of being grounded on the aforementioned autonomous concept.

Reference to custody rights is essential to allow the judge to verify that the original habitual residence was legal and that the abduction disrupted a settlement of the child in a household that was lawful. As stressed in the Explanatory Report, the only reason for the judge to consider the lawfulness of the situation before removal is to discriminate between abductions modifying a legal settlement and abductions modifying an illegal settlement of the child. Clearly, the latter would not deserve protection.

No other grounds for inspecting the law applicable to custody seemed to be authorised by the text. In other words, the inspection carried out by the judge as regards to the situation

¹²⁰ Explanatory Report, par. 9, p. 458.

¹²¹ See, for instance, Lord Justice Dyson in the case of *Hunter v Murrow* [2005] England and Wales Court of Appeal Civil Division 976: "the first task is to establish what rights, if any, the applicant had under the law of the state in which the child was habitually resident immediately before his or her removal or retention. I shall refer to this as "the domestic law question". This question is determined in accordance with the domestic law of that state. It involves deciding what rights are recognised by that law, not how those rights are characterised.[...] The next question is whether those rights are properly to be characterised as "rights of custody" within the meaning of articles 3 and 5(b) of the Convention. I shall refer to this as "the Convention question". This is a matter of international law and depends on the application of the autonomous meaning of the phrase "rights of custody". Where, as in the present case, an application is made in the courts of England and Wales, the autonomous meaning is determined in accordance with English law as the law of the court whose jurisdiction has been invoked under the Convention. But as Lord Browne-Wilkinson said in *Re H (Abduction: Acquiescence)* [1998] AC 72 at page 87F, the Convention cannot be construed differently in different jurisdictions: it must have the same meaning and effect under the laws of all Contracting States. In *R v Secretary of State for the Home Department, ex p Adan* [2001] 2 AC 477 at page 517 when referring to the meaning of the Geneva Convention relating to the Status of Refugees, Lord Steyn said: "In practice it is left to national courts, faced with material disagreement on an issue of interpretation, to resolve it. But in so doing it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning."

of the child in the foreign legal system should be limited to assessing the legitimacy of the factual settlement before its alteration by the abductor, with the purpose to create a different household abroad for the child.

In practice, however, the transfer of residence is considered illegal when it has caused a unilateral modification of the living environment of a child, affecting the legal custody of him/her and/or affecting the relationship between him and one of his/her parents. In order to verify whether such unilateral modification affects the legal custody of the child, it is necessary to solve a classical problem of private international law: the law applicable to custody needs to be identified.

Therefore, in the implementation of the Hague Convention – and in particular after the leading American case of *Abbott*¹²² – the inspection of the judge shifted, from the simple verification of the legitimacy of the prior settlement of the child, to the verification of the existence of “a right of the abductor to determine the child’s residence” in the foreign law on custody rights. Accordingly, the characterization of child abduction became dependent on the content of foreign laws on custody.

This interpretation fails to respect the basic principles of the Convention and may even be in contradiction to the letter of Art. 5, which states that:

“For the purposes of this Convention –a) “rights of custody” shall include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence”.

For its implementation, the Convention deals with the situation of a residential parent and that of a non-residential parent, attributing to the former the right to determine the residence of the child – for the purposes of the implementation of Art. 8-20 of the Convention – and giving to the second the protection of Art. 21.¹²³

Thus, Art. 3 of the Hague Convention, read in conjunction with Art. 5, did not – according to its drafters – foresee a remedy for every breach of a parental authority right conferred upon an adult by the State having jurisdiction to confer it, but only for the disruption of a previously settled and legitimate household.

In fact, the objective of the Hague Convention is, in the first place, that of counteracting the disruption- through a kidnapping - of the family and social environment of a child, in violation of a previous judicial - or in any event legal - settlement.

It seems that the emotional charge in family disputes involving children and the aforementioned American case law have undermined an accurate implementation of the Convention, unduly extending the scope of the high-level protection initially reserved to the need to prevent child abduction in the true sense.

¹²² In *Abbott v. Abbott*, 130 S.Ct. 1983 (2010) the violation of a “ne exeat order” by Chilean authorities has been interpreted as a violation of “custody rights” under the Hague Convention in a high conflict divorce where both parents had seised Chilean Courts in order to obtain ne exeat orders (the mother had also feared an abduction of the child to the UK, country of citizenship of the father).

¹²³ In *Hunter v Murrow* [2005] England and Wales Court of Appeal Civil Division 976: “The cases in this court which uphold the boundary between Article 5(a) and 5(b) of the Convention are most recently *Re: V – B (Abduction: Custody Rights)* [1999] 2 FLR 192 and in *Re: P (Abduction Consent)* [2004] 2 FLR 1057. In both these cases the lead judgment was given by Ward LJ. In the first of these cases he said at 198 H: - “It seems to me, therefore, that the proper approach to the consideration of whether or not the father’s rights amounts to rights of custody is to view the expression broadly, endeavouring to give it a universal meaning but one which preserves the essential distinction between, on the one hand, the rights of custody which should only be varied by the courts of the child’s habitual residence for the purpose of which consideration the child should be speedily returned, and, on the other, the rights of access, the protection of which do not require so Draconian a remedy and which can be safeguarded in the country to which the children will have been lawfully and not wrongfully removed.”

Clearly, the idea of restoring the status quo ante only makes sense in case of a kidnapping: the child is brought back to the household to which s/he belonged and from which s/he was illegally removed.

In cases of illegal transfers of residence, if the custodial parent has resettled abroad and moved house, changed job, made arrangements for the education of the child, etc., it does not even seem appropriate to speak about a "return" of the child, since such a return to the country of origin would not be equivalent to a restoration of the status quo.

The previous status quo will probably be inexistent and the life of the child will be confronted with a second transfer involving a change of his/her affective environment and household and would not amount to a "return" to his/her previous life, as is the case of returns consequent upon child abductions in the true sense.¹²⁴

Regardless of these considerations, especially after the precedent of *Abbott v. Abbott*, the violation of access rights has been systematically assimilated to an infringement of "rights of custody", whenever a "right of veto" of the non-custodial parent existed in the law applicable to custody rights. This interpretation, in disregard of the letter of the text of the Hague Convention, has legitimated a broader notion of "abduction" and enlarged the scope of the high-level protection against kidnapping.¹²⁵

Paradoxically, the extension of the scope of Arts. 8-20 has had the effect of potentially impairing the efficiency of the return mechanism, a too dangerous sanction for minor breaches of parental rights (minor when compared to a kidnapping in the true sense). As a consequence, a sound awareness that that sanction is often excessive and inappropriate has encouraged courts to correct the return mechanism, giving an extensive interpretation to the defences against return.¹²⁶

It is important to stress however, that an illegal transfer of residence without changes in the household of a child is substantially different from a kidnapping or a retention entailing a modification of his/her household.¹²⁷

The weak "international" protection of the "non-residential" parent in Art. 21 – and its scarce implementation – is at the core of this unfortunate assimilation and evolution and requires special attention.¹²⁸ Criticism of the Convention in the sense that it is not useful for the protection of the non-residential parent is recurrent in academic writings.¹²⁹

The legal concept of "abduction" developed by national courts since the ratification of the Hague Convention affects EU Regulation 2201/2003, since Art. 2(9) and 11 of the latter directly and literally refer to the former.¹³⁰

¹²⁴ Refer to p. 4.4.10 of the German Report for criticism voiced by German Authors.

¹²⁵ L.J. Silberman, *The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from The United States and Europe – Abbott, Neulinger, Zarraga*, in *Oklahoma Law Review*, vol. 63, 2011, <http://ssrn.com/abstract=1995567>.

¹²⁶ *Supra*, par. 3.2.2.

¹²⁷ A Kronberg, *Ulovlige børnebortførelser*, in T Baumbach et al., *Festskrift til Jørn Vestergard*, Copenhagen: Jurist- og Økonomforbundets Forlag 2008, p. 331; Fucik/Miklau, *Aufenthaltsbestimmung, Wohnortwechsel und HKÜ*, *iFamZ* 2013, 31. Beclin, *Die wichtigsten materiellrechtlichen Änderungen des KindNamRAG 2013*, *Zak* 2013/7.

¹²⁸ As explained in the text, with the exception of children living in two households simultaneously (half time in each parent's household) where any disruption of a settlement and transfer abroad may be qualified as "abduction", in all other cases the protection involving "immediate return" was – in the mind of the Hague Convention's drafters – reserved to the residential parent.

¹²⁹ See, e multis, Dutta/Scherpe, *Die Durchsetzung von Rückführungsansprüchen nach dem Haager Kindesentführungsübereinkommen durch deutsche Gerichte*, in: *Zeitschrift für das gesamte Familienrecht* 2006, p. 901 (901); RIECK, *Kindesentführung und die Konkurrenz zwischen dem HKÜ und der EheEuGVVO 2003 (Brüssel IIa)*, in: *Neue Juristische Wochenschrift* 2008, p. 182 ff.

¹³⁰ See CJEU 5 October 2010 In Case C-400/10 PPU, J. McB. V L. E., p. 41: "Since 'rights of custody' is thus defined by Regulation No 2201/2003, it is an autonomous concept which is independent of the law of Member States. It follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of that law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an

3.2.4. The impact of the characterization of illegal transfers of residence as child abduction cases on the exercise of the fundamental freedom of movement within the EU

The uncertainties on the legal concept of “abduction” in the Hague Convention affect directly EU Regulation 2201/2003, since art. 11 of the latter refers directly to the former.

It seems important to stress that an illegal transfer of residence is comparatively different from a kidnapping and that it has a different impact on the life of a child.

The Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention and the following national reports show that – in the time-frame available to judges for issuing a return or non-return order – too much emphasis is put in the investigations on custody rights and their content in the law of the country a quo and less enquiries are made as regards to the arrangements for securing the protection of the child in case of his or her return to that State.

3.2.4.1. The “right to decide a child’s residence”

Following the characterization of every unauthorized transfer of a child’s residence as “child abduction”, the operation of the Convention has been challenged by the enlargement of the scope of the protection granted by Arts. 8-20, including return, at the expense of the protection in Art. 21.

National courts, confronted with the need to act within 6 weeks in order to deal with very heterogeneous cases, show contradictory trends, asserting the need for restrictive interpretation of the exceptions to return, but frequently upholding exceptions to the obligation of returning a child, either through the acceptance of a defence, or not enforcing decisions of return.

On the other hand, the transfer of a child’s residence is characterized as a question of the “rights” of the non-resident parent¹³¹ and this situation has created an obstacle for primary caregivers, especially mothers, willing to relocate with their children, even in the absence of joint custody.¹³²

In order to further expand the protection granted by the “return mechanism” national legislation tend to modify the concepts of “parental responsibility – custody rights” and separate custody from parental responsibility.¹³³

In particular, most national legislators, in order to counteract child abduction, have created specific legal rules as regards to “the right to determine the child’s place of residence” dissociating this right from all other “rights relating to the care of the person of the child”.¹³⁴

These restrictions directly affect the fundamental freedom of movement that the EU intends to promote, removing every obstacle to participation in the European labour market.

autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question (C-66/08 Kozłowski [2008] ECR I-6041, paragraph 42 and case-law cited). Accordingly, for the purposes of applying Regulation No 2201/2003, rights of custody include, in any event, the right of the person with such rights to determine the child’s place of residence.”

¹³¹ Antokolskaja M., *Shared Residence from a Comparative Perspective: A Solomon’s Judgement New-Style*, Festschrift für Ingeborg Schwenzer, Berne 2011, t. I, p. 81.

¹³² C. Bruch, “The promise and perils of a Protocol to the 1980 Convention on the Civil Aspects of International Child Abduction”, in A. Büchler, M. Müller-Chen, eds., *Festschrift für Ingeborg Schwenzer zum 60. Geburtstag*, 2011, pp. 237-249.

¹³³ See Bucher A., *Autorité parentale conjointe dans le contexte suisse et international*, in *La famille dans les relations transfrontalières*, Symposium en droit de la famille Fribourg, Genève 2013, p. 1-68 on the transformation of custody rights in a de facto care of the child.

¹³⁴ ISDC, *Study on Parental Responsibility*, EP study 425.615, p. 43.

They affect, in particular, Article 3 (ex Article 2 TEU) according to which:

- "1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime" (Consolidated version 2012)."

They must also be seen in the light of the Treaty on the Functioning of the European Union and especially of its art. Article 45, according to which:

- "Freedom of movement for workers shall be secured within the Union.
Such freedom of movement shall entail [...] the right, subject to limitations justified on grounds of public policy, public security or public health:
- (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission" (Consolidated version 2012)."

As suggested above, the increase in reported child abduction cases may be a direct consequence of the assimilation of "child kidnappings" on the one hand, and "illegal transfers of a child's residence", on the other hand.

3.2.4.2. Contradictory trends in the evolution of parental responsibility

As revealed by a previous study conducted by the SICL,¹³⁵ national legal "rights relating to the care of the person of the child" may not – and in many cases do not – include "the right to determine the child's place of residence".

The aforementioned study identifies– in a comparative perspective - three broad legal concepts of relevance to the rights of child carers over the child: custody rights, guardianship and visiting rights.

In a nutshell, it may be said that "guardianship" generally exists independently and regardless of any interruption of cohabitation between the parents; it concerns the right of one or both parents to take economic and legal decisions for the child. In continental law, and in our study, guardianship is equivalent to "parental responsibility".

"Custody" generally consists of taking care of the child and addressing his needs in his/her daily routine: housing, feeding, school, extracurricular activities.¹³⁶

A "visiting right" or – in our study and in the text of the Hague Convention, the "right of access to the child" – is the right to regularly spend circumscribed periods of time in the company of the child.

The "battle" over the right of determining the residence of the child has encouraged the evolution of parental rights and duties towards the abandon of the Hague bipartite scheme and the adoption of the aforementioned tripartite scheme.

¹³⁵ Ibidem.

¹³⁶ See Bucher A., *Autorité parentale conjointe dans le contexte suisse et international*, 2013, passim.

The evolution towards a tripartite scheme involving the explicit attribution to both parents jointly of a “right to determine a child’s residence”, unless a judgement deprives one of them of such “right”, is visible in all countries considered in this report. However, joint parental responsibility is often subject to marriage, otherwise the law vests only the mother with parental responsibilities and unmarried fathers need to be vested with parental responsibilities by virtue of a judgment or an agreement with the mother that proves the father’s status of parent of the child.

The bipartite scheme of the Convention has been recently re-adopted by Austria, once again, it seems, as a consequence of the doctrinal debate on the political effects of “child abduction rules”.¹³⁷ Austria has been enacting, since 1 February 2013, new provisions dealing with legal requirements for joint custody and the relocation of a child.¹³⁸ According to the new rules, the custodial parent who has the largest share of care of the child in his or her own household may also solely decide upon the place of residence of the child, within or outside Austrian borders, even in the case of joint custody. Only in the absence of a residential parent it is necessary to have a prior consent of the other parent or a court decision in order to lawfully transfer the child’s residence abroad.¹³⁹

The Austrian rules are significantly more compatible with the European fundamental freedoms within the European Area of Freedom, Justice and Security.

The exercise of the parental responsibilities of the non-residential parent may be impaired by a transfer of residence, as a consequence of the following factors: the distance,¹⁴⁰ financial obstacles to the mobility of the non-residential parent, linguistic and cultural barriers to his/her capacity to integrate and understand the context in which the child is growing up. These potential impairments need specific attention, since the Hague Convention on Child Abduction has failed to guarantee the protection of access rights *per se* and Art. 21 has scarcely been implemented

3.2.5. Implementation of the Convention

Originally, the Convention aimed at creating a close co-operation among the judicial and administrative authorities of the Contracting States, in light of the acknowledgement that family cases and the right of a child to grow up in a safe environment and to keep ties with both of his/her parents require attentive *in concreto* analysis.

Exceptions to return shall allow only restricted inquiries by the judge and not an in-depth analysis of the child situation. They shall be treated as urgent proceedings in Member States.

¹³⁷ *Infra*, par. 4.13. *passim*.

¹³⁸ § 162 Austrian Civil Code (ABGB) in its version after the Kindschafts- und Namensrechts-Änderungsgesetz 2013 – KindNamRÄG 2013, BGBl. I Nr. 15/2013 and the explanatory report: 2004, der Beilagen XXIV. GP, Regierungsvorlage, Vorblatt und Erläuterungen, p. 23: „Wenn und sobald die Eltern eine Vereinbarung getroffen haben, welcher Elternteil das Kind in seinem Haushalt hauptsächlich betreut oder das Gericht die Betreuung des Kindes im Haushalt eines Elternteils festgelegt hat, soll diesem Elternteil nach § 162 Abs. 2 des Entwurfs das alleinige Wohnortbestimmungsrecht zukommen. Dies gilt auch für eine Verlegung des Wohnorts in das Ausland“. *Infra* at 4.13.3. and the observations of Fötschl, both in the Austrian Report and in *Sorgerecht und internationale Kindesentführung*, EF-Z 2014/67, p. 100.

¹³⁹ Sect. 3 of § 162 Austrian Civil Code (ABGB). *Ibidem*.

¹⁴⁰ Siehr, in: Säcker/Rixecker (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 10: Internationales Privatrecht: Rom I-Verordnung; Rom II-Verordnung; Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-24)*, 5th edn., Munich 2010, Annex II to Art. 21 EGBGB, para. 28.

3.2.5.1. Comparative analysis of the civil procedure and proceedings arising from the transfer abroad of the habitual residence of a child

Many countries have created new and special provisions for proceedings designed to counteract unilateral violation of custody rights, particularly in order to meet the peculiar requirements of litigation based on violations of the Hague Convention on Child Abduction. Some countries designed such new proceedings, not only to comply with the requirements of the Convention, but also to comply with EU Regulation 2201/2003 and/or seized the opportunity to reform their procedural rules of family law.

In Spain, the Organic Law n. 1/1996 introduced articles 1902 to 1909, specifically designed for the implementation of the Hague Convention on Child Abduction.

With the statute L 2007-05-10/52, Belgium created a chapter XIII in the Belgian CJ, containing Arts. 1322bis to 1322quaterdecies, in order to specifically address proceedings based on the Hague Convention on Child Abduction, EU Regulation 2201/2003 and the 1980 European Convention on Custody of Children. Similarly, Sweden adopted its Implementation Act.

In the Czech Republic, a recent statute - n. 292/2013 in force since January 1st, 2014 - was adopted in order to introduce non-contentious proceedings, for the first time. In particular, the new proceedings are designed to determine or contest parentage and to deal with the transfer of a child's residence abroad in violation of parental responsibility.

In addition, litigation based on violations of the Hague Convention on Child Abduction has been concentrated, by many countries, in a few specialized Courts.¹⁴¹

In Sweden, the Stockholm District Court has exclusive jurisdiction to order the transfer of children illegally brought to Sweden, as well as to enforce a foreign order of return.¹⁴²

In Belgium, litigation arising from the transfer abroad of the residence of the child is always allocated to the Presidents of the five Instance Courts located at the seats of the Belgian Appellate courts: namely in Antwerp, Brussels, Liège, Gent and Mons. The Presidents have jurisdiction to decide upon the return of a child from Belgium to the State in which the child had his/her residence before having been brought to Belgium. The Czech Republic concentrates litigation about children illegally relocated in the Czech Republic in a specialized senate of the district court of Brno, where the Central authority is also situated. The jurisdictionally competent court is a municipal court. When the child has been abducted from the Czech Republic, the proceedings may be brought before the municipal court of the former residence of the child.

In Spain, there is no specialized court. Jurisdiction is vested in the Court of First Instance of the judicial district in which the child is present.

Parties to the proceedings are the parents or any person, institution or entity having custody rights over the child and the Central Authority or the public prosecutor solicited by a parent or by the Central Authority.¹⁴³ In most countries, it is obligatory to join the public prosecutor as a party to the proceedings.¹⁴⁴ In Denmark, the Statsforvaltningen - the regional state administration - has various duties and functions in connection with parental responsibilities and may initiate proceedings in court.

¹⁴¹ See CJEU, 9 January 2015, *Bradbrook v. Aleksandrowicz*, in case C-498/14 PPU on the conformity of specialized courts with EU Regulation 2201/2003.

¹⁴² See art. 13 of the Swedish Implementation Act: «Application for enforcement of a [return order] are made in the district court in the district where the child resides. If another district court hearing a dispute between the same parties on the custody, accommodation or visitation, enforcement may also be sought from the district court. If there is any other court of competent jurisdiction, enforcement is dealt with by the Stockholm District Court. Application for transfer of children under 11 § is the Stockholm District Court. Law (2006: 462).

¹⁴³ See, for instance, the Spanish and Belgian Reports.

¹⁴⁴ See, for instance, art. 1902-3 of the Spanish Procedural law (hereinafter LEJ) stating: "Las actuaciones se practicarán con intervención del Ministerio Fiscal".

The welfare of the child during the proceedings is specifically addressed by many implementation laws. According to art. 1903 of the Spanish LEJ, the judge may adopt any measure for the protection of the child.¹⁴⁵ Section 16 of the Danish child abduction Act¹⁴⁶ requires the child to be heard either directly or through a psychologist. According to section 17, the child may be placed either with one of the parents or in a neutral place in particular cases.

Some European countries have been condemned by the ECHR for not having guaranteed the welfare of the child and the maintenance of contacts between him/her and the left-behind parent during the judicial proceedings.¹⁴⁷

The six week time-limit is generally respected in some countries, such as Belgium and Spain, whereas countries such as Slovakia and Romania have been condemned by the ECHR for the length of child abduction proceedings having taken place in those countries.¹⁴⁸

In the Czech Republic, it seems that the time-limit for issuing a decision on the merits is respected. Since the enforcement order may be appealed, since the means of execution through “withdrawal” of the child are not prescribed and since the time-frame of such enforcement is also uncertain,¹⁴⁹ enforcement might nevertheless not always be efficiently carried out. In order to improve cooperation to counteract child abduction, the new Czech legislation contains various means of speeding up the procedure: the Court may decide the case without a hearing, the time-frame is three weeks after the lodging of the application, extraordinary means of appeal are excluded, deadlines are unconditional, proceedings may not be stayed and the return of the child may be ordered before the final decision on the merits is issued.

It is crucial to provide adequate procedural means of guaranteeing the effectiveness of the child’s testimony (i.e. in many case, the child’s objection to a return), not only in order to determine the place of residence of a grown-up, as we have just seen, but especially in order to advance the “grave risk exception” . In this respect, a comparative analysis¹⁵⁰ of the US-American and British systems has found that the British system accords children a greater opportunity to express their views and an accordingly greater opportunity for courts to fully consider the many factors involved and to reach more consistent results.

3.2.5.2. Comparative analysis of the enforcement methods

Jurisdiction to enforce is often given to the District Court of the place at which the child is present. In Sweden, the Stockholm District Court has jurisdiction to enforce orders of transfer whenever the child has been brought to Sweden illegally from abroad. If the Stockholm District Court issues a decision refusing the transfer of a child residing in Sweden, Court of the district where the child resides may be required to enforce that decision. If a dispute between the same parties on custody, accommodation or visiting

¹⁴⁵ Art. 1.903 LEJ: «A petición de quien promueva el procedimiento o del Ministerio Fiscal, el Juez podrá adoptar la medida provisional de custodia del menor prevista en la Sección siguiente de esta Ley y cualquier otra medida de aseguramiento que estime pertinente».

¹⁴⁶ Act on International Enforcement of Decisions concerning Custody etc. (International Child Abduction)(Consolidation Act no 375 of 06/04/10) Act No 793 of 27 November 1990 on international enforcement of decisions concerning custody, etc. (international child abduction) with the changes which follows from section 1 of Act No 387 of 28 May 2003, section 13 of Act No 434 of 8 May 2006 and section 2 of Act No 500 of 6 June 2007.

¹⁴⁷ *Macready v. the Czech Republic* - 22 April 2010 ; *LaFargue v. Romania*, 13 July 2006, *Prod Ialová v. the Czech Republic* ; *Bergmann v. the Czech Republic*.

¹⁴⁸ For instance, Belgian law in addition to prescribing the use of the urgent proceeding named *référé*, drafted art. 1322septies to exclude counterclaims.

¹⁴⁹ See Czech Report, par. 4.2.4., note 27.

¹⁵⁰ GREENE A. M., *Seen and Not Heard? Children’s Objections Under the Hague Convention on International Child Abduction*, (2005) 13 *University of Miami International and Comparative Law Review* 105.

rights is being heard somewhere else in Sweden, enforcement may also be sought of that district court.

Enforcement of the decision is a very delicate process and, in principle, depends upon cooperation of the parties. If the parties do not collaborate, Belgian law, in art. 1322undecies, allows the judge to designate one or more persons to accompany the bailiff charged with execution. In the Czech Republic, if the party requested to return the child does not voluntarily comply with the court's decision, s/he first receives warning, followed by an enforcement order that may even be accompanied by a fine (up to 50.000 CZK). For the reasons explained above, however, enforcement seems to be the weak link in the chain.

In most countries, enforcement is sought through the use of default fines (astreintes).¹⁵¹

3.2.5.3. Existing criminal sanctions

Criminal sanctions need to be handled with extreme caution, since they potentially contradict the legislative policies underlying "litigation over the residence of the child" whenever the criminalisation of the current primary caregiver, stigmatised as an "abductor" and a "criminal", may increase the importance and the intensity of litigation between the parents, instead of promoting a peaceful settlement of the conflict, in the interests of the child.

Moreover, the deterrent effect of criminal sanctions seems to be low, at least in those cases in which the principal motivation for abduct is that of protecting the child. On the whole, the imposition of criminal sanctions seems to be at odds with those fundamental principles of public international law which require the pursuit of the best interests of the child.

No special criminal offence of parental child abduction exists in the Czech Republic, Denmark, Germany, France, Italy, Hungary, Austria, Poland, Slovakia, Sweden.

Only Belgium, Lithuania, Spain, Russia and the UK punish the crime of parental child abduction.

In one single article, the relevant Lithuanian legislation combines abduction in general, in the first paragraph, and in a second paragraph, parental abduction as a qualified form of abduction.

The kidnapping of his/her own child may lead, in England and Wales, even to life imprisonment, although prosecution is subject to a specific consent of the Director of Public Prosecutions and is not automatic.¹⁵²

Kidnapping involves the following elements:

- (a) the taking or carrying away of one person by another;
- (b) by force or by fraud;
- (c) without the consent of the person so taken or carried away;
- (d) without lawful excuse.¹⁵³

Besides kidnapping, the illegal expatriation of a child – i.e. the sole fact of illegally taking a child outside of the UK – is punished in the UK.¹⁵⁴

¹⁵¹ See, for instance, the Danish Report, the German Report, the Romanian Report, the Belgian Report, etc.

¹⁵² See the UK Report, under 4.17.5.

¹⁵³ See the UK Report, under 4.17.5., summarising Alistair McDonald Q.C. (ed.), Clarke, Hall and Morrison on Children, op. cit., Division 5, section 35.

¹⁵⁴ See the UK Report, under 4.17.5.

In every country examined, abduction is defined as the removal of a child from the person who has the custody rights, without his/her consent. Abduction may concern children or adults. The definition of a minor is not always the same for the purpose of criminal rules and civil rules on “child abduction”. For instance, Germany, Austria, Poland and the United Kingdom have a different age limit for the purposes of criminal child abduction. Criminal rules protect children under the age of 14 in Germany, under 15 years old in Poland and under 16 years old in Austria and the United Kingdom.

Of the countries considered in this study, 11 – Belgium, the Czech Republic, Spain, France, Lithuania, Hungary, Austria, Poland, Romania, Slovakia and Sweden – do not limit (parental) abduction in the sense that the rule would deal only with cross-border abduction, meaning that the child would have to be removed from the person who has custody rights and brought into another country. Instead, the relevant articles in the penal codes of those 11 countries define “abduction” as including every situation in which a child is removed from the person who has custody rights, regardless of whether the child has been brought into another country or away from the custodian, but kept in the same country.

On the other hand, Denmark, Germany, Italy and the United Kingdom define “abduction” in a different sense. The elements of the crime are present only in cases of cross-border abduction. The situation mentioned above, in which the abductor and the child stay in the country where the child has his domicile is not granted criminal protection.

The sanctions provided by the particular criminal codes of the countries examined in this study include wide range of the penalty levels. This possibility of sentencing a child abductor to a period of imprisonment is common, however, to all of them.

Some of the countries examined combine imprisonment with a fine; others sentence either to imprisonment or a fine. The maximum extent of this penalty varies between 8 days of imprisonment in the case of Belgium and 8 years in the case of Lithuania. Most of the countries stipulate imprisonment for a maximum of between three and five years.¹⁵⁵ Spain in addition combines imprisonment between 2 and 4 years with the special prohibition of the exercise of parental rights for 4 to 10 years. The maximum period of imprisonment is one year in Belgium, France, Austria and Sweden. The United Kingdom stipulates imprisonment for up to 7 years, which is the second highest level of penalty identified by the present study, other than that imposed by Lithuania.

Most of the countries examined in this study provide an enhanced criminal sanction for especially serious forms of abduction. Situations which demand an enhanced sanction include those in which the abductor doesn't have any parental authority (Belgium), in which the child's life is or has been put at risk (Germany), in which the child is younger than 14 years old (Austria), in which the child is retained outside of the territory of the country (France) or in which the child is retained for more than 5 days (France). In these cases, the period of imprisonment nearly doubles.

On the other hand, a sentence can be mitigated, if for example the abducted child is older than 14 (in the case of Italy) or 16 (according to the penal code of Austria).

3.2.5.4. Compensation of the parent left behind and other civil law sanctions, including the possibility of claiming damages

There has been wide discussion of the extent to which it is appropriate to require the abducting party to compensate the parent left behind. Another issue deserving analysis concerns possible compensation to be claimed by the child, once s/he reaches adulthood.

¹⁵⁵ The Czech Republic, Denmark, Germany, Spain, Italy, Hungary, Poland, Slovakia.

Comparative studies¹⁵⁶ have allowed the identification of two alternative models: the tort model and the contract model.

In the tort model, the parent left behind brings a civil claim in tort against the abducting parent and receives compensation for losses suffered. Compensation may also be granted to the parent left behind as a consequence of a civil claim in contract against the abducting parent: damages are awarded for the breach of the contractual arrangements on the subject of the exercise of custody and visiting rights, which had been concluded with the other parent at the time of separation.

However, in the context of a family, however disrupted, most jurisdictions avoid to make orders as to costs, outside exceptional circumstances (when the disparity of means is sensitive or if the circumstances of the abduction justify it).

3.2.5.5. Judicial, administrative and other authorities competent for child abduction cases

The Central Authorities are administrative bodies that were created to implement the Hague Convention on Child Abduction. Most countries designated the respective national administrations in charge of family matters as Central Authority.

The Services of the Central Authority are to be provided free of charge, with few exceptions.¹⁵⁷

Central Authorities may play a significant role in enhancing the protection of parental rights after a separation or divorce. Their structures and responsibilities vary considerably from one country to another – sometimes but not always for demographic reasons.

The on-going projects of enhanced involvement of the Central Authorities in mediating high-conflict divorces in connection with child abduction cases represent an opportunity to rethink their practical role in guaranteeing the best possible relations between children and their parents.

3.3. The impact of EU Regulation 2201/2003 in child abduction proceedings

Since the Hague Convention is applicable in 93 States, the need to avoid “unilateralistic interpretations” of the Convention by States Parties is acute, because of the number and variety of the legal systems in which the Convention operates, the delicacy of the matter regulated by the Convention and the potential impairment of human rights of particularly fragile subjects, namely children.¹⁵⁸

Several factors favour unilateralistic interpretations, despite its prohibition by the Vienna Convention on the law of treaties.¹⁵⁹

¹⁵⁶ Refer, for example, to R. Schuz & B. Shmueli, *Between Tort Law, Contract Law, and Child Law: How to Compensate the Left-Behind Parent in International Child Abduction Cases*, (2012) 23 *Columbia Journal of Gender and Law* 65 and to J. Ruiz Jiménez & L. Tejedor Muñoz, *Indemnización de los daños morales sufridos por uno de los progenitores al ser privado por el otro de relacionarse con su hijo*, (2010) 718 *Revista Crítica de Derecho Inmobiliario* 805.

¹⁵⁷ Most countries apply the rules in force for legal aid to Central Authorities services.

¹⁵⁸ B. Conforti, *International Law and the Role of Domestic Legal Systems*, Dordrecht, 1993, p. 105, stresses that domestic courts “must avoid a unilateral interpretation of the treaty, that is an interpretation either guided by nationalist concerns (“political” unilateralism), or corresponding exclusively to legal concepts of its legal system (“legal” unilateralism”).

¹⁵⁹ The prohibition of unilateralist interpretations under public international law is derived from Arts. 33-3 and 33-4 of the Vienna Convention on the Law of Treaties, stating that “3. The terms of the treaty are presumed to have the same meaning in each authentic text. 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning

In the context of the Child Abduction Convention, nationalist concerns may – consciously or unconsciously – lead judges to unduly protect their nationals when they are involved in international proceedings. It is needless to say that – despite the debates on the existence of a right/duty to protect nationals under customary international law – such protection constitutes a clear example of discrimination grounded on nationality and is thus contrary to the constitutional principles of the European Union.

The protection of citizens may induce a nationalist interpretation of the “best interests of the child” leading to eventually situate the “best residence” of the child within the territory of the forum. The ECHR has recently acknowledged, in a child abduction case, that the perception of a father of being discriminated in the mother’s home country was legitimate.¹⁶⁰ The same court has noted “the opinion of the President of [a Slovakian Court] which may be interpreted as implying that there is a systemic problem [in treating international-child-abduction proceedings], with the attendant effect of negating the object and purpose of the Hague Convention”.¹⁶¹

The Explanatory report to the Hague Convention on Child Abduction acknowledges this risk, on the basis that a judge expresses particular cultural, social or anthropological attitudes derived from his or her national community and that this may result in the imposition of a subjective value judgment, potentially impairing a uniform implementation of the Convention.¹⁶²

As recently put forward, it is the position of the judge that necessarily reflects that of his own legal order and may be accountable for such bias.¹⁶³

The existence of a national bias in treating child abduction cases is recurrently admitted in legal literature, stressing that mutual trust does not always exist in judicial practice.¹⁶⁴ Some cases are considered as revealing an underlying persuasion that the best interests of the child are best promoted within a court’s national borders.¹⁶⁵

The existence of “national” interpretations of the exceptions provided for in Art. 13 has also been frequently denounced.¹⁶⁶

Regardless of borders, the cultural gap between the countries involved in any dispute over the residence of the child is taken into account by courts in child abduction cases.¹⁶⁷

which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.

¹⁶⁰ See ECHR, 13 January 2015, case of *Manic v. Lithuania*, Application no. 46600/11, at 117: “In the light of the foregoing, and also taking into account the applicant’s inability to obtain prompt and informative responses when communicating with the bailiff, who is a State official, and the State-appointed lawyer, both of whom were to act in good faith for the benefit of the applicant (...), as well as a certain lack of information from the Utena District Court about the proceedings that concerned him directly, it was to an extent legitimate for the applicant to feel that his interests had been neglected in Lithuania, which might explain his unwillingness to go there later. From the above considerations it also transpires that the applicant’s contact with his son so that the boy would get to know his father “in the father’s own environment” (...) was prevented by the Lithuanian authorities at precisely the initial stage when it was most important. The Court therefore considers that what happened after the Utena court decisions of 1 March and 27 April 2011 could not remedy the applicant’s situation sufficiently satisfactorily.”

¹⁶¹ See ECHR, 13 January 2015, case of *Hoholm v. Slovakia*, Application no. 35632/13, where the Court “holds that there has been a violation of Article 6 § 1 of the Convention, taken both alone and in conjunction with Article 13 of the Convention” observing, in particular, at point 49: “Without passing any abstract judgment on the system of remedies available in Slovakia in international-child-abduction proceedings, the Court notes the opinion of the President of the Bratislava II District Court (...), which may be interpreted as implying that there is a systemic problem in allowing appeals and extraordinary appeals on points of law in the given type of proceedings, with the attendant effect of negating the object and purpose of the Hague Convention”.

¹⁶² Explanatory Report, p. 462.

¹⁶³ G.P. Romano, *Conflits entre parents et entre ordres juridiques en matière de responsabilité parentale, Enlèvement international d’enfants, Saisir le juge ou s’engager dans la médiation?*, Neuchâtel, 2015, p. 81 and note 46.

¹⁶⁴ See, for instance, the Belgian report, par. 4.1.9. in fine.

¹⁶⁵ See the « *Oliver case* » dealt with in the Danish report at 4.3.3, note 9 and 20 and in the Austrian Report at 4.12.3. at note 58 and a case involving Sweden and the US, quoted in the Swedish Report at 4.16.2.

¹⁶⁶ *Infra*, at 3.4.

In addition, the unequal economic welfare of EU Member States – resulting in a significant gap between the salaries of the parents residing in two different Member States – are said to influence the identification of the country offering a better welfare to the child – because of the higher salary of the parent residing there.¹⁶⁸

3.3.1. A comparison between the operation of the Regulation and that of the Convention

The Regulation, as well as the Convention, is applied when a parent addresses a request for the return of the child, after her/his illegal removal from his/her household, to the authorities of the Member State of the former habitual residence of the child (Art. 11, EU Regulation 2201/2003).

However, the mechanism of the Convention, already undermined by an extensive interpretation of “parental kidnapping”, is also altered by Art 11, EU Regulation 2201/2003.

The Convention is based, as already observed, on cooperation between the Central Authorities of Contracting States, while EU Regulation 2201/2003 is based on a strict repartition of jurisdiction between the State “of origin” and the State “of enforcement” .

First, art. 11, par. 2 of the Regulation prescribes that “it shall be ensured that the child is given the opportunity to be heard during the proceedings unless it appears inappropriate having regard to his or her degree of maturity.”

Objections have been raised to the compulsory hearing of the child, in particular on the grounds that a child may be influenced by his or her actual residential parent.

A second objection is of pragmatic character: the hearing of the child may even harmful, whenever the court’s decision contradicts his or her will, or because the parent “not chosen” may not take his/her child’s view with maturity and responsibility. In other words, one should fear a childish reaction on the part of the “not preferred” parent.¹⁶⁹

It seems that the opportunity to hear the child and the consequences of possible objections of the child require a case-by-case approach.¹⁷⁰

Moreover, the compulsory hearing of the child in genuine and brutal kidnappings, where the circumstances of the case appear sufficient to the judge to order expedite and urgent return, interferes negatively and uselessly with the timeliness of the procedure.

Secondly, Art. 11, par. 4 of the Regulation restricts the operation of Art. 13 par. 1-b) of the Convention, prescribing that European judge’s order the return, despite the existence of a “grave risk”, whenever “adequate arrangements have been made to secure the protection of the child after his/her return”.

Another significant shift from the mechanism of the Convention results from Art. 11, par. 6, 7 and 8 EU Regulation 2201/2003:

¹⁶⁷ The Danish report finds that courts consider it inappropriate to force parents and/or the children to stay in a country different from the one where they have been integrated; see also the German report at notes 94 and 95.

¹⁶⁸ See the concluding remarks of the Hungarian report at 4.10.14.

¹⁶⁹ See the German Report at 4.4.11 for references.

¹⁷⁰ In a return proceedings under the Hague Convention of child abduction, the ECHR, 9 September 2014, *Gajtani v. Switzerland*, App. n. 43730/07 held that there was no violation of art. 8 EConvHR in a case where a national court had not taken into account the opinion of a 11 year old child opposing return and not heard his five years old sister.

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.

In other words, potentially conflicting judgments between the courts of Member States - intolerable within the EU - are solved by giving the ultimate word on the issue of "return" to the judge of the habitual residence of the child.

The decisions of the court having jurisdiction under Art. 10 EU Regulation 2201/2003 – the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention, unless s/he has acquired a habitual residence in the State to which he has been transferred – are immediately enforceable in the European area of freedom, justice and security – because they are not subject to any exequatur procedure in the Member State where enforcement is sought.

In particular, for the decision to be enforced it is not necessary to wait for a decision on the rights of custody, because of the procedural autonomy of "child abduction cases".¹⁷¹ Thus, according to the Court of Justice of the European Union: "the need to deter child abduction, and the child's right to maintain on a regular basis a personal relationship and direct contact with both parents, take precedence over any disadvantages" such as those caused to a child being "moved needlessly".¹⁷²

In the context of the Regulation, any possibility of avoiding the enforcement of the foreign decision on return of a child is excluded. The possibility for the judge to exercise his/her jurisdictional function is thereby also excluded.¹⁷³

Even

"a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional custody rights and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has

¹⁷¹ CJEU, 11 July 2008, in case C-195/08 PPU, Inga Rinau, p. 63: "Although intrinsically connected with other matters governed by the Regulation, in particular rights of custody, the enforceability of a judgment requiring the return of a child following a judgment of non-return enjoys procedural autonomy, so as not to delay the return of a child who has been wrongfully removed to or retained in a Member State other than that in which that child was habitually resident immediately before the wrongful removal or retention".

¹⁷² CJEU, 1 July 2010, in case C-211/10 PPU, Doris Povse v. Mauro Alpago, p. 63.

¹⁷³ See Recital 24, arts. 41-43 of the Brussels IIbis Regulation.

jurisdiction in the Member State of origin and ordering the return of the child".¹⁷⁴

Notwithstanding the precautions established in the Hague Convention,

"enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child".¹⁷⁵

The "clear repartition of jurisdiction" prevails even in case of an infringement of Art. 24 of the European Charter of Fundamental Rights, since even an infringement of the Charter may only be heard in the "Court of origin":

"before a court of the Member State of origin can issue a certificate which accords with the requirements of Article 42 of Regulation No 2201/2003, that court must ensure that, having regard to the child's best interests and all the circumstances of the individual case, the judgement to be certified was made with due regard to the child's right freely to express his or her views and that a genuine and effective opportunity to express those views was offered to the child, taking into account the procedural means of national law and the instruments of international judicial cooperation.

However, [...], it is solely for the national courts of the Member State of origin to examine the lawfulness of that judgment with reference to the requirements imposed, in particular, by Article 24 of the Charter of Fundamental Rights and Article 42 of Regulation No 2201/2003".¹⁷⁶

In this case, enforcement was ordered, notwithstanding the circumstance that the German judge had evidence that the child was refusing to return to the country of origin and that the child's right to be freely heard had not been guaranteed due to a lack of judicial co-operation between Member States.

A different issue concerns the nature of the certification. The CJEU has constantly stressed that the authenticity of a certification is not subject to any appeal:

"any appeal against the issuing of a certificate pursuant to Article 42 of that regulation, other than an action seeking rectification within the meaning of Article 43(1) of the regulation, is excluded, even in the Member State of origin";

since "the first subparagraph of Article 42(2) in no way empowers the court of the Member State of enforcement to review the conditions for the issue of that certificate as stated therein."¹⁷⁷

Thus, if a judge in a Member State determines, according to the case-file, that a certificate issued by a court of the Member State of origin under Article 42 of Regulation No 2201/2003 contains a declaration which is manifestly false, s/he must still rely on its authenticity.

In summary, the mechanism of the Regulation is based on the pursuit of deterrence. It stipulates that child abduction may only be counteracted by the rigid, systematic and rapid reaction of the States involved, in order to make "child abduction" totally useless. According to the CJEU, giving the least power of revision to the judge responsible for

¹⁷⁴ CJEU, 1 July 2010, in case C-211/10 PPU, Doris Povse v. Mauro Alpago, p. 79.

¹⁷⁵ CJEU, 1 July 2010, in case C-211/10 PPU, Doris Povse v. Mauro Alpago, p. 83.

¹⁷⁶ CJEU, 22 december 2010, in case C-491/10 PPU, Aguirre Zarraga, p. 68-69.

¹⁷⁷ CJEU, 22 december 2010, in case C-491/10 PPU, Aguirre Zarraga, p. 50 ff.

enforcement “could undermine the effectiveness of the system set up by Regulation No 2201/2003”.¹⁷⁸

Because of the inflexibility of the return mechanism, it seems even more urgent, in the context of EU Regulation 2201/2003, to dispose of a clear definition of “child abduction”.

3.3.2. The “Human Rights test”

Notwithstanding the need to discourage “child abduction”, the ECHR has taken the view that the enforcement of a return order, contrary to the best interest of a child, may entail liability of the State enforcing the return order for violation of the European Convention of Human Rights. A first decision of 6 July 2010, *Neulinger and Shuruk v. Switzerland*,¹⁷⁹ is still regarded by scholars as the leading case on the subject.

In the case *Sneersone and Kampanella*, the *Neulinger* principles were reformulated in full:¹⁸⁰

(i) The Convention cannot be interpreted in a vacuum, but, in accordance with Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties (1969), account is to be taken of any relevant rules of international law applicable to the Contracting Parties.

(ii) The positive obligations that Article 8 of the Convention imposes on States with respect to reuniting parents with their children must therefore be interpreted in the light of the UN Convention and the Hague Convention.

(iii) The Court is competent to review the procedure followed by the domestic courts, in particular to ascertain whether those courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8.

(iv) In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters, bearing in mind, however, that the child’s best interests must be the primary consideration.

(v) “The child’s interests” are primarily considered to be the following two: to have his or her ties with his or her family maintained, unless it is proved that such ties are undesirable, and to be allowed to develop in a sound environment. The child’s best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences.

(vi) A child’s return cannot be ordered automatically or mechanically when the Hague Convention is applicable, as is indicated by the recognition in that instrument of a number of exceptions to the obligation to return the child (see, in particular, Articles 12, 13 and 20), based on considerations concerning the actual person of the child and his environment, thus showing that it is for the court hearing the case to adopt an *in concreto* approach to it.

(vii) The task to assess those best interests in each individual case is thus primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned. To that end they enjoy a certain margin of appreciation, which remains subject, however, to European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power.

¹⁷⁸ CJEU, 22 december 2010, in case C-491/10 PPU, *Aguirre Zarraga*, p. 55.

¹⁷⁹ ECHR, 6 July 2010, *Neulinger and Shuruk v. Switzerland*, app. n. 41615/07.

¹⁸⁰ ECHR, 12 July 2011, *Sneersone and Kampanella*, app. n. 14737/09, p. 85.

(vii) In addition, the Court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully. To that end the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin.

In light of these principles, Italy was held responsible for the violation of Art. 8 ECHR on the grounds that

“Even if the Court accepted the Italian courts’ theory that their role was limited by Article 11 (4) of the Regulation to assessing whether adequate arrangements had been made to secure [the child’s] protection after his return to Italy from any identified risks within the meaning of Article 13 (b) of the Hague Convention”, it cannot fail to observe that the Italian courts in their decisions failed to address any risks that had been identified by the Latvian authorities. Thus, for example, the conclusions contained in the Rga Custody Court’s report (see above, paragraph 18), the expert psychologist’s report (see above, paragraph 19) and the Rga City Vidzeme District Court’s decision of 11 April 2007 (see above, paragraph 22) were not explicitly mentioned in either of the two decisions. It is therefore necessary to verify whether the arrangements for [the child’s] protection listed in the Italian courts’ decisions can be in any case considered to have reasonably been taken into account his best interests”.¹⁸¹

The ECHR considers that the obligations of States under the Hague Convention and under the EU Regulation must not infringe Art. 8 of the ECHR in the particular circumstances of a given case:

95. The decisive issue is whether the fair balance that must exist between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters [...] taking into account, however, that the best interests of the child must be of primary consideration and that the objectives of prevention and immediate return correspond to a specific conception of “the best interests of the child” (see paragraph 35 above).

96. The Court reiterates that there is a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount.

97. The same philosophy is inherent in the Hague Convention, which associates this interest with restoration of the status quo by means of a decision ordering the child’s immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child’s interests, thus explaining the existence of exceptions, specifically in the event of a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13, first paragraph, (b)). The Court further notes that the European Union subscribes to the same philosophy, in the framework of a system involving only EU Member States and based on a principle of mutual trust. Brussels II bis Regulation, whose rules on child abduction supplement those already laid down in the Hague Convention, likewise refers in its

¹⁸¹ Sneersone and Kampanella, p. 87 ff.

Preamble to the best interests of the child (see paragraph 42 above), while Article 24 § 2 of the Charter of Fundamental Rights emphasises that in all actions relating to children the child's best interests must be a primary consideration (see paragraph 41 above).

98. Thus, it follows directly not only from Article 8 of the Convention, but also from the Hague Convention itself, given the exceptions expressly enshrined therein to the principle of the child's prompt return to his or her country of habitual residence, that such a return cannot be ordered automatically or mechanically.¹⁸²

In the following case of *X v. Latvia* the Court reiterates that:

"As to the need to comply with the short time-limits laid down by the Hague Convention and referred to by the Riga Regional Court in its reasoning (see paragraph 25 above), the Court reiterates that while Article 11 of the said Convention does indeed provide that the judicial authorities must act expeditiously, this does not exonerate them from the duty to undertake an effective examination of allegations made by a party on the basis of one of the exceptions expressly provided for, namely Article 13 (b) in this case."¹⁸³

As stated by Judge Pinto De Albuquerque in his concurring opinion:

"Taking human rights seriously requires that the Hague Convention operates not only in the best interests of children and the long-term, general objective of preventing international child abduction, but also in the short-term, best interests of each individual child who is subject to Hague return proceedings. Justice for children, even summary and provisional justice, can only be done with a view to the entirety of the very tangible case at hand, i.e. of the actual circumstances of each child involved. Only an in-depth or "effective" evaluation of the child's situation in the specific context of the return application can provide such justice. In layman's terms, Neulinger and Shuruk is alive and well. It was and remains a decision laying down valid legal principles, not an ephemeral and capricious act of "judicial compassion".

Thus, even if the EU, by virtue of its legislative power, has been able to bypass "the insurmountable difficulties encountered in establishing, within the framework of the Convention, directly applicable jurisdictional rules",¹⁸⁴ such jurisdictional rules must not exclude the concurrent jurisdiction of the courts enjoying proximity to the child, or otherwise impair their capacity to apply the Hague Convention, rather than simply administer a procedure. This is particularly true in light of the developments of the notion of "child abduction" now covering cases that are not "kidnappings" *strictu sensu*, and that require, as explained above and by the ECHR, a deep case-by case analysis.¹⁸⁵

¹⁸² CJEU, 22 December 2010, in case C-491/10 PPU, Aguirre Zarraga, p. 55.

¹⁸³ ECHR, 26 November 2013, *X v. Latvia*, Application no. 27853/09.

¹⁸⁴ Conclusions drawn from the discussions of the Special Commission of March 1979 on legal kidnapping, prepared by the Permanent Bureau. Prel. Doc. No 5, June 1979, in *Actes et documents*, p. 163-164.

¹⁸⁵ See, in particular, L. Walker & P. Beaumont, *Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice*, *Journal of Private International Law*, 2011, p. 231-249.

3.4. Critical review of the most acute legal difficulties in the implementation of the legal framework

3.4.1. Deterrence v. Best Interest of the Child

As regards the efficiency of the Convention, there is general agreement on its importance and usefulness.¹⁸⁶ A considerable proportion of the authors nevertheless advance a number of points of concern in respect of the functioning of the "return mechanism" scheme.¹⁸⁷

Profound criticisms of the approach adopted by the Hague Convention – and a fortiori by EU Regulation 2201/2003 – concern the scarce attention paid by the regimes in force to the letter and spirit of the United Nations Convention on the Rights of the Child.¹⁸⁸

The circumstance that violations of Art. 8 ECHR are claimed both by taking parents and by left-behind parents reveals the weaknesses of the current functioning of the "return" mechanism. In particular, it has been said that adopting a technical approach, based on private international law, may not be an adequate manner of protecting the best interests of the child in question.¹⁸⁹

Also, it seems inappropriate to force judges to adhere to merely procedural reasoning, i.e. the return of the child on grounds of a certificate, in all cases where the judge has access to information encouraging him or her to go beyond the mere procedural issue of the return and to protect the best interests of the child.

As observed supra, this mechanism presupposes that there is trust and cooperation between the two judges seized of the case, which is not always true in concrete situations.¹⁹⁰

3.4.2. Lack of protection of de facto situations, discrimination of non-residential parents

The weak protection afforded to "access rights" by Art. 21 of the Hague Convention has shifted the focus from child abduction to the investigation, through private international law techniques, of the existence of custody rights vested in the left-behind parent.

As a consequence, according to the current interpretation of the Hague Convention, the Convention does not protect "de facto" situations nor, does it efficiently protect access rights.¹⁹¹

As a second consequence, non-residential parents are only protected if the law vests them with parental responsibilities. This is not always the case of unmarried fathers.

¹⁸⁶ Refer to E. mult. A. Fiorini, *Enlèvements Internationaux d'enfants, Solutions internationales et responsabilités étatiques*, (2006) 51 McGill Law Journal 279.

¹⁸⁷ Refer for example to T. Kruger, *International Child Abduction: The Inadequacies of the Law*, Oxford: Hart Publishing, 2011 and to K. Trimmings, *Child Abduction within the European Union*, Oxford: Hart Publishing, 2013.

¹⁸⁸ R. Schuz, *The Hague Child Abduction Convention and Children's Rights*, (2002) 12 *Transnational Law & Contemporary Problems* 393; B. Dutoit, *Le droit international privé de la famille et les droits fondamentaux de l'enfant: le choc qui fait chic?*, in Permanent Bureau of the Hague Conference on Private International Law (ed), *A Commitment to Private International Law/ Un engagement au service du droit international privé. Mélanges en l'honneur de Hans van Loon*, Cambridge: Intersentia, 2013, pp. 143-157; A. Bucher, *L'intérêt de l'enfant pénètre la Convention sur l'enlèvement*, in *Vers de nouveaux équilibres entre ordres juridiques, liber amicorum*, Hélène Gaudemet-Tallon, Paris: Dalloz, 2008, pp. 683-701. See also the Irish Supreme Court reasoning in *B.B. v. J.B.* [1998] 1 IR 299, *infra* at 4.6.10.

¹⁸⁹ See, in particular, the German and Austrian report, *passim*.

¹⁹⁰ *Supra* at 3.3.

¹⁹¹ See the Irish Report, in fine and as regards to the lack of protection of access rights, the German Report at 4.4.12. especially note 171 ff.

In many countries, their “right to determine the child’s residence” is subject to conditions: it may depend, for instance, upon the existence of a judgement or an administrative procedure involving a joint declaration of the unmarried parents.

These restrictions exist – in different degrees – in many European countries, such as Denmark,¹⁹² Germany,¹⁹³ Ireland¹⁹⁴ and France.¹⁹⁵

Further problems will appear in connection with those rights related to a child that national laws award to same-sex partners.

3.4.3. Restriction of the freedom of movement of separated parents

Authors in many countries, especially and rather vehemently in Austria, have pointed out that the child abduction rules unduly restrict the freedom of movement of primary caregivers, especially mothers.¹⁹⁶

In this respect, it has been correctly revealed that the problem created by an illegal transfer of residence – namely the impairment of the exercise of parental rights and duties – is not created merely by the crossing of borders but, more substantially, by the distance between the new residence of the child and that of the left behind parent.¹⁹⁷

The circumstance that the transfer of residence, although cross-border, is carried out from one Member State to another Member State seems also relevant.

Moreover, the national courts realise that, whenever the abduction is carried out by a primary caregiver, it is necessary to organise the return of both, not only of the child in question.¹⁹⁸

Interestingly, in a couple of cases, the transfer of a child’s residence carried out by a non-residential parent that enjoyed sole custody rights, have led to the “return” of the child to his/her previous household.¹⁹⁹

3.4.4. Assimilation of the consent of the primary caregiver with that of the other parent

The comparative analysis recurrently reports the imbalance between the protection against child abduction and that against transfers of a primary residence without the consent of the non-residential parent.

As a consequence, they consider the agreement of the primary caregiver to the transfer to have more weight than that of the parent not sharing his/her household with the child.²⁰⁰

¹⁹² See par. 4.3.3.

¹⁹³ See par. 4.4.3.

¹⁹⁴ See par. 4.5.11.

¹⁹⁵ See par. 4.7.2.

¹⁹⁶ See, extensively, the Austrian Report, *passim*.

¹⁹⁷ Siehr, in: Säcker/Rixecker (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 10: Internationales Privatrecht: Rom I-Verordnung; Rom II-Verordnung; Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-24)*, 5th edn., Munich 2010, Annex II to Art. 21 EGBGB, para. 28. Shannon G., *Child Law (Dublin: Roundhall, 2010)* 622.

¹⁹⁸ See the German Report at 4.4.11. at note 158 ff., the Austrian Report at 4.12.9 at note 129 ff., the Romanian Report at 4.14.6.

¹⁹⁹ See the Danish Report at 4.3.8. reporting the following case: a judicial decision had given to a father sole custody of the child because of the psychological fragility of the mother; despite the decision the child lived with his mother, seeing his father occasionally. When the father brought the child abroad with his new partner, the mother requested and obtained his return.

²⁰⁰ See the German Report at 4.4.4., the Irish Report at 4.5.3., the Austrian Report at 4.12.3. and 4.12.9.

In the context of abductions carried out by primary caregivers the “return” might prove difficult to implement and the country reports stress the need of organising a return of the child together with his/her primary caregiver.

The absence, in the current state of interpretation of the Convention, of adequate attention to the issue of domestic violence also needs to be addressed, since it provides one frequently advocated justification for abductions carried out by mothers.²⁰¹

3.5. Identification of possible solutions to enhance protection against the breach of parental rights of one parent by the other

3.5.1. The different legal interests deserving protection

In particular, the legal interests deserving protection under the different hypotheses seem to be radically different.

In the case of illegal transfer of a child's residence, the legal interest deserving protection is the right of the child to maintain contacts with the member(s) of his/her family in order to guarantee the right/duty of both parents to participate in the upbringing of the child.²⁰²

In this case, the child loses significant contacts with members of his affective environment.

The situation is different when the child has been kidnapped by surprise, be it in a brutal and traumatic manner, or in any other way that entails the deprivation of his/her primary caregiver(s).

The legal interests deserving protection are thus significantly different in substance in these two hypothesis of “child abduction”, despite their assimilation in the context of most recurrent interpretation of the Hague Convention on child abduction.

Rather, the substantial differences between general child abduction, parental child abduction and the illegal transfer of a child's residence justify the use of different legal terms and different legal rules.

The existing statistics and case law and the studies that followed them confirm the significance of these differences, showing that abduction is sometimes at odds with parental responsibilities (e.g. it is an egoistic act of a parent, done in order to “punish” the other parent or a superficial act of a parent wishing to engage hastily in a new relationship) or, at the other end of the scale, it may constitute a responsible exercise of parental responsibilities,²⁰³ such as an attempt to protect the child from abuse, or even a response to the refusal of the child to see the other parent, or to ensure his/her upbringing in a sound environment.²⁰⁴

²⁰¹ See, for instance, the Irish Report at par. 4.5.11; the Romanian Report 4.14.6; 4.14.10 and the Report for UK at 4.17.8.

²⁰² ECHR, 1 July 2014, case of *Blaga v. Romania*, point 64: “The Court reiterates that the mutual enjoyment by parents and children of each other's company constitutes a fundamental element of family life and is protected under Article 8 of the Convention [...] In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – was struck, within the margin of appreciation afforded to States in such matters [...]. See also ECHR, 3 June 2014, case of *López Guió v. Slovakia* p. ; *Sneersone and Kampanella v. Italy*, 12 July 2011, p. 85; *R. v. Estonia*, 15 May 2012, p. 37; *B. v. Belgium*, 10 July 2012, p. 56-65 ; *Anghel v. Italy*, 25 June 2013, p. 79 s.

²⁰³ I.J. Sagatun & L. Barrett, Parental child abduction: The law, family dynamics, and legal system responses, (1990) 18 *Journal of Criminal Justice* 433.

²⁰⁴ Very telling in this respect is the case of *Neulinger and Shuruk v. Switzerland*, Application no. 41615/07, decided by the ECHR's Grand Chamber on 6 July 2010.

These developments confirm the necessity of evaluating the legitimacy of transfers of a child's residence on a case-by-case basis.²⁰⁵

Case law shows that the authorities may need to carry out a long and complex legal and/or factual analysis in order to determine whether there is any justification for the actions of the "taking" family member and to declare whether or not the removal and retention of the child should attract a judicial remedy.

It is possible to conclude that the need to prevent and react to all possible violations of parental responsibilities has had the paradoxical consequence of impairing an efficient implementation of the Hague Convention on Child Abduction.

These findings suggest the development of a legal framework designed to counteract child abduction through an appropriate categorization of the various typologies of "child abduction" and thus to identify the most appropriate measures to adopt with a view to protecting the legal interests of the persons involved and primarily, those related to children's rights.

3.5.2. Mediation and alternative dispute resolution techniques

Family law litigation involves a conspicuous series of issues; financial, emotional and safety related. These might further increase litigation, especially in the absence of skilful, specialised and responsible lawyers.

Since high conflict divorces and separations constitute a top risk factor for child abduction, mediation techniques constitute a suitable model for resolving family disputes with a view to preventing child abduction.²⁰⁶ Mediation is also a viable strategy of reacting to a child abduction and reuniting the parents with a view to ensuring parenting after a family breakdown.²⁰⁷

The first reason for this is that litigation in family cases does not end with the return of the child to the State of habitual residence. Rather to the opposite, judicial proceedings may increase acrimony between the parents instead of decreasing it.

A second reason is that additional litigation and re-transfer of the child to his/her former habitual residence might worsen his/her psychological trauma. Thus, although return is the primary objective of the Convention, an agreement on non-return subject to specific conditions capable of guaranteeing practical access to the left-behind parent may be more consistent with the best interests of the child and the needs of the parents, than a judicial order of return. The advantage of mediation may be that of providing viable and long-lasting solutions, taking into account all the elements of the case (rights of the child, mobility of the parents, well-being of each of the persons involved in the child abduction triangle, etc.).²⁰⁸

²⁰⁵ Amplius, R. Schuz, *The Hague Child Abduction Convention*, Hart Publishing, 2013, p. 71 -90; K. Trimmings, op. cit. , p.150.

²⁰⁶ See, for instance, the Hague Conference's Guide to Good Practice on Mediation of 2012, http://www.hcch.net/index_en.php?act=publications.details&pid=5568&dtid=3, The Mediation Pilot Scheme 2006 elaborated by reunite.org in 2006 <http://www.reunite.org/edit/files/Library%20%20reunite%20Publications/Mediation%20Report.pdf> etc.

²⁰⁷ See the Recommendations of the Council of Europe: No R (98) 1 of the Committee of Ministers to Member States on family mediation, adopted by the Committee of Ministers on 21 January 1998, and Rec (2002)10 of the Committee of Ministers to Member States on mediation in civil matters, adopted by the Committee of Ministers on 18 September 2002, (respectively available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1153972&SecMode=1&DocId=450792&Usage=2>, <https://wcd.coe.int/ViewDoc.jsp?id=306401&Site=CM>).

²⁰⁸ W. Duncan, "Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Final Report", Prel. Doc. No 5 of July 2002, p. 89.

3.5.2.1. The Hague Conference's Guide to Good Practice on Mediation of 2012²⁰⁹

The Hague Conference on Private International Law is actively promoting the use of mediation in order to address the best possible implementation of the Hague Convention on Child Abduction.²¹⁰

Although promoted by the Hague Conference, mediation is not provided for in all countries. Despite this circumstance, numerous charities, sometimes funded in part by national governments, have developed mediation schemes to encourage the parties to reach an agreement. In this case, mediation is not a compulsory prerequisite for filing a proceeding, but runs in parallel with the proceedings.²¹¹

According to a report drafted by the UK charity Reunite, mediation typically leads to a Memorandum of Understanding where the left-behind parent withdraws his return request pursuant to the Hague Convention on Child Abduction – thus give his/her consent to the new residence - and obtains new access rights under certain conditions.²¹²

According to the Hague Conference's Guide to Good Practice on Mediation of 2012, mediators shall have the following characteristics:

- A professional approach to and suitable training in family mediation (including international family mediation);
- Significant experience in cross-cultural international family disputes;
- Knowledge and understanding of relevant international and regional legal instruments;
- Access to a relevant network of contacts (both domestic and international);
- Knowledge of various legal systems and how mediated agreements can be made enforceable or binding in the relevant jurisdictions;
- Access to administrative and professional support;
- A structured and professional approach to administration, record keeping, and evaluation of services;
- Access to the relevant resources (material / communications, etc) in the context of international family mediation;
- The mediation service is legally recognized by the State in which it operates, i.e. if there is such a system;
- Language competency”²¹³

²⁰⁹ Op. cit. note 203.

²¹⁰ See the website of the HCCH where the following documents are available: Central Contact Points for international family mediation: Revised draft Guide to Good Practice under the Hague Child Abduction Convention, Part V - Mediation 2012; Draft Guide to Good Practice under the Hague Child Abduction Convention, Part V - Mediation (Prel. Doc. No 5 of May 2011) 2011; Working Party on Mediation - Principles for the establishment of mediation structures in the context of the Malta Process 2010; Working Party on Mediation - Explanatory Memorandum on the Principles for the establishment of mediation structures in the context of the Malta Process 2010; Preliminary Outline of the Guide to Good Practice on Mediation under the 1980 Hague Child Abduction Convention (for consultation with the expert group) 2010; Working Party on Mediation - conference call of 29 October 2009 - meeting report 2009; Working Party on Mediation in the Context of the Malta Process - Questionnaire II + responses 2009; Working Party on Mediation - conference call of 30 July 2009 - meeting report 2009; Working Party on Mediation in the Context of the Malta Process - Questionnaire I + responses 2009.

²¹¹ See the UK report under 4.17.4. on the operation of the charity named Reunite.

²¹² Trevor Buck on behalf of Reunite, An evaluation of the long-term effectiveness of mediation in cases of international parental child abduction, Reunite International Child Abduction Centre, June 2012, See the UK report under 4.17.4.

²¹³ See Working Party on Mediation, PRINCIPLES FOR THE ESTABLISHMENT OF MEDIATION STRUCTURES IN THE CONTEXT OF THE MALTA PROCESS available on line at http://www.hcch.net/upload/wop/mediationprinc_e.pdf and the related documents all quoted in the previous footnote.

However, the same guide acknowledges that:

“in States where the development of international mediation services is at an early stage, many of the characteristics listed above are aspirational and can not, at this point, be realistically insisted upon”²¹⁴

Moreover, not all cases may be addressed and solved through the mediation process.

The mediation process must start with a “feasibility test” and be conducted paying particular attention to the messages that the persons involved in the child abduction triangle wish to exchange, with a view to guaranteeing the best interest of the child:

It is recognised that a great variety of procedures and methodology are used in different countries in family mediation. However, there are general principles, which, subject to the laws applicable to the mediation process, should inform mediation:

- Screening for suitability of mediation in the particular case
- Informed consent
- Voluntary participation
- Helping the parents to reach agreement that takes into consideration the interests and welfare of the child
- Neutrality
- Fairness
- Use of mother tongue or language(s) with which the participants are comfortable
- Confidentiality
- Impartiality
- Intercultural competence
- Informed decision making and appropriate access to legal advice”²¹⁵

Mediating agreements may solve parenting issues and, in consequence, decrease the need to engage in court proceedings or continue endless judicial arm-wrestling. In particular, mediation could be advocated to implement Arts. 7 and 12 of the Hague Convention and to promote cooperation between Central Authorities with a view to securing the voluntary return of a child and encouraging amicable solutions.

In this respect, the Hague Conference also promotes the establishment of mediation structures, through the creation of “contact points” with a view to:

“facilitate the provision of information, inter alia, on available mediation services in the respective jurisdictions, on access to mediation and on other important related issues, such as relevant legal information”

particularly in the context of the so-called Malta Process.²¹⁶

²¹⁴ Ibidem.

²¹⁵ Ibidem.

²¹⁶ The Malta Process is “a dialogue between judges and senior government officials from certain “Hague Convention States” and certain “non-Convention States”, whose laws are based on or have been influenced by Shariah law, focuses on seeking solutions to cross-border disputes concerning child custody, contact and abduction that are particularly difficult due to the non-applicability of relevant international

In sum, the use of mediation aims at securing just and practical solutions, capable of guaranteeing, despite important geographical distances, that a child's ties with the members of his/her family are maintained.²¹⁷

It is noteworthy that private national associations and States – under the auspices of the Hague Conference or autonomously - are developing special training and developing schemes for mediation in cross-cultural disputes or even more specifically, for child abduction cases.

The national reports however, highlight the reluctance of certain States to encourage mediation, because of the fear that mediation could prevent adherence to the six week time-limit set for the proceedings.

3.5.2.2. The European Parliament's mediator for International Child Abduction and other EU initiatives in respect of mediation

The European Parliament Mediator exists since 1987 and may be alerted in international child abduction cases.²¹⁸ The tasks of the mediator consist in assisting parents in child abduction cases and promote a negotiated solution in the best interests of their child. Moreover, the Mediator's Office has played an important role in coordinating and investigating the problem of child abduction.

Mediation is regarded as a key strategy for child abduction in the Stockholm Programme of the European Council²¹⁹ and in the Commission's Action Plan Implementing the Stockholm Programme²²⁰.

The Stockholm Programme, in particular, stresses that: "As regards parental child abduction, apart from effectively implementing existing legal instruments in this area, the possibility to use family mediation at international level should be explored, while taking account of good practices in the Member States. The Union should continue to develop criminal child abduction alert mechanisms, by promoting cooperation between national authorities and interoperability of systems."²²¹

In this respect, after the adoption of the European code of conduct for mediators on 2 July 2004²²² and the entry into force of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial

legal frameworks". Hague Conference's Guide to Good Practice on Mediation, p. 16, n. 13. See the Third Judicial Conference on Cross-Frontier Family Law Issues held in St. Julian's, Malta, 23–26 March 2009.

²¹⁷ BUCK, T., An Evaluation of the Long-term Effectiveness of Mediation in Cases of International Parental Child Abduction, 2012, on line at <http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Mediation%20research%20report.pdf>, Paul C.C. and S. Kiesewetter (Eds), Cross-Border Family Mediation – International Parental Child Abduction, Custody and Access Cases, Wolfgang Metzner Verlag, 2011, passim.

²¹⁸ It should be noted that the European Parliament Mediator has no statutory basis. On its appointment and role see B. Pali and S. Voet, Family Mediation in International Family Conflicts: The European Context, Institute of Criminology (LINC) Katholieke Universiteit Leuven (KU Leuven) in the framework of the project Training in International Family Mediation implemented by Child Focus (Belgium) in cooperation with project partners Mediation bei internationalen Kindschaftskonflikten (MiKK e.V.) (Germany), and associate partner Centrum Internationale Kinderontvoering (Netherlands). Available on line at http://www.call116000.org/downloads/research_report_21_april_2012.pdf.

²¹⁹ OJ C 115, 4.5.2010, p. 1–38.

²²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Delivering an area of freedom, security and justice for Europe's citizens - Action Plan Implementing the Stockholm Programme /* COM/2010/0171 final */.

²²¹ Ibidem.

²²² See the European Code of Conduct for Mediators of 2 July 2004 at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

matters,²²³ specific EU training work has been developed, in particular with non-profit organizations active in child abduction cases.²²⁴

In the Conclusions of the ministerial seminar on 14th of October 2010 concerning international family mediation in cases of international child abduction,²²⁵ the Council highlighted that:

- “international family mediation can represent an efficient method to resolve [...] painful conflicts. Mediation most often leads to lasting and balanced solutions as they were discussed and accepted on a free basis by the parties. This enables, on the one hand, to resume the dialogue and to pacify conflicts between the parents and, on the other hand, to avoid potential repetitions and promote the voluntary enforcement of decisions, in the higher interest of the child.
- With the prospect of further work, at Community and international level, on promotion and implementation of the international family mediation in these painful situations, the participants in this seminar:
- invite the Member States and the Commission to take into account and pool the information related to national, European or international hands-on experiments going on in this field;
- [...]
- invite the Member States to consider the particular issue of child abduction during the transposition and /or the implementation of the Directive 2008/52/CE of the European Parliament and of the Council of 21 May 2008 on certain aspects of the mediation in civil and commercial matters;
- encourage the Member States to work on the implementation of pilot projects, including the encouragement to a specific training for the international family mediators and other professionals involved in the international family mediations;
- [...]
- invite the Member States and the Commission to consider the possibility of setting up a specific working party within the European Judicial Network in civil matters, and which would notably be composed of the central authorities. It will be possible to appeal to the expertise of the European Parliament Mediator for International Parental Child Abduction, of mediators and organizations specialized in cases of child abduction, and of liaison judges for cases of child abduction, in order to draw a synthesis of the different related initiatives and works, notably those of The Hague Conference. This working party will report about its work and will propose to the Council and the Commission the most appropriate and efficient means to promote and improve the use of the international family mediation in cases of international parental child abduction, in compliance with the applicable legal instruments as well as when the abduction occurs towards a State which is not Party to any Conventions;
- invite the Commission to take into account the present conclusions during its further potential legislative works concerning the family mediation and

²²³ OJ L 136, 24.5.2008, p. 3–8. See the “network of cross border mediators” co-funded by the European Union: <http://www.crossbordermediator.eu/node/79>.

²²⁴ E.g. the training program for international family mediation co-financed by the European Commission and mentioned above (at note 217).

²²⁵ Council document 16121/10, JUSTCIV 194, of 12 November 2010, available at <http://register.consilium.europa.eu>.

regarding the issues related to parental authority, rights of custody, rights of access and international child abductions.

A working group is created in the framework of the European Judicial Network with the mandate of proposing efficient means to improve the use of family mediation in cases of international parental child abduction.

Art. 55 (e) EU Regulation 2201/2003 prescribes to Central Authorities to “facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end”.

According to the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of EU Regulation 2201/2003 of 15 April 2014²²⁶, bilateral cooperation between Central Authorities has proved useful as 155 cases have been discussed in bilateral meetings since 2010.

However, it seems that the collection and exchange of information in conformity with art. 55 has proved difficult to enact because of two main factors. First, because of language differences that result in delays in the acquisition of relevant information. Secondly, because of the “significant differences exist between Member States with regard to the assistance provided by Central Authorities to holders of parental responsibility that seek enforcement of access rights judgments”.²²⁷

As highlighted by the statistical analysis (par. 2), the important differences of Central Authorities of Member States as regards to their structure, number of employees, etc. explains in part the sensitive differences in the number of requests received.

Despite practical difficulties, it would be important to propose – in the context of family dissolution proceedings and whenever it is possible to assess risks of unilateral actions impacting the right of the child to maintain contacts with both parents – a mediation scheme.

Such a scheme may prove particularly useful in order to prevent child abduction and prepare a lawful and agreed transfer of a parent's residence abroad – with or without contextual transfer of the child's residence.

The number and importance of the issues at stake in case of a transfer abroad requires communication between the parents. Communication supervised by mediators could prevent unilateral action and facilitate the relationship between the persons involved in the upbringing of the child.

Secondly, after the illegal transfer of a child's residence from one to another Member State, expert mediators from the countries involved in the move could offer professional help with a view to finding an amicable settlement with regard to the residence of the child and the modalities to exercise parental rights.

3.5.3. Cooperation between the courts of the previous and the new habitual residence of the child

National reports attest many cases where Member States do not agree as to returning a child. This observation has led to art. 11(8) of EU Regulation 2201/2003 seeking to assess which of the judges of Member States should prevail in case of persistent contrast.

²²⁶ COM(2014) 225 final, p. 11.

²²⁷ Ibidem.

Let us take the recurrent case of a German woman marrying a Spanish man, moving to Spain, having children in Spain, separating from her husband and willing to resettle in Germany with the Spanish-German children.²²⁸

Obviously, the Spanish man living in Spain has a deeper knowledge of the Spanish language, culture and legal system when compared to a German woman recently immigrated; he is certainly better integrated in his home country. The same can be said for the German woman as regards to Germany. Throughout the whole process of litigation: from finding a suitable lawyer to explaining the complexity of the family situation to the judge each of them will have a *de facto* advantage in his or her home country and a disadvantage in the other. There is a reciprocal inequality of arms between the two.

A second factor creating a national bias concerns the position of the judge.²²⁹

As shown by case law, whenever the case is not that of a kidnapping in the true sense, the judge has a larger margin of appreciation of the circumstances of the case and tends to use it. There is no need nor any intention to cast a malicious doubt on the impartiality of European judges: it suffices to observe that the point of view of a Spanish judge is that of the Spanish legal order and there is no guarantee that his German colleague – interpreting the same facts from a German perspective – would pronounce the same decision.

These circumstances have been acknowledged by the European Parliament and the Council having led to art. 15 of EU Regulation 2201/2003 which prescribes the judge to “consider [if] a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child: (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or (b) request a court of another Member State to assume jurisdiction [...]”.

This mechanism may be adapted in order to allow a joint or bi-national decision whenever the dispute between parents involves, at the same time, two opposing European legal orders.²³⁰

To this end, the courts of Member States involved in the family dispute should cooperate from the early stages of the judicial proceedings, in particular through the channel of the European Judicial network.

Moreover, a binational task force of mediators could be actively engaged in the process of encouraging an amicable settlement of the dispute.

If mediation fails, the best guarantee to find a fair solution is to allow a joint-decision by the courts of Member States involved in the move.

If, moreover, the case is so hard that the binational court is not able to agree on a decision of the case, only the decision of a supranational court, such as the General Court of the European Union, equally distant from both legal orders and both parties should solve the dispute between parents.

3.5.4. Synthetic recommendations to the European Parliament

In light of the analysis, we esteem necessary to improve the mechanisms of the Hague Convention on Child Abduction within the European Area of Freedom, Justice and Security,

²²⁸ CJEU, 4 December 2010, Aguirre Zarraga v. Simone Pelz (C-491/10 PPU) and of 15 July 2010 and, respectively, 9 November 2010, Bianca Purrucker v Guillermo Vallés Pérez (C-256/09 and C-296/10).

²²⁹ G.P. Romano, *Conflits entre parents et entre ordres juridiques en matière de responsabilité parentale*, Neuchâtel, 2015, p. 62 ff.

²³⁰ *Ibidem*.

where the principle of mutual trust applies together with the right of Union citizens and their family members to move and reside freely within the territory of the Member States.

In addition to the urgent need for strategies to tackle the issue of cross-border parental child abduction, the following recommendations take into account specific European policies aimed at reducing family litigation through mediation, in conformity with the objectives set in the Stockholm Program of the European Council, in the Commission's Action Plan Implementing the Stockholm Programme and with the EU Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (see 3.5.2.). The latter explicitly acknowledges, in its art. 7, the vulnerability of children involved in judicial proceedings; a concern that is particularly acute whenever the child's main attachment figures, his or her parents, are pitted against each other.

In conclusion, the study recommends to the EP: to improve scientific research and data collection at EU level (I); to encourage Member States to centralise child abduction cases in specialised courts and, at the same time, to promote specific training for mediators and judges dealing with transnational proceedings involving children (II); to amend Regulation 2201/2003 so as to: prevent "child abductions" via a mediation scheme allowing to organise a licit transfer of the child's residence from one Member State to another; ensure the protection of the best interests of the child through an enhanced cooperation between European judges with the aim of reducing the length of "child abduction" proceedings (III).

I. Improvement of scientific research

I.1. Development of a European public database

The Hague Conference of Private international law has created a "Child Abduction Section" within its website, in order to monitor the phenomenon of child abduction and the legal and judicial responses to it. The Section hosts two notable databases to that end: INCADAT and INCASTAT. In addition the will to introduce "a more efficient system for dealing with international child abduction" led to the creation of the software "ichild". The aim of these databases is to collect, respectively, judicial decisions, statistics and both as regards to child abduction cases. However, these databases are not easy to update since they are mainly based on the work of national correspondents.

In this respect, the EU could build a specific database in order to better acknowledge the number and relative percentage of high-conflict dissolutions of unions between the father and the mother of one or more children with transnational elements on the basis of an exchange of information through national statistical authorities, that are already operating and collecting data at the national level.

In this respect, the study reveals the need to further develop the collection of data by Central Authorities and the harmonisation of their publication.

On the one hand, a categorization of the requests according to the reasons for abduction would allow a better understanding of the "typical cases". On the other hand, possible correlations between migratory patterns and child abduction applications need to be highlighted.

A public database updated in real time or a 2.0 platform available to Central Authorities would be useful to monitor the evolution of the socio-economic reality of the phenomenon.

II.2. Development of a strategy to prevent high-conflict separations, divorces and the disruption of families with children

As a second step, it would be important to identify the most frequent reasons behind the escalation of "judicial violence" between former partners, in the context of which child abduction takes place.

This study suggests that gender studies and studies on intercultural communication may offer, in this respect, key elements in order to identify situations at risk and elaborate a strategy to prevent high-conflict dissolution of families.

A deeper knowledge of the phenomenon would improve mediation schemes and allow recourse to mediation before a potential child abduction or an illegal transfer of a child's residence occurs, in high risk situations.

II. Development of specialised courts and creation of a network of trained mediators for transnational proceedings involving children

II.1. Development of a European network of specialised mediators

Representatives of National Central Authorities are working on enhancing bilateral cooperation in cases of cross-border mediation, e.g. with Poland and Spain.²³¹ In addition, NGOs and associations of "family mediators" are, to a certain extent, already grouped in transnational networks. A network of cross-border mediators has been established by the Belgian NGO Child Focus, the German Mikk and the Leuven Institute of Criminology of the Katholieke Universiteit Leuven. This network gathers an important number of European mediators, specially trained in mediation in cross-border child abduction.²³² These different initiatives show that mediation is indeed promoted also outside of the framework of the Hague network of Central Authorities.

After the adoption of the European code of conduct for mediators on 2 July 2004 and Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, a network of EU-trained and/or EU-authorized mediators for transnational proceedings involving children could be specifically developed and act under the auspices of the European mediator for child abduction. The network could serve the following different purposes.

First, as suggested above, it would be important to propose – in the context of family dissolution proceedings and whenever it is possible to assess risks of unilateral actions impacting the right of the child to maintain contacts with both parents – a mediation scheme, with a view to reach an amicable settlement on the transfer of a parent's residence abroad – with or without contextual transfer of the child's residence. The number and importance of the issues at stake in case of a transfer abroad requires communication between the parents. Communication supervised by mediators could prevent unilateral action and facilitate the relationship between the persons involved in the upbringing of the child.

Secondly, after the illegal transfer of a child's residence from one Member State to another, expert mediators from the countries involved in the move could offer professional help with a view to finding an amicable settlement with regard to the residence of the child and the modalities to exercise parental rights.

II.2. Judicial training and development of specialised courts

The elaboration of strategies preventing family litigation shall include specific training to lawyers and judges assisting transnational judicial proceedings arising in the context of family dissolutions, in order to prevent aggressive judicial litigation.

²³¹ Bundesamt für Justiz, (Federal Office of Justice), Zentrale Behörde für internationale Sorgerechtskonflikte: Tätigkeitsbericht 2011, available at https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/HKUE/Taetigkeitsbericht_2011.pdf?__blob=publicationFile&v=3, p. 10; id., Zentrale Behörde für internationale Sorgerechtskonflikte: Tätigkeitsbericht 2012, available at https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/HKUE/Taetigkeitsbericht_2012.pdf?__blob=publicationFile&v=4, p. 12.

²³² MiKK e.V., EU Training Project TIM, available at <http://www.mikk-ev.de/english/eu-training-project-tim/>; Network of Cross-border Mediators, Who we are, available at <http://www.crossbordermediator.eu/>.

In this respect, those Member States that do not yet have specialised courts for the implementation of the Hague Convention on Child Abduction should be encouraged to centralise litigation in a few specialised courts.

The training of judges sitting in such Courts shall include: the development of appropriate language skills favouring the communication between them and foreign judges specialised in child cases; the ability to cooperate with each other without national and gender prejudices (intercultural communication skills); the capacity to deal expeditiously with child abduction cases and with cases of illegal transfers of a child's residence; the ability to cooperate with recognised mediation centres.

III. Changes in the legislation in force

III.1. Developing a two-track strategy in order to timely address child abduction and to promote cooperation among Member States' judges

In order to ease the identification of the most serious breaches of the rights of parents and children, a dividing line needs to be made between cases where the best interest of the child to return may be presumed (fast track) and cases where the best interest of the child requires in concreto analysis and prevention of implicit discrimination based on nationality.

In doing so, hypothetical national biases interfering in a negative manner with justice administration within the EU and with the rights of the child need to be explored.

To illustrate these biases, let us take one recurrent case: that of a German woman marrying a Spanish man, as in the cases *Aguirre Zarraga v. Simone Pelz* (C-491/10 PPU, of 4 December 2010) and *Bianca Purrucker v Guillermo Vallés Pérez* (C-256/09, of 15 July 2010 and C-296/10, of 9 November 2010).

In both of these cases a German woman had moved to Spain to live with a Spanish man. In both cases, children were born to the couple, the couple broke up and the German women involved were willing to resettle in Germany with the Spanish-German children.

Judicial proceedings were pending in Spain and in Germany. It seems obvious that a Spanish man living in Spain has a deeper knowledge of the Spanish language, culture and legal system when compared to a German woman recently immigrated; he is certainly better integrated in his home country. The same can be said for the German woman bringing her case to a German court. These differences create a *de facto* inequality of arms throughout the whole process of litigation; from finding a suitable lawyer to explaining the complexity of the family situation to the judge.

This inequality is "reciprocal", so to say, since it benefits citizens in their homeland and *de facto* harms foreigners in the partner's land.

A second factor creating a national bias concerns the position of the judge.

As shown by case law, whenever the case is not that of Scenario A and B above, the judge tends to take into account the circumstances of the case more in detail. There is no need or any intention to cast a malicious doubt on the impartiality of European judges: it suffices to observe that the point of view of a Spanish judge is that of the Spanish legal order and there is no guarantee that his German colleague – interpreting the same facts from a German perspective – would pronounce the same decision.

These circumstances have been acknowledged by the European Parliament and the Council having led to art. 15 of EU Regulation 2201/2003 which prescribes the judge to "consider [if] a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child: (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or (b) request a court of another Member State to assume jurisdiction [...]".

This mechanism may be adapted in order to allow a joint or bi-national decision whenever the dispute between parents involves, at the same time, two opposing European legal orders.

To this end, the courts of Member States involved in the family dispute should cooperate from the early stages of the judicial proceedings, in particular through the channel of the European Judicial network.

Moreover, a binational task force of mediators could be actively engaged in the process of encouraging an amicable settlement of the dispute (below at III.2). If mediation fails, the best guarantee to find a fair solution is to allow a joint-decision by the courts of Member States involved in the move.

If the binational court is not able to agree on a co-decision of the case, only the decision of a supranational court, such as the General Court of the European Union, could solve the dispute between parents from a perspective that is equally distant from the parties.

Details on the content of recommended amendments follow.

III.2. Suggested amendments to EU Regulation 2201/2003

In light of the above, Arts. 2, 10 and 11 of EU Regulation 2201/2003 should be amended and two new articles should be added, as suggested in bold:

Article 2

Definitions

For the purposes of this Regulation:

1. the term "court" shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;
2. the term "judge" shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation;
3. the term "Member State" shall mean all Member States with the exception of Denmark;
4. the term "judgment" shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;
5. the term "Member State of origin" shall mean the Member State where the judgment to be enforced was issued;
6. the term "Member State of enforcement" shall mean the Member State where enforcement of the judgment is sought;
7. the term "parental responsibility" shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;
8. the term "holder of parental responsibility" shall mean any person having parental responsibility over a child;
9. the term "rights of custody" shall include rights and duties of the holder of parental responsibility who is entrusted with the care of the person of a child, and in particular the right to house the child in his or her primary residence in conformity with a judgment or by operation of law or by an agreement having legal effect under the law of the Member State where that residence is;
10. the term "rights of access" shall include in particular the right to take a child to a place other than his or her habitual primary residence for a limited period of time;

11. the term "illegal transfer of a child's residence" is the transfer of the primary residence of a child by the parent having a right of custody in breach of rights of another holder of parental responsibility.

12. the term "child abduction" shall mean the removal or retention of a child in a Member State other than the one of his or her primary residence in breach of rights of custody.

"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.~~

New article * [between art. 2 and 3 of Regulation 2201/2003]

Mediation and Cooperation between courts in cases of transfer of a child's residence from one to another Member State

1. Central Authorities of Member States shall see to the establishment of a network of experts and institutions that are in a position to provide advice, to carry out conciliation or mediation, to represent individual children, and that are capable of acting expeditiously, when requested to prevent, organise or remedy the breach of parental rights in conformity with arts. 9, 10 and 11.²³³

2. Where proceedings relating to child abduction or transfer of a child's residence between the same parties are brought before courts of different Member States, the courts shall cooperate with a view to ensuring the child such protection and care as is necessary for his or her well-being in conformity with art. 3 of the Convention on the Rights of the Child.

To this end, they shall, acting directly or through their respective Central Authorities, take all appropriate steps to:

(a) collect and exchange information:

(i) on the situation of the child;

(ii) on the reasons behind the will or the action of taking the child abroad;

(iii) on decisions taken concerning the child;

(b) facilitate agreement between holders of parental responsibility through Central Authorities, mediation or other means, and facilitate cross-border cooperation to this end.²³⁴

New article ** [between art. 9 and 10 of Regulation 2201/2003]

Lawful transfer of the child's residence

²³³ Inspired by art. 3 of the Swiss "Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults" of 21 December 2007, unofficial translation in English available at <http://www.admin.ch/ch/e/rs/2/211.222.32.en.pdf>

²³⁴ From art. 55 of EU Regulation 2201/2003.

1. Where the holder of custody rights plans to move the primary residence shared by him or her with the child from one Member State to another and another holder of parental responsibility does not authorise the transfer of the child's residence, a request may be filed to the Central Authorities of the Member States affected by the move [that of the present residence and that of the planned new residence].
2. The Central Authorities requested shall appoint a committee of certified mediators belonging to both Member States within [2] weeks from the request [nb. authorities to be entrusted to certify and appoint].
3. The bi-national committee of certified mediators shall:
 - a) hear [all persons] involved in the dispute over the transfer of residence of the child;
 - b) request the parties to reach an amicable settlement as regards the residence of the child and the organisation of parental rights and duties thereof;
4. In case an amicable settlement is reached, it shall be immediately enforceable in both countries.
In case an amicable settlement is not reached within [six weeks] from its appointment, the bi-national committee of mediators issues a report on the case.
5. The party seeking the transfer of the child's residence may notify the report to the competent courts [that of the habitual residence or that of the planned new residence]. Paragraphs 8 and 10 of art. 11 shall apply.

Article 10

Jurisdiction in cases of child abduction

In case of ~~wrongful removal or retention of the child~~ abduction, the courts of the Member State where the child was habitually resident immediately before the ~~wrongful removal or retention of the child~~ abduction 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.

Article 11

Procedure in cases of child abduction and illegal transfer of a child's primary residence

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 10 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.

In child abduction cases, 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.

In cases of illegal transfer of a child's primary residence, paragraphs 8 to 10 shall apply.

4. A court cannot refuse to return a child victim of child abduction 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~~ unless the removal is grounded on the right to self-defense.

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~~ abduction 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.~~

8. The court seised by the return request in conformity of paragraph 1 or by the transfer request in conformity of art. ** shall, except where exceptional circumstances make this impossible, issue an interim decision on the temporary residence of the child no later than [six weeks] after the application is lodged.

9. The interim decision shall be immediately notified to the court of the other Member State having jurisdiction according to par 5 of art. **. The court shall be requested to assume joint jurisdiction. Art. 15, par. 2 shall apply.

10. With the collaboration of Central Authorities, the courts seised of a return request shall entrust a bi-national committee of mediators. Paragraphs 2 to 5 of art. ** shall apply.

11. The courts shall issue a final decision on the return request or on the transfer request jointly within [three months] from the submission of the report by the bi-national committee of mediators, except where exceptional circumstances make this impossible.

The decision shall concern the respective rights and duties of the holders of parental responsibility with a view to ensuring the child such protection and care as is necessary for his or her well-being in conformity with art. 3 of the Convention on the Rights of the Child.

12. If the judges sitting in the two courts fail to take a joint decision, the case shall be decided by the General Court of the European Union within [four months].

4. NATIONAL REPORTS

KEY FINDINGS

- There are numerous on-going projects for new legislation on custody and “parental child abduction” in the Member States reported upon.
- National case law shows that the return of a child, illicitly relocated abroad, depends on numerous factors that go beyond the strict application of the Hague Convention: mediation and exceptions founded on the superior legal force of human rights principles are sometimes favoured in order to avoid ordering a return.

4.1. Belgium

Glossary of terms

Belgian law
implementing EU
Regulation 2201/2003

Loi visant la mise en œuvre du Règlement (CE) n° 2201/2003 du Conseil du 27 novembre 2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le Règlement (CE) n° 1347/2000, de la Convention européenne de Luxembourg du 20 mai 1980 sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants ainsi que de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants

Moniteur Belge, 21 juin 2007

Belgian law
implementing the
Hague Convention on
Child abduction

Loi portant assentiment à la Convention sur les aspects civils de l'enlèvement international d'enfants, faite à La Haye le 25 octobre 1980, abrogeant les articles 2 et 3 de la loi du 1er août 1985 portant approbation de la Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants, faite à Luxembourg le 20 mai 1980 et modifiant le Code judiciaire

Moniteur Belge, 24 April 1999, p. 13737-13738.

Code judiciaire

10 Octobre 1967. - Code Judiciaire / 10 Oktober 1967. - Gerechtelijk Wetboek.

Belgian law
implementing EU
Regulation 2201/2003

Loi visant la mise en œuvre du Règlement (CE) n° 2201/2003 du Conseil du 27 novembre 2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le Règlement (CE) n° 1347/2000, de la Convention européenne de Luxembourg du 20 mai 1980 sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants ainsi que de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants

Moniteur Belge, 21 juin 2007

4.1.1. Statistical Assessment

4.1.1.1. Key statistics overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	8836 (19.6%)	10663 (24.6%)	9893 (21.7%)	7270 (17.2%)
International divorces	3496 (12.9%)	4968 (15.8%)	6663 (18.8%)	4541 (17.4%)
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	9	25	40	29
Outgoing return requests made under the Hague Convention	n/a	30	50	115

* Marriage and divorce figures based on centrally-collected Eurostat data. Percentages indicate international marriages/divorces as a proportion of all marriages/divorces. 2007 marriage and divorces figures not available; 2008 figures used. 2012 figures for marriages and divorces provided by national statistics authority.

4.1.1.2. Available national data

Statistics for Belgium are available through the website of the Belgian Statistics Office, "Statbel", as well as through the Belgian Central Authority in charge of international child abduction cases, which is part of the Ministry of Justice. Statistics as to international marriages and international divorces are publicly available, as well as statistics on the number of claims concerning international child abduction registered by the Belgian Central Authority.

Statbel has published the number of international marriages celebrated in Belgium in each of the years 2000 to 2013. This information shows that, between 2000 and 2006, the number of international marriages celebrated in Belgium increased almost continuously. Since 2007, however the number of international marriages has been continuously decreasing, except for 2012 where the number of international marriages increased slightly. In addition, the table shows that this trend concerns only international marriages celebrated in Belgium: the number of marriages between nationals has been fluctuating over the years covered by the table, but has not decreased in proportions similar those of international marriages celebrated in Belgium.

Statbel also published the number of international divorces registered in Belgium in each of the years 2000 to 2013. These figures show that the number of international divorces, along with the number of "national" divorces, has been continuously decreasing since 2009. The available data however does not differentiate between international divorces involving children and those where no child was involved.

The number of claims based on The Hague Convention in each year from 2004 to 2008 is made publicly available.¹ The number of these claims from 2009 to 2013 is also available,

¹ The information is available at: http://justice.belgium.be/fr/themes_et_dossiers/enfants_et_jeunes/enlevement_international_denfants/statistiques/.

although not yet published.² These data are provided by the Belgian Central Authority and they concern all applications made under the Hague Convention, whether in cases of international child abduction or aiming at an effective organization of access rights. However, it seems that, in most cases, such requests follow an international child abduction and only a few cases concern mere "access rights".

In addition, it should be noted that these statistics do not take into account cases where the left-behind parent took action directly without contacting the Belgian Central Authority, for instance by initiating a legal return procedure before judicial authorities. Similarly, they do not include abductions where the Hague Convention was not concerned, such as cases between countries not bound by an applicable International Covenant or cases falling under a specific regime, such as those regulated by the protocols between Belgium and Morocco or Tunisia.³ Finally, these statistics do not include cases in which the Regulation 2201/2003 was applied with no need of a Central Authority's direct intervention.

A working group was put in place in 2008 to produce more detailed statistics, but these have not been issued thus far.

According to the information available, the number of claims based on the Hague Convention has been fairly stable over the years 2009 to 2013. Over the years examined, a large majority of the cases involved France; followed by the Netherlands, Germany, Italy, Spain, the United States, Turkey, the United Kingdom, Poland and Portugal.

Table 3:

Statistics Belgian Central Authority SPF Justice ⁴	Number of claims based on The Hague Convention	Belgium as requesting State	Belgium as requested State
2009	138 (205 children)	83	55
2010	124 (170 children)	84	40
2011	146 (184 children)	108	38
2012	144 (181 children)	115	29
2013	121 (165 children)	93	28

4.1.2. National laws implementing the Hague Convention on child Abduction

The Hague Convention on Child abduction was ratified by Belgium on 9 February 1999, and entered into force in Belgium on 1 May 1999.

In addition to affording this international convention an autonomous legal status within the domestic legal order, the Belgian law implementing the Hague Convention on Child Abduction⁵ introduced a series of implementing provisions of a procedural nature. The

² See table 3.

³ See : Protocole d'accord instituant une commission consultative belgo-marocaine en matière civile, signed on 29 April 1981; Protocole d'accord instituant une commission consultative tunisio-belge en matière civile, signed on 27 April 1989, available at: http://justice.belgium.be/fr/themes_et_dossiers/enfants_et_jeunes/enlevement_international_denfants/accords_avec_le_maroc_et_la_tunisie/.

⁴ Statistical data provided by the Belgian Central Authority for the present study.

⁵ 10 Août 1998. - Loi portant assentiment à la Convention sur les aspects civils de l'enlèvement international d'enfants, faite à La Haye le 25 octobre 1980, abrogeant les articles 2 et 3 de la loi du 1er août 1985 portant approbation de la Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants, faite à Luxembourg le 20 mai 1980 et modifiant le Code judiciaire, Moniteur Belge, 24 April 1999, p. 13737-13738.

national law thus created a new chapter within the Code judiciaire aimed at regulating proceedings in view of the protection of cross-border/transnational rights of custody and rights of access. Subsequently, the Belgian law implementing EU Regulation 2201/2003 added new provisions and partially modified those of the law of 1998⁶.

First, the Code judiciaire allocates the competence to decide on applications based on the Hague Convention on Child abduction, in particular applications to obtain the return of the child. *Ratione materiae*, Article 1322bis of the Code judiciaire provides that the Presiding judge of the Tribunal of first instance⁷ is competent to decide all claims based on the Hague Convention, seeking the immediate return of the child, seeking to enforce compliance with custody rights or rights of access existing in another State, or seeking the organization of a right of access. *Ratione loci*, the legislator established a specialized competence to decide upon applications based on the Hague Convention on Child abduction. Only the tribunals of the seat of the Appeals courts in Belgium have jurisdiction to decide these issues: applications must indeed be filed with the President of the tribunal of first instance⁸ of the seat of the Appeals Court where the child is present or has his or her habitual residence at the time of the filing of the application. Since there are five Appeals Courts in Belgium, only five tribunals of first instance⁹ have jurisdiction to decide upon applications based on the Hague Convention. Similarly, when the child is not present on Belgian soil, the application must be filed with the tribunal of first instance of the seat of the Appeals Court where the respondent is present or has his or her habitual residence.¹⁰

Second, the Code judiciaire provides that the proceedings concerning with the return of a child abducted to Belgium can be initiated directly by the left-behind parent of the child or by the public prosecutor on behalf of the Belgian Central Authority that was previously contacted by the left-behind parent.

Third, the Code judiciaire contains provisions regarding the nature of the proceedings initiated on the basis of the Hague Convention on Child abduction. Based on article 1322bis¹¹, the procedure is *inter partes*, i.e. implying that both parents will have the possibility to present their arguments in court. In addition, so as to fulfil the requirement of expeditious proceedings set out in Article 2 of the Hague Convention on Child abduction, Article 1322sexies of the Code judiciaire provides that the proceedings based on the Hague Convention on Child abduction will be “*comme en référé*”, i.e. according to the procedure for urgent matters. Judges draw the parties’ attention to the time limit of 6 weeks provided in Article 11 of the Hague Convention: for instance, the President of the Tribunal of First Instance of Verviers rejected a request to extend the procedure through a “*renvoi au rôle*”, so as to avoid a violation of the 6-week-deadline¹².

As to the scope of the judge’s competence, the proceedings are limited to the question of the return of the child victim of abduction; this is why Article 1322septies provides that a counterclaim is excluded.

⁶ 10 Mai 2007. - Loi visant la mise en œuvre du Règlement (CE) n° 2201/2003 du Conseil du 27 novembre 2003 relatif à la compétence, la reconnaissance et l’exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le Règlement (CE) n° 1347/2000, de la Convention européenne de Luxembourg du 20 mai 1980 sur la reconnaissance et l’exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants ainsi que de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l’enlèvement international d’enfants, , Moniteur Belge, 21 juin 2007.

⁷ As from 1 September 2014, a special tribunal has been set up for family matters. From this date, international child abduction cases are decided by the Tribunal for family matters (“tribunal de la famille”).

⁸ As from 1 September 2014, international child abduction cases are decided upon by the Tribunal for family matters of the seat of the Appeals Court where the child is present or has his or her habitual residence at the time of the filing of the application.

⁹ As from 1 September 2014, international child abduction cases fall under the competence of the Tribunal for family matters.

¹⁰ Article 633sexies of the Code judiciaire. Special rules apply when the proceedings are held in German.

¹¹ Article 1322bis refers to Article 1034bis et seq. of the Code judiciaire.

¹² Tribunal of first instance, Verviers, 7 June 2007, Rev. trim. dr. fam., 2008, I, pp. 217-219, note M. Fallon.

The tribunal's decision as to the return of the child is "exécutoire par provision", meaning that it will in principle be executed even if an appeal against it is lodged. When ordering the return of a child who has been wrongfully abducted, the tribunal's decision may specify modalities for the execution of the judgment taking into account the interest of the child and may designate, if necessary, the person(s) allowed to accompany the court bailiff for the execution of the tribunal's judgment.

Decisions of non-return of the child rendered in Belgium must be forwarded by the administrative services of the competent tribunal to the Belgian Central Authority within three days. The States involved necessarily cooperate through their Central Authorities. Thus, it is up to the Central Authority of Belgium to forward the Belgian decision and the related documents to the Central Authority of the requesting State.¹³

For the purposes of the Hague Convention, the role of the Central Authority is ensured in Belgium by the Federal Public Service of Justice.¹⁴ The Central Authority must ensure that its services are provided free of charge¹⁵ since Belgium has not exercised the reservation provided by Article 26 (3) of the Hague Convention on Child abduction.

4.1.3. Characterisation of parental child abduction in Belgium

Pursuant to the Hague Convention, international child abduction is the wrongful removal or retention of a child under the age of 16 who was habitually resident in a Contracting State.

Based on the Hague Convention, wrongful removal means that a parent unduly takes the child abroad, while wrongful retention refers to the situation in which a parent takes advantage of a licit temporary stay of the child abroad not to return the child as originally planned.

In order to determine when the removal or retention is wrongful, the Hague Convention relies on the breach of existing custody rights under the law of the State in which the child was habitually resident (1), and on the verification that those rights were actually exercised (2).

4.1.3.1. Custody rights

First, for child abduction to be unlawful, it is necessary to verify that there has been a breach of existing rights (a) under the law of the State in which the child was habitually resident (b).

a) A breach of existing rights

The Hague Convention defines custody rights as the "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence" (Article 5 (a)).

It is an autonomous concept which corresponds to the Belgian law concept of parental authority ("autorité parentale sur la personne de l'enfant").¹⁶ Under Belgian law, even when the parents do not live together, they jointly hold parental authority unless the judge decides otherwise.¹⁷ Therefore, in principle and by operation of law, neither of the

¹³ Article 1322nonies of the Code judiciaire.

¹⁴ Article 1322terdecies in fine of Code judiciaire.

¹⁵ No costs of proceedings or fees are charged to the claimant.

¹⁶ Tribunal of first instance, Brussels, 5 February 2008, INCADAT HC/E/BE 929.

¹⁷ Art. 374 of the Civil Code (« Lorsque les père et mère ne vivent pas ensemble, l'exercice de l'autorité parentale reste conjoint [...] A défaut d'accord sur l'organisation de l'hébergement de l'enfant, sur les

parents can unilaterally modify the child's place of residence without violating custody rights under Belgian law.¹⁸ Besides, in Belgium, no distinction is made between married and unmarried parents. Hence, an unmarried father need not obtain a judgment conferring custody on him.¹⁹ No prior judgment on parental authority is required.²⁰ Obviously, when a judgment confers exclusive custody of the child on one of the parents, this parent is legally entitled, without the consent of the other parent, to move out of the country of the child's habitual residence with the child.

b) The child's habitual residence

To determine whether the removal or retention was wrongful, the child's habitual residence must be determined. Under Belgian law, "habitual residence" is to be understood as a question of fact and is therefore different from the legal concept of "domicile".²¹ The right to determine the child's place of residence stems from rights related to parental authority.²² In most cases, the habitual residence of a child is where he or she has actually been living for some time. Among key elements to be considered are the location of the home, school, medical examinations, social life, sports and cultural activities.²³ According to the Tribunal of first instance of Brussels, the place of habitual residence is situated where the effective center of gravity of the child's life can be found, i.e. the place where he or she has the center of his emotional, family, educational and social interests.²⁴ The mere fact that the child frequently travelled to the requested State does not change his place of habitual residence.²⁵ In a matter in which the child had been living with his mother in Italy for two years, and subsequently lived with his father in Belgium for seven months, the tribunal of Liège found that the child concerned had his habitual residence in Italy based on the fact that he had been living there without any objection from his father, whereas the mother strongly objected to the child remaining in Belgium beyond the holidays.²⁶

Thus, in order to determine the child's habitual residence, Belgian courts assess whether there was a firm intention of the parent holding custody rights or respectively of both parents, to modify the child's place of residence. If such is the case, the mere fact that the child has not been living in the new place for a long time is irrelevant.

4.1.3.2. Effective exercise of custody rights

Under The Hague Convention, no removal or retention is deemed wrongful if the parent holding custody rights did not actually exercise them (Art. 3 (1) (b) of The Hague Convention). What must be done by a parent for a tribunal to find that he or she actually exercised his or her custody rights will depend on the law of the State of the child's habitual residence immediately before the removal or retention.

décisions importantes concernant sa santé, son éducation, sa formation, ses loisirs et sur l'orientation religieuse ou philosophique ou si cet accord lui paraît contraire à l'intérêt de l'enfant, le juge compétent peut confier l'exercice exclusif de l'autorité parentale à l'un des père et mère »). See also: Brussels (3e ch.), 21 January 2003, INCADAT HC/E/BE 707, in which it was ruled that, given the Belgian nationality of the parties, Belgian law applied and therefore, parental authority had to be jointly held.

¹⁸ Tribunal of first instance [see KTD 8], Brussels, 12 September 2001, INCADAT HC/E/BE 526; Tribunal of first instance, Brussels, 5 February 2008, INCADAT HC/E/BE 929.

¹⁹ T. Kruger, *International Child Abduction, The Inadequacies of the law*, Oxford and Portland 2011, p. 19.

²⁰ Tribunal of first instance Brussels, 6 March 2003, INCADAT HC/E/BE 545.

²¹ Belgian Code of Private International Law, Act of 16 July 2004, *Moniteur Belge* 27 July 2004, art. 4 § 2 (1); Tribunal of first instance Brussels, 17 November 2008, INCADAT HC/E/BE 954.

²² Belgian Code of Private International Law, Act of 16 July 2004, *Moniteur Belge* 27 July 2004, Art. 35.

²³ Carré et al., *Droit des personnes et des familles, Chroniques de jurisprudence 2005-2010*, Brussels 2012, nr. 789 ; Tribunal of first instance Brussels, 17 November 2008, INCADAT HC/E/BE 954. Cour d'appel de Liège - arrêt n° F-20100629-15 (2009/RF/264) du 29 juin 2010 available at www.iuridat.be.

²⁴ Tribunal of first instance Brussels, 17 November 2008, INCADAT HC/E/BE 954.

²⁵ Brussels (3e ch.), 21 January 2003, INCADAT HC/E/BE 707.

²⁶ Tribunal of first instance, Liège, 14 March 2002, INCADAT HC/E/BE 706.

In Belgium, it has been held that a father could not argue that the mother was not effectively exercising her rights of custody at the time of the removal when such removal had been organized by the father.²⁷ No cohabitation with the child is required. The mere fact that the parent frequently drove his child to the day nursery and to the paediatrician was considered sufficient evidence of that parent's actual exercise of custody rights.²⁸ In another case,²⁹ the father tried to argue that the mother was not actually exercising her custody rights because the child had been in a boarding school for three years. The Court dismissed this line of reasoning stating that the actual exercise of custody rights was not prevented by these facts. It reaffirmed the principle according to which no permanent cohabitation is necessary. The overall attitude of the parent will be the key element.

4.1.4. Judicial and non-judicial tools available to the parties, including mediation

According to the Hague convention, Central Authorities must, directly or through any intermediary, take all appropriate actions for ensuring the safe and voluntary return of the child, or for facilitating an amicable solution.³⁰ Similarly, Article 10 of the Hague Convention invites the Central Authority to take every possible measure to organize a voluntary return of the child. The Central Authority shall therefore first try to obtain an agreement between the parents. It is only if such a settlement is not possible that the Central Authority will seek a judicial settlement of the dispute.³¹

In Belgium, the Central Authority is embodied by a specific department within the Ministry of Justice, where six legal officers are in charge of the international child abduction cases. In doing so, they do not follow a specific protocol on how to deal with outgoing or incoming requests concerning international child abduction under the Hague Convention on Child Abduction. In general terms, the Belgian Central Authority intervenes whenever the abductor is in a family relationship with the abducted child, whether parent or grand-parent.

As to mediation, the Belgian Central Authority has indicated that, for the time being, the parties concerned by an international child abduction are not invited to participate in mediation. The process of seeking an amicable solution before going to court is frequently reduced to a visit of the police to the place where the abducted child resides in a view towards explaining the legal consequences of a refusal to voluntarily return the child to his or her habitual place of residence.

As a result, mediation is rarely used in practice in Belgium.³² Several reasons can be found to explain this situation: first, as will be examined in more detail below (see Section 4.1.7 below), the duration of the mediation process may explain the reluctance to use it since it may prevent the return proceedings under the Hague Convention. Indeed, during the mediation process, the child who has been abducted will have the occasion to integrate into his or her new environment, and this may constitute a reason for a judge to refuse to order the return of the child to his or her place of habitual residence just before the abduction because such return would not be in the interest of the child.³³ In addition, the costs and

²⁷ Tribunal of first instance, Brussels, 12 September 2001, INCADAT HC/E/BE 526; Brussels (3e ch.), 21 January 2003, INCADAT HC/E/BE 707.

²⁸ Brussels (3^e ch.), 17 June 2010, RTDF 4/2010, p. 1226.

²⁹ Tribunal of first instance, Brussels, 6 March 2003, INCADAT HC/E/BE 545.

³⁰ Article 7 c of The Hague Convention; Kruger, *International Child Abduction*, op. cit., p. 108.

³¹ F. Collienne & S. Pfeiff, *Les enlèvements internationaux d'enfants, Convention de La Haye et Règlement Bruxelles IIbis, Pratique et questions de procédure*, RTDF 2/2009, p. 355.

³² This was confirmed to us orally by the Belgian Central Authority; see also: T. Kruger, *International Child Abduction*, op. cit., pp. 156-160.

³³ *Idem*, pp. 107-108.

the language of mediation may also complicate the process since cases of international child abduction are international by nature.

The Code judiciaire nevertheless regulates the process of mediation in general: Article 1724 provides that any dispute capable of being settled by a transaction may be mediated, as well as specific matters including issues relating to parental authority.³⁴ Family mediation is a cooperative proceeding aimed at managing a family conflict. It is organized in the presence of an impartial, independent and qualified third party in order to create confidential relations³⁵. The Code judiciaire regulates two forms of mediation: judiciary mediation and voluntary mediation. Voluntary mediation refers to a mediation procedure that is started and organized by the parties involved in the conflict: they can decide to start a mediation at any moment, independently from judicial proceedings or during or after judicial proceedings. The parties will select the mediator among a list of certified mediators and will fix the organization of the mediation and its duration, stipulating to mediation agreement. Judiciary mediation is ordered in the framework of ongoing judicial proceedings by a judge, with the approval of the parties (Article 1734 of the Code judiciaire). Judiciary mediation can be organized for the entire dispute or for any part of it (Article 1735 §2 of the Code judiciaire); the mediator will be designated in the judge's decision following approval by the parties from a list of certified mediators; and the judge remains seized of the case until the mediation process ends.³⁶

Finally, it should be noted that the Belgian Central Authority is participating in a working group in view of fostering the use of mediation in the framework of international child abduction at the European level. Moreover, the Foundation for missing and sexually exploited children, operating under the name of Child Focus,³⁷ has already put into place training for mediation in the framework of international child abduction and has set up a list of European mediators who are qualified to work on international child abduction cases

4.1.5. Existing criminal sanctions

According to Article 432 of the Penal Code, parental abduction may constitute a criminal offence. In particular, it is a criminal offence whenever the abduction violates custody rights established in a prior judicial decision. Hence, according to Article 432 §3 of the Penal Code, one of the elements of this criminal offence is that the custody rights of the parents of the child be set forth in a judicial decision, issued prior to the abduction, clearly determining the residence of the child and the contacts between the child and his or her parents.³⁸ As a result, not every wrongful removal according to the Hague Convention gives rise to criminal liability.³⁹ This difference in definitions has been criticized.⁴⁰

Since 1st of April 2001,⁴¹ sanctions for parental child abduction under the Belgian Penal Code have become stronger. Based on Article 432 §1 and §3 of the Penal Code, a mother or father who breaches the custody rights of the other parent shall be punished by imprisonment for between eight days and one year and/or a fine from 156 to 6000

³⁴ Article 1724, 1^o referring to Title IX, 1st book of Civil Code.

³⁵ As from 1st September 2014, the Tribunal for family matters is obliged to inform the parties at the first hearing of the possibility they have to solve their dispute amicably through conciliation or mediation or other amicable dispute settlement mechanisms. In case the parties agree to start a mediation or conciliation procedure, the case is forwarded to a specific chamber of the tribunal of first instance, in charge of amicable settlement of disputes. The parties may interrupt the mediation or conciliation at any time and the amicable settlement procedure is confidential (art. 731 Code judiciaire).

³⁶ Y.-H. Leleu, *Droit des personnes et des familles*, 2^{ème} éd., Bruxelles 2010, p. 370.

³⁷ For more information on this Foundation see: <http://www.childfocus.be/fr>.

³⁸ T. Kruger, *International Child Abduction*, op. cit., p. 108.

³⁹ J.-L. Renchon, *L'enfant et les relations familiales internationales*, Bruxelles 2003, n° 31.

⁴⁰ Kruger, *International Child Abduction*, op. cit., pp. 155-156.

⁴¹ Loi du 28 novembre 2000 relative à la protection pénale des mineurs.

euros⁴². If the guilty parent has no parental authority, the term of imprisonment may amount to three years. Pursuant to Article 432 §2 and §3, the guilty parent who hides a minor child for more than five days or wrongfully keeps him or her outside Belgium shall be punished more seriously, i.e. by imprisonment for one to five years and/or a fine from 300 to 6000 euros⁴³, with a minimum imprisonment of three years in the event the abducting parent has no parental authority.

Moreover, these criminal sanctions are applicable also when the parent holding custody rights does not collaborate or actively impairs the effective exercise of the other parent's visiting rights. In 2012, the Belgian Cour de Cassation confirmed a decision punishing the holder of custody rights on these grounds.⁴⁴

4.1.6. Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages

Since Belgium did not express the reservation referred to in Article 26, paragraph 3 and Article 42 of the Hague Convention, the Belgian State will not request reimbursement of the costs of the procedure from the left-behind parent. Pursuant to Article 26 par. 4 of the Hague Convention, however, "the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child [...] to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child". Pursuant to this Article, the left-behind parent has the possibility of making a request to the tribunal for reimbursement of certain expenses in connection with the abduction, provided he or she can prove them. In this context, it should be noted that the Belgian State generally covers the travel expenses of the child when the child is returned to Belgian soil after an abduction and when the requesting parent is entitled to legal aid; the same does not apply in case of the return of the child from Belgium to a foreign country.

With respect to the civil claims under Article 26 of the Hague Convention for reimbursement of expenses incurred, a preliminary review of relevant cases has shown that Belgian courts and tribunals do not automatically order the abducting parent to reimburse the expenses incurred by the other parent. For instance, it was decided in a return proceeding that, in order not to exacerbate the situation by a purely financial question, each of the parties should bear their own costs in the proceedings.⁴⁵ Moreover, Belgian courts require that the party claiming reimbursement proves that the expenses were actually incurred. Hence, the claim for reimbursement of a sum of 10,000 Euros that had been arbitrarily determined without referring to any accountable receipt was dismissed by a court and reduced to the basic procedural costs according to Belgian law.⁴⁶

⁴² Under Belgian law, the amount of the fines mentioned in the Penal Code is multiplied by a coefficient in order to correspond to monetary fluctuations. Since 1st January 2012, the fines mentioned in the Penal code must be multiplied by 6 (Loi du 28 décembre 2011 concernant diverses dispositions en matière de la Justice II (I), Moniteur Belge 30.12.2011, art. 2). For the sake of clarity, the amounts mentioned in the core text of the present report have already been multiplied. The nominal amounts of the fines provided in art. 432 §1 of the Penal Code are 26 to 1000 euros.

⁴³ Under Belgian law, the amount of the fines mentioned in the Penal Code is multiplied by a coefficient in order to correspond to monetary fluctuations. Since 1 January 2012, the fines mentioned in the Penal code must be multiplied by 6 (Loi du 28 décembre 2011 concernant diverses dispositions en matière de la Justice II (I), Moniteur Belge 30.12.2011, art. 2). For the sake of clarity, the amounts mentioned in the core text of the present report have already been multiplied. The nominal amounts of the fines provided in art. 432 §2 of the Penal Code are 50 to 1000 euros.

⁴⁴ Cour de Cassation - arrêt n° F-20120131-2 (P.11.0732.N) du 31 janvier 2012 available at www.iuridat.be.

⁴⁵ Tribunal of first instance, Liège, 14 March 2002, RTDF 2/2003, p. 403.

⁴⁶ Tribunal of first instance, Brussels, 5 February 2008, INCADAT HC/E/BE 929.

Besides the reimbursement of actual expenses resulting from a parental abduction, the left-behind parent can also initiate proceedings to obtain reparation of the damages he or she suffered and which are not covered by Article 26 of the Hague Convention and therefore would not have been decided upon by the judge of the return proceedings under the Hague Convention. This would, for instance, be the case for the reparation of the moral tort of having been wrongfully separated from his or her child or, in the case of the child, from the left-behind parent. In such a hypothesis, although to our knowledge there has been no case in this respect, the tribunal would need to establish, pursuant to Article 1382 of the Belgian Civil Code, that the wrongful act, i.e. the abduction, caused a tort to the left-behind parent or to the child and that such tort could be repaired. In this respect, the courts will verify that the wrongful act was a *conditio sine qua non* of the tort, as it occurred in concreto. Finally, the tort must be certain in its principle, i.e. not hypothetical; represent the violation of a legitimate interest; and be personal to the claimant. It should here be noted that moral damages can in principle be claimed under Belgian law as long as such a claim fulfils these conditions.⁴⁷

When the wrongful act, i.e. the abduction, also qualifies as a criminal offence, the left-behind parent has the choice either to bring his civil liability claim before the criminal judge, in which case the civil claim will be dealt with together with the criminal claim, or to bring it directly to the civil tribunal, who will decide upon it after the end of the criminal proceedings.⁴⁸

Under the Belgian code of civil procedure, tribunals may order under certain conditions the losing party to pay specific amounts of money (*l'astreinte*) in case it would not comply with the tribunal's order⁴⁹. In the framework of international child abduction, such penalty system may contribute to an effective execution of the decision to return the child to his or her habitual residence before abduction. However, Belgian courts and tribunals generally only order such penalties if there are indications that the guilty parent will not return the child in compliance with the court order. Hence, in a matter in which the Court had ordered the return of a young child to his place of habitual residence in Paris within 3 days, the Court refused to impose a penalty since, in the Court's view, nothing indicated that the mother would not comply with its decision and that, as the father acknowledged, her state of mind had become more positive.⁵⁰

4.1.7. Judicial, administrative and other authorities competent for child abduction cases

The Central Authority in Belgium is the main authority responsible for the application of the State's obligations under the Hague Convention. The Central Authority is represented by the department of legislation and fundamental rights and freedoms within the Federal Public Service of Justice.

Moreover, national courts are also responsible for enforcing the provisions under the Hague Convention. As previously mentioned, in view of developing specialized competences, international child abduction cases are dealt with by a limited number of tribunals. Indeed, return applications may only be brought before the President of the tribunal of first instance of the seat of the Appeals Court of the place where the child is present or has his or her habitual residence at the time of the filing of the application; when the child is not present on Belgian soil, the application must be filed with the tribunal of first instance of the seat of the Appeals Court where the respondent is present or has his

⁴⁷ D. de Callatay & N. Estienne, *La responsabilité civile*, Chronique de jurisprudence 1996-2007, Volume 2: Le dommage, Brussels 2009, pp. 21 ff.

⁴⁸ Dubuisson et al., *La responsabilité civile*, Chronique de jurisprudence 1996-2007, Volume 1: Le fait générateur et le lien causal, Brussels 2009, nr. 602.

⁴⁹ Articles 1385bis to 1385nonies of the Code judiciaire.

⁵⁰ Tribunal of first instance, Brussels, 5 February 2008, INCADAT HC/E/BE 929.

or her habitual residence.⁵¹ Based on this restricted *ratione loci* rule, only five Presidents of the tribunal of first instance may be called upon to decide on applications based on the Hague convention and the EU Regulation 2201/2003.

Finally, the Public Prosecutor ("Ministère Public") is also responsible for enforcing the rules set up by the Hague Convention. It plays two different roles: first, when the Central Authority initiates the return proceedings on behalf of the left-behind parent, the Public Prosecutor is the authority competent to file the application. Second, the Public Prosecutor is also responsible for engaging the criminal prosecution against the abducting parent.

4.1.8. Sensitive issues featured in national case law

The issues that have most frequently arisen before Belgian courts and tribunals in recent years concern, on the one hand, the definition of wrongful removal or retention⁵² and, on the other hand, the exceptions provided in the Hague Convention, and in particular, the exception focusing on the best interest of the child.

From a general perspective, our review of the case law has led us to conclude that there seems to be no clear approach on the relationship between the immediate return rule under Article 3 of the Convention and the reasons for non-return orders, in particular when based on article 13 of the Convention. Indeed, on the one hand, tribunals have on several occasions stressed that the exceptions to the immediate return provided for in the Convention were listed in an exhaustive manner and that they need to be interpreted restrictively;⁵³ hence, a 2006 tribunal order considered that the condition regarding the risk of harm should be verified only in exceptional cases where serious elements of proof had been produced and where, in case the State of habitual residence of the child before the abduction is a Member State of the European Union, no appropriate measure to protect the child can be taken in that State.⁵⁴ Similarly, it was decided that the burden of proof as to the conditions for the application of the exceptions in the matter was borne by the party claiming their application.⁵⁵ On the other hand, it seems nevertheless that, more recently, courts have been applying the exceptions, in particular Article 13 of the Hague Convention, with more flexibility, taking into consideration primarily the best interest of the child in the context of the case. Hence, in a 2010 decision, the Brussels Court of Appeal considered that, based on the time that had elapsed since the wrongful removal of the children to Belgium, the children were well integrated in their new environment and that there would be a grave risk that their return would expose them to physical or psychological harm or otherwise place them in an intolerable situation.⁵⁶ Similarly, the Supreme court of Belgium, the Court of Cassation, stated that, based on Article 8 of the European Convention on Human Rights, the return of the child should not be ordered automatically or mechanically but rather only when it corresponds to the best interest of the child, which requires an *in concreto* examination based on the individual circumstances of the child and his other environment.⁵⁷ This case was decided after the European Court of Human Rights held that, by deciding that the child should be returned to her state of origin, i.e. the United States, the Belgian courts had violated the right to family life (Article 8 ECHR) since the long duration of the proceedings had allowed the child to become integrated in her new life environment in Belgium and that, as a result, returning the child to the USA would violate the right of the abducting parent to family life.

⁵¹ Article 633sexies of the Code judiciaire. Special rules apply when the proceedings are held in German.

⁵² On the notion and its interpretation in Belgium please refer to section 4.1.3 above.

⁵³ Tribunal of first instance, Brussels, 6 March 2003, INCADAT HC/E/BE 545; Tribunal of first instance, Brussels, 21 June 2006, INCADAT HC/E/BE 856.

⁵⁴ Tribunal of first instance, Brussels, 21 June 2006, INCADAT HC/E/BE 856.

⁵⁵ Tribunal of first instance, Brussels, 6 March 2003, INCADAT HC/E/BE 545.

⁵⁶ Bruxelles (3e ch.), 11 février 2010, RTDF 4/2010, p. 1178.

⁵⁷ Cass., 4 March 2013, nr. C.11.0675.F/1, available at: www.juridat.be.

The issue of whether the left-behind parent has acquiesced to the abduction has been examined several times by Belgian courts and tribunals. It has been decided in particular that the fact that negotiations are being conducted between the parents is not evidence that the left-behind parent consented to his [or her] child being moved abroad.⁵⁸ Generally, courts and tribunals consider the overall attitude of the left-behind parent and especially whether legal proceedings were initiated, which would show disagreement of the claiming parent.⁵⁹ The court also held that there was no presumption of a parent's acquiescence to the removal of his or her child and that such acquiescence can only be taken into consideration when the left-behind parent was aware of his or her own rights.⁶⁰ In this case, the court found that, although the mother only requested the return of her child a month after his removal, she did not mention that the father had taken away all official documents related to the child and took no steps to get in touch with the father or to try to fetch the child. The father - who bore the burden of proof - did not provide enough evidence in support of his allegation that the mother had acquiesced to the removal of the child. The court insisted on the fact that, in case of doubt, the return of the child must be ordered. In another case, the court ruled that the mere fact that a mother frequently visited her son in Belgium was not sufficient evidence that she had acquiesced to his settlement in Belgium.⁶¹

As to non-return decisions based on the risk of physical or psychological harm or other intolerable situation, case law shows that despite the lack of a clear approach, this exception has rarely been successfully raised before Belgian courts. This can be explained by the fact that it can be difficult to provide to the tribunal conclusive evidence as to the possibility of a danger and that, when a child's habitual residence before abduction was in a EU Member State, the EU Regulation 2201/2003 provides that non-return orders require that no appropriate measures to protect the child can be taken by the courts of the EU Member State in which the child used to have his or her habitual residence.⁶²

Hence, in a case regarding two children born to a Portuguese mother and a Belgian father who, after their parents' separation, had been wrongfully taken to Belgium by their father, the father submitted that the children should stay with him in Belgium because of the mother's financial situation and her alleged lack of attention to the children's health. The Belgian tribunal held that the children were not at risk based on the fact that the children were leading normal lives in Belgium, which indicated that their health problems were not as serious as the father alleged them to be. It added that, *inter alia*, it had not been established that the children's health issues were due to their mother's neglect, or that they could not adequately be taken care of in Portugal, the mother's State of residence.⁶³

Similarly, the administration of hazardous drugs to a child was deemed not to be decisive because the parent was able to provide a convincing explanation.⁶⁴ Also, a parent's mere conviction that the other had bad intentions towards the children is not sufficient. This was held by a Belgian court in a case in which the father had argued that the mother was willing to sell her children's organs. Even if the father's beliefs were firmly held, they were not supported by any evidence.⁶⁵

In another case, a father argued that his children should not be returned to their mother in Israel because of the dangerous political situation and terrorist attacks in that country.⁶⁶

⁵⁸ Tribunal of first instance, Brussels, 17 April 2003, INCADAT HC/E/BE 547; see also: B. Jacobs, Note, *Divorce* 2004/9, p. 139ss.

⁵⁹ Tribunal of first instance, Brussels, 21 June 2006, INCADAT HC/E/BE 856; Tribunal of first instance, Brussels, 22 February 2008, INCADAT HC/E/BE 927.

⁶⁰ Tribunal of first instance, Brussels, 6 March 2003, INCADAT HC/E/BE 545.

⁶¹ Tribunal of first instance, Brussels, 22 February 2008, INCADAT HC/E/BE 927.

⁶² Tribunal of first instance, Brussels, 21 June 2006, INCADAT HC/E/BE 856.

⁶³ Tribunal of first instance, Brussels, 17 November 2008, INCADAT HC/E/BE 954.

⁶⁴ Tribunal of first instance, Brussels, 21 June 2006, INCADAT HC/E/BE 856.

⁶⁵ Tribunal of first instance, Liège, 14 March 2002, RTDF 2/2003, p. 398.

⁶⁶ Tribunal of first instance, Brussels, 17 April 2003, INCADAT HC/E/BE 547; see also: B. Jacobs, Note, *Divorce* 2004/9, p. 139ss.

The tribunal found that although the general context in Israel is difficult, there was insufficient proof that the children would be in a specific danger, physical or psychological, as a result of their return to that country. It also noted that it was hard for a Belgian court to assess to what extent the children might be at risk in Israel and that the mother, who is also responsible for the physical protection of the children, was in a better position to assess that risk, having the possibility at all times of returning to Belgium with her children should the situation in Israel deteriorate.⁶⁷

More recently, however, an Article 13 par. b exception was successfully raised by a mother who had removed her children from their habitual place of residence in Thailand. Given the substantial amount of time (two years) that had elapsed since the removal, the young children had adapted to their new residence in Belgium and the court found that it would not be in their best mental and physical interest to move them again, moreover to a place where the situation of the family would also be less certain.⁶⁸

Also, the Belgian Court of Cassation on 4 March 2013 confirmed a decision, rendered on 17 June 2010 by the Court of Appeal of Brussels, regarding a child who had been taken by her mother to Spain without the father's consent.⁶⁹ After the Spanish judge had held that the child need not be returned to Belgium, Belgian courts were seized on the basis of Article 11.7 of the EU Regulation 2201/2003. The Court of Appeal held that the best interest of the child was primarily to be taken into consideration and that, based on several factors, in particular the fact that the mother had meanwhile re-married and had a second child with her new husband and, as a result, her first child was therefore now living in a stable family context, the child should remain in Spain. The Court of Appeal thus decided that the child should be living principally with her mother and that as a result, there was no basis on which to order a return of the child to Belgium. The Court of Cassation, in its judgment of 4 March 2013, stated that the return of a child on the basis of the Hague Convention should not be ordered automatically or mechanically, but that the best interest of the child should be at the center of the evaluation of such request. It therefore considered that the Court of Appeal's decision was well reasoned and that it should not be overturned.

Finally, Article 13 also encompasses the hypothesis pursuant to which the child directly objects to his or her return. For this exception to apply, the child must be old enough to express his or her opinion freely. Most of the cases in which courts have decided not to order the return of the child are based on this exception. It is quite obvious that if the child is old enough and mature enough to express him or herself and objects to his or her return, this desire must be respected. Belgian courts have held that a child of four-and-a-half years old could not be heard,⁷⁰ nor could a child of barely six.⁷¹ The hearing of a thirteen year-old was however allowed.⁷² In the latter case, the tribunal verified two conditions: (i) that the child had sufficient age and maturity for his opinion to be taken into account; and (ii) that the opposition expressed by the child was sufficient in light of the Convention. The tribunal held that there was nothing in the official report of the child's interview that could lead to the view that he did not have the necessary objectivity to give a balanced and enlightened opinion. Although the child was not very talkative, he nevertheless gave specific, nuanced replies, so that it could be seen that he understood the meaning and scope of the questions. The Court concluded that the child had indeed reached an age and maturity where it became appropriate to take his opinion into account. Regarding the child's opposition, the tribunal considered that the child had expressed a categorical refusal to return to Italy since he felt at home in Belgium, which he did not in Italy where he had no friends and felt abandoned by his mother. The child had also excluded any final return to his country of origin. The Judge held that the opposition was not the expression of a simple

⁶⁷ Ibidem.

⁶⁸ Brussels (3^e ch.), 11 February 2010, RTDF 4/2010, p. 1178.

⁶⁹ Brussels (3^e ch.), 17 June 2010, RTDF 4/2010, p.1207, confirmed by: Cass., 4 March 2013, nr. C.11.06175.F/7, available at: www.juridat.be.

⁷⁰ Tribunal of first instance, Brussels, 25 January 2007, INCADAT HC/E/BE 857.

⁷¹ Tribunal of first instance, Brussels, 17 November 2008, INCADAT HC/E/BE 954.

⁷² Tribunal of first instance, Brussels, 27 May 2003, INCADAT HC/E/BE 546.

preference to be looked after by one parent rather than another, but rather was the demonstration of a detailed opinion comparing what he had known in Italy and what he was experiencing in Belgium. The Court concluded that the exception of Article 13 (2) was applicable and dismissed the request for return of the child.

4.1.9. Specific characteristics of Belgian policies

As a preliminary remark, one should note that the Belgian legislator in 2008 modified Article 22bis of the Constitution of Belgium, so as to ensure that it specifies that in every decision concerning a child, the interest of the child is to be afforded the utmost importance.⁷³ Such modification of the Constitution aimed at integrating into the Constitution the substantive provisions of the Convention Regarding the Rights of Children of 20 November 1989. As has already been explained, this Convention might also play a role in legal decisions regarding international child abduction.

Indeed, several authors have, in recent years, highlighted the delicate situation in which national judges find themselves when having to decide, under the Hague Convention on Child abduction, on the return of a child to the State of his habitual residence before abduction. Indeed, more and more frequently, national judges are faced with a dilemma, caught between the necessity of fighting against abductions on the one hand, and that of safeguarding the best interest of the child while avoiding approval of a situation that has been created by the guilty parent of the child, on the other.⁷⁴

Such commentaries are made at a time when States – including Belgium – have been condemned by the ECHR for violation of the right to family life contained in Article 8 of the European Convention on Human Rights, in matters relating to the application of the Hague Convention on child abduction.⁷⁵ In these judgments, the ECHR had indeed held that the return of the abducted child under the Hague Convention on Child abduction would result in a violation of the right to family life. These authors have also commented on recent national court decisions that were rendered following the same line of reasoning as that preferred by the European Court of Human Rights and that have already been examined above.⁷⁶

Some authors have criticized the ECHR's decision in *B. vs. Belgium*, in which Belgium was condemned for having violated Article 8 of the European Convention on Human Rights, for having ordered the return of the child to the place of her habitual residence before abduction, the United States, because the child had eventually integrated into her new environment, as a result of the long duration of the proceeding. According to the authors, by condemning Belgium, the European judge acted as a third instance judge instead of respecting the domestic judges' discretion. Particular to this case was the fact that the ECHR, having ordered provisional measures, had contributed to the long duration of the

⁷³ Article 22bis of the Belgian Constitution provides: « Chaque enfant a droit au respect de son intégrité morale, physique, psychique et sexuelle.

Chaque enfant a le droit de s'exprimer sur toute question qui le concerne; son opinion est prise en considération, eu égard à son âge et à son discernement.

Chaque enfant a le droit de bénéficier des mesures et services qui concourent à son développement. Dans toute décision qui le concerne, l'intérêt de l'enfant est pris en considération de manière primordiale. La loi, le décret ou la règle visée à l'article 134 garantissent ces droits de l'enfant. »

⁷⁴ N. Massager, *Droit familial de l'enfance. Filiation, autorité parentale, hébergement*, Bruylant, Brussels, 2009, p. 544; F. Saroléa, *Le retour immédiat de l'enfant déplacé illicitement face à l'écoulement du temps: principe ou option ?*, Note under: Brussels (3^e ch.), 11 February 2010, RTDF 4/2010, pp. 1191-1206.

⁷⁵ See in particular: ECHR, *B. vs. Belgium*, 10.07.2012, INCADAT HC/E/1171; ECHR, *Neulinger and Shuruk vs. Switzerland*, 6.07.2010, INCADAT HC/E/1323. B. Jacobs, Note: *La Convention de La Haye serait-elle affaiblie par la jurisprudence de la Cour de Strasbourg?*, Act. dr. fam. 2012/10, p. 220ss.

⁷⁶ Brussels (3^e ch.), 11 February 2010, RTDF 4/2010, p. 1178; Brussels (3^e ch.), 17 June 2010, RTDF 4/2010, p.1207, confirmed by: Cass., 4 March 2013, nr. C.11.06175.F/7, available at: www.juridat.be.

proceedings in Belgium and thereby to the integration of the child in Belgium.⁷⁷ Another author considered that the approach of the ECHR in this type of situation results in a lack of legal certainty in situations where the Hague Convention and other instruments are intended to bring clarity.⁷⁸

Commenting on the *Neulinger and Shuruk vs. Switzerland* case and on recent national court decisions, an author has observed that the European Court of Human Rights analysed the return of the child as a mere alternative to the non-return, thereby affording to the principle the same weight or importance as that of the exceptions provided for in Articles 12, 13 and 20 of the Hague Convention. Although this new approach seems to contradict the text of the Hague Convention, this author observes that this less dogmatic approach of the Hague Convention is positive for the child, whose best interest is at the center of the court's decision. Overall, and in this author's view, such a balancing of the interests at stake reveals an inconsistency within the system set up by the Hague Convention since it shows that the exceptions have become more important than the principle.⁷⁹

In addition, it seems difficult to restrict a judge to a merely procedural reasoning, i.e. the return of the child, when he or she has access to information encouraging him or her to go beyond the mere procedural issue of the return. Moreover, this mechanism, set up by the Hague Convention, presupposes that there is sufficient trust between the two judges involved in this situation, which is not always the case in concrete situations.⁸⁰

4.1.10. Justifications for refusing to return a child relocated to Belgium

According to the judgment of the Court of Cassation of 4 March 2013, the "best interest of the child" should be examined with respect to his or her personal development and as a function of his or her age, his or her maturity, the absence or presence of the parents, the environment in which he or she lives and his or her personal history.⁸¹ For this reason, the best interest of the child requires an examination on a case by case basis.

Based on the recent case law examined in the present report, it seems that integration of the child in his or her new life environment has become a key element for rejecting return proceedings. The integration factor becomes even more convincing when it is combined with (i) the long duration of the proceedings (which, in general, allows the child to become integrated); (ii) the uncertain future of the child in his or her state of habitual residence before abduction because of the situation of the other parent in that country; or (iii) the stability of the family context in the State to which the child has been brought by the abducting parent.

Hence, in the case in which a mother had wrongfully removed her two children from Thailand to Belgium, the Appeals Court decided that the long duration of the return proceedings in Belgium had enabled the children to integrate into their new life environment, in such a manner that it would not be in their best interest to return them to their father who was living in Thailand.⁸² The court also justified its position by the fact that the living conditions of the children in Thailand were less certain, since there was a risk that they would not be able to integrate into an international school in Bangkok on their return, and that, following a change in the professional situation of the father, it appeared

⁷⁷ A. Godfroid & S. Gevers, "Straatsburg negeert Haags kinderverdrag door toedekking van illegaal ontvoering", *De Juristenkrant*, 12.09.2012, p. 16.

⁷⁸ B. Jacobs, Note: *La Convention de La Haye serait-elle affaiblie par la jurisprudence de la Cour de Strasbourg?*, *Act. dr. fam.* 2012/10, p. 220ss.

⁷⁹ F. Saroléa, *Le retour immédiat de l'enfant déplacé illicitement face à l'écoulement du temps: principe ou option ?*, Note under: *Brussels (3^e ch.)*, 11 February 2010, RTDF 4/2010, pp. 1191-1206.

⁸⁰ *Ibid.*

⁸¹ Cass., 4 March 2013, nr. C.11.0675.F/7, available at: www.juridat.be.

⁸² *Brussels (3^e ch.)*, 11 February 2010, RTDF 4/2010, p. 1178.

uncertain that he would be able to continue living in Thailand. Similarly, in 2010 the Appeals court of Brussels – whose decision was confirmed by the Court of Cassation in 2013 – decided that the return of the child from Spain to Belgium was not in her best interest based on the fact that she had been living principally with her mother since her birth and that she benefitted in Spain from a more stable family environment than the single parent family environment in which she would be living in Belgium, because her mother had re-married in Spain and had another child with her second husband.⁸³

4.1.11. On-going projects of future legislation on child abduction

Several projects are currently ongoing. First, the various stakeholders in international child abduction in Belgium have set up a working group with a view to producing harmonized statistics on international child abduction. This working group was set up in 2008. To date, the statistics concerned have not been published and could not be made available for the purposes of this report. Second, the Belgian Central Authority is actively participating in a European working group for the purpose of fostering the use of mediation in the context of international child abduction at the European level. Finally, following the judgment of the European Court of Human Rights condemning Belgium in 2012,⁸⁴ the Belgian Central Authority is preparing an outline defining the measures it intends to take in order to implement the judgment of the European Court at the national level.⁸⁵ In this context, according to our contacts at the Belgian Central Authority, the main suggestions included in this outline are shortening the duration of return proceedings and promoting the taking into account of the best interest of the child.⁸⁶

⁸³ Brussels (3^e ch.), 17 June 2010, RTDF 4/2010, p.1207, confirmed by: Cass., 4 March 2013, nr. C.11.06175.F/7, available at: www.juridat.be.

⁸⁴ ECHR, B. vs. Belgium, 10.07.2012, INCADAT HC/E/1171.

⁸⁵ See in this context: Recommendation CM/Rec(2008)2 of the Council of Ministers to the Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec\(2008\)2&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2008)2&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

⁸⁶ This report was last updated in December 2014.

4.2. Czech Republic

Glossary of terms

Czech NCC

New Civil Code of the Czech Republic – law no. 89/2012 Coll.
http://obcanskyzakonik.justice.cz/fileadmin/NOZ_interaktiv.pdf

4.2.1. Statistical Assessment

4.2.1.1. Key statistics overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	5313 (9.6%)	5052 (9.8%)	4969 (8.7%)	4283 (9.47%)
International divorces	1004 (3.4%)	1523 (4.6%)	2151 (6.9%)	1900 (7.2%)
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	5	11	15	n/a
Outgoing return requests made under the Hague Convention	n/a	7	15	n/a

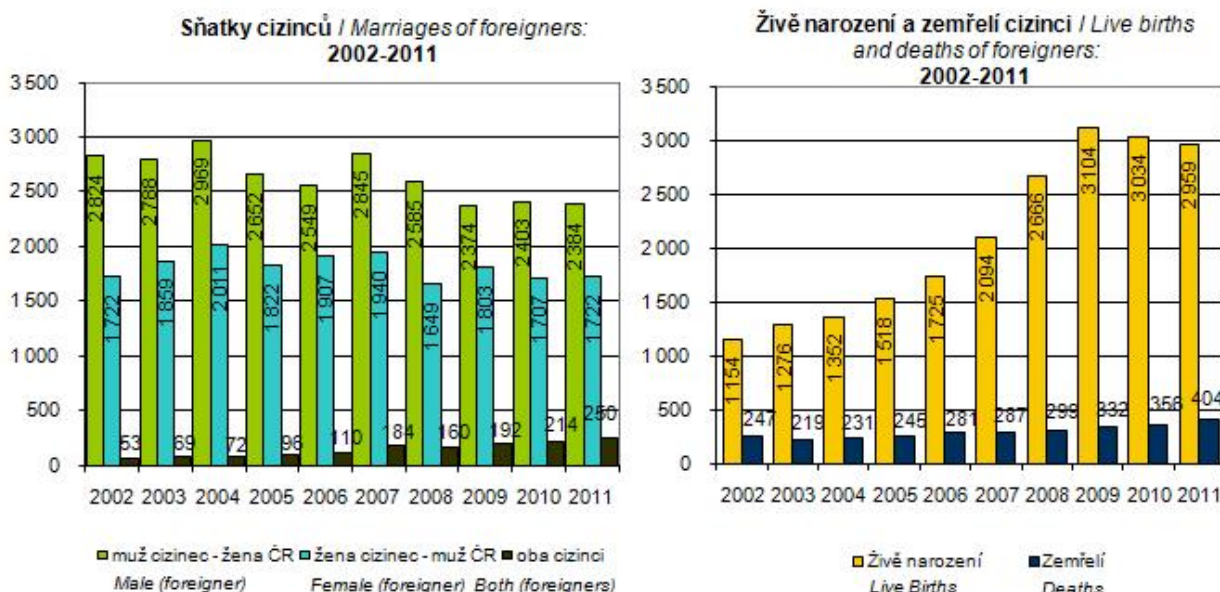
* Marriage and divorce figures based on centrally-collected Eurostat data. Percentages indicate international marriages/divorces as a proportion of all marriages/divorces.

4.2.1.2. Available national data

Data on international marriages celebrated in the Czech Republic is regularly published by the Czech statistical office.¹

¹ See: <http://www.czso.cz/>.

Information for the years 2002 to 2011 is as follows:



Since 1995, when the Czech statistical office began keeping records on the nationality of divorcing persons, the proportion of foreign nationals divorcing before Czech courts has been growing. In 2012, 1,900 marriages in which at least one partner was a citizen of the Czech Republic ended in divorce.² This represented 7.2% of the total number of divorces, while in 1995 there were 716 such divorces, representing 2.5 % of the total number of divorces that year. Among those divorced in 2012, 4.7% were foreign men (a total of 1235), most of whom were citizens of Slovakia (305), Vietnam (119) and the Ukraine (94). Three point three percent (3.3%) of all divorced women were foreign women (a total of 868). Of these foreign women, 234 were from the Ukraine, 265 from Slovakia and 99 from Vietnam. The range of recorded nationalities of divorced men is wider than those of women and is less concentrated in large groups. Divorced foreign men were citizens of 97 different countries, divorced foreign women of 57 countries.³

According to the the Office for International Legal Protection of Children, registered parental child abductions from abroad to the Czech Republic were 17 in 2010, 19 in 2011 and 25 in 2012. The opposite scenario, where parents had moved children from the Czech Republic to other States, resulted in 26 cases registered in 2010, 24 in 2011 and 42 in 2012.⁴

4.2.2. The national legal framework

The Czech Republic has ratified the UN Convention on the Rights of the Child⁵ as well as the Hague Convention on child abduction and the 1996 Hague Convention on

² Another category are divorces where both partners are the Czech citizens and again another category, also numerous in the Czech Republic, concern divorcing partners who are both foreigners. These two categories are not included in the available statistical data.

³ Source: The Czech statistical office: <http://www.czso.cz/csu/redakce.nsf/i/rozvodovost>

⁴ Idem.

⁵ In Czech Collection of laws No. 104/1991. According to the Art. 10 of the Czech Constitution "[P]romulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a law provides, the treaty applies."

Parental Responsibility.⁶ Child abductions occurring from one EU Member State to another fall under EU Regulation 2201/2003. Another international document in force is the 1996 European Convention on the Exercise of Children's Rights.⁷

In situations involving the Czech Republic and any country to which none of these legal instruments can be applied, the bilateral agreements on legal assistance (if any) are applied; otherwise it is necessary to operate through diplomatic channels or on the basis of the terms of any reciprocity agreements between the states concerned.

Current legal regulation of international child abductions applicable in the Czech Republic can also be found in the national procedural law, EU Regulation 2201/2003 and in other above-mentioned International conventions, which are integral part of the Czech legal order (see the information on publication in the official Collection of Laws). In Czech national law, a special proceeding is applicable for cases of international child abduction. The cases under the Convention are currently heard as cases concerning the care of minors pursuant to the Code on special courts proceedings.⁸

On January 1, 2014 the New Civil Code of the Czech Republic entered into force. It introduces several changes to Czech family law and contains numerous provisions on parental responsibility and child abduction issues.⁹

Parental responsibility belongs to both parents;¹⁰ if one of the parents is no longer alive, is unknown or does not possess the full capacity to carry out legal acts, all parental responsibility goes to the other parent.¹¹ Parental responsibility may be suspended, limited or divested only under circumstances provided by law;¹² the right to upbringing and care for a child is only one of several rights and responsibilities which fall under parental responsibility. Unless the parental responsibility of the parent who is not the primary caregiver of the child has been withdrawn or limited, such parent is further entitled to make decisions on fundamental matters concerning the child.¹³ In the case of parents living apart, Czech law uses the terms of rights of custody and rights of contact.

4.2.3. Characterisation of parental child abduction in the Czech Republic

According to Czech practice, international child abduction is the wrongful removal or retention of a child outside the state of his or her habitual residence with neither the consent of the custodial parent nor the approval of the court.¹⁴ The habitual residence of the child is not necessarily the child's permanent address. It is the place where the child actually lives for a longer period of time, where he/she goes to school or nursery school, has a doctor, has friends and the child's extended family lives.¹⁵

⁶ In Czech Collection of laws No. 34/1998.

⁷ In Czech Collection of laws No. 54/2001.

⁸ Law on special courts proceedings No. 292/2013 Coll. (§§ 478-491):

http://obcanskyzakonik.justice.cz/fileadmin/user_upload/PDF/Zakon-o-zvlastnich-rizenich-soudnich.pdf.

⁹ Civil Code, law No. 89/2012 Coll., §§ 855- 909:

http://obcanskyzakonik.justice.cz/fileadmin/NOZ_interaktiv.pdf.

¹⁰ Civil Code No. 89/2012 Coll., § 865.

¹¹ Civil Code No. 89/2012 Coll., § 878.

¹² Civil Code No. 89/2012 Coll., § 869, 870, 871

¹³ Civil Code No. 89/2012 Coll., § 865

¹⁴ Legal definition exists in Penal Code No. 40/2009 Coll. § 200 only for child abduction. According to it "whoever removes a child [...] from the custody of the person who, under another legal regulation or an official decision, has the obligation to take care of him or her" commits child abduction.

¹⁵ See the decision of the Regional Court in Brno which decided in the case No. 20 Co 365/2012-411 on 15.05.2012. The decision is available in legal Database- Automatický systém právních informací. This legal definition expresses general practice of the Court which is entrusted to decide international child abduction cases. In addition to habitual residence are used expressions like permanent residence, factual residence or domicile.

Retention of the child abroad for a longer time than the time which was consented to by the other parent also constitutes, according to the Czech jurisdiction, international child abduction.¹⁶

Parental abduction is a crime in the Czech Republic.¹⁷

It is prohibited by law¹⁸ to provide any public information which can identify victims of child abduction by name, address, and place of origin or by other way which can lead to disclosure of the identity of the victim.¹⁹ The final judgment may not be published in the public media with the listing of the name or names, surname or residence of the victim. The presiding judge may, with regard to the victim and the nature and character of the criminal offence committed, impose further restrictions associated with the publication of a final convicting judgment for the purpose of adequate protection in the interests of such victim.²⁰

4.2.3.1. Child illegally removed from the Czech Republic

If the child is wrongfully removed from the Czech Republic to a foreign country the Office for International Legal Protection of Children operates under the EU Regulation 2201/2003 and the Hague Convention on Child Abduction as requesting central authority. The office sends the request for the return of a child to the foreign requested central authority of the State where the child was wrongfully removed or retained.

The left-behind parent can demand the child's return (1) via the Office for International Legal Protection of Children, (2) through the central authority of the state where the child was wrongfully removed to or (3) by filing a petition to a court in that state (the petition should comply with all the conditions required by the law of that State).

In the first case, the Office for International Legal Protection of Children closely cooperates with the central authority of the requested State. The Office provides the contact with the authority and informs the left-behind parent about return proceedings. The Office helps to obtain and complete all the documents which must be forwarded and which could help to make the proceedings faster.

The Office represents the parent towards the central authority of the requested state but it does not represent her/him before the court of the requested state. The possibilities and conditions of representation (representation by a lawyer free of charge or at reduced fee) are regulated by the law of the state and the Office provides all the necessary information.

4.2.3.2. Child illegally relocated to the Czech Republic

If the child has been brought to the Czech Republic, the Office for International Legal Protection of Children receives the request for the return of the child to the country of the child's habitual residence.

As in the parallel situation, the left-behind parent can request the child's return: (1) via the central authority of the state of his/her habitual residence, (2) through the central authority of the state to which the child has probably been removed, the Office for International Legal Protection of Children or (3) by filing a petition with a Municipal Court in Brno (the petition must comply with all the conditions imposed by Czech law).

¹⁶ Decision of the Regional Court in Brno No. 20 Co 365/2012-411 from 15.5.2012, p. 5. Source legal Database ASPI.

¹⁷ Penal Code No. 40/2009 Coll. § 200.

¹⁸ Code of Criminal Procedure No. 141/1961 Coll.

¹⁹ Code of Criminal Procedure No. 141/1961 Coll. § 8b/2.

²⁰ Code of Criminal Procedure No. 141/1961 Coll. § 8b/3.

The Czech Office for International Legal Protection of Children informs the competent court in the place of the child's permanent residence of the receipt of the request pursuant to the Convention. After receiving this information about the wrongful removal or retention of the child, the court will not decide on the merits of custody rights.

Amicable settlement of the case is a priority for the Office for International Legal Protection of Children. The Office tries to enable, mediate and facilitate an agreement between the parents about the residence and custody of the child.

In the case of abduction, the Office closely cooperates with other state authorities, for example with Czech embassies in foreign countries, the Czech Police in determining the real residence of the child, or the employees of the local social authorities.

During preparation of this report we asked the Czech Office for International Legal Protection of Children in Brno for cooperation, support and to share practical experiences. The office confirmed reception of our request but unfortunately did not provide any other information or cooperation.

4.2.4. Right of access

Every child has the right to know both his/her parents and to maintain contact with both of them.²¹ In cases where one of the parents prevents the other from having contact with the child, it is possible to take legal action in order to allow for such contact.²² Providing and ensuring contact with a child living in a State that is different from the State where his or her parent lives is most often resolved by enforcement of foreign judgments, or by using legal instruments provided by international law.

The right of access to the child includes the right of a parent or other person to maintain contact with the child.²³ The contact can be achieved through visits to the child; the child's stay in the non-custodial parent's house; or indirectly through modern means of communication, such as e-mail, phone or Skype. The right of access also includes the right to receive information about the child (about his/her health and psychological condition, school results, interests, etc.), that should be provided by the parent caring for the child regularly.

In the Czech Republic, the right of access needs not be judicially regulated if the parents have made an agreement about it.²⁴ In cases of disagreement, however, the court may decide.²⁵

If the child is in the Czech Republic, the proceeding concerning the right of access could be initiated before the court in the place of residence of the child and it is free of charge.²⁶

In the event that the child lives abroad, the competent jurisdiction is generally in the State of the child's habitual residence.²⁷

In the Czech Republic, it is possible to submit a request for enforcement to the competent court when a parent does not respect a judgment concerning the right of access.²⁸ In the enforcement of the judgment, the child may be given to the parent who demands access in cooperation with a court executor, social workers or the police. Because this could be a very traumatic intervention in a child's life, all participating

²¹ Civil Code No. 89/2012 Coll., § 887.

²² Civil Code No. 89/2012 Coll., § 891.

²³ Civil Code No. 89/2012 Coll., § 882(1), § 887.

²⁴ Civil Code No. 89/2012 Coll., § 891.

²⁵ Civil Code No. 89/2012 Coll., § 888.

²⁶ Civil Procedure Code No. 99/1963 Coll., § 9.

²⁷ Act on private international law No. 91/2012 Coll., § 56.

²⁸ Civil Procedure Code No. 99/1963 Coll., § 251.

institutions should first try mediation to find an amicable solution. The Czech court can also repeatedly impose a fine of up to CZK 50.000- as an "astreinte" to force the parent to comply.

When a parent is prevented from having contact with his or her child and the child lives in a different State, the Office can turn to the foreign authorities and, in cooperation with these institutions, initiate the enforcement of the judgment on access to the child abroad on the basis of European regulations or of bilateral agreements between the states.

4.2.5. Judicial tools

In the Czech Republic, it is necessary to file a petition for the enforcement of a decision on parental responsibility with the court. The court having jurisdiction to decide on the petition for the enforcement is the district court for the place of the minor's residence.²⁹ Prior to ordering the enforcement of the decision, the court will request the party concerned to comply with the decision voluntarily. If the requested party refuses to do so, the court may warn the party and point out the consequences of the failure to fulfil the obligations imposed by the decision. If the obliged party still refuses to follow the decision, the court issues the enforcement order and it can also impose a fine of up to 50,000 CZK.³⁰ The enforcement is carried out by withdrawal of the child; if it is evident from the very beginning that the obliged parent will not comply with the decision voluntarily, the court may order the enforcement immediately.³¹ It is, however, possible to appeal the enforcement order to a regional court. The enforcement order does not specify exactly how the handover of the child shall be carried out and within what time frame.

In the above mentioned proceedings all parties are equal³², everyone has the right to assistance of counsel from the very beginning of such proceedings³³ and everybody is entitled to compensation for damage caused by an unlawful decision of a court, other state bodies, or public administrative authorities, or as the result of an incorrect official procedure.³⁴ Everyone has the right to have his/her case considered in public, without unnecessary delay, and in his/her presence, as well as to express his/her views on all of the admitted evidence.³⁵ The public may be excluded only in cases specified by law.³⁶ Anyone who declares that he does not speak the language in which a proceeding is being conducted has the right to the services of an interpreter.³⁷

This and, more generally, the rights to fair trial are under protection of the Constitutional Court of the Czech Republic.³⁸

In cases of international child abduction it is possible to request a court to order the return of the child. The proceedings must be initiated as soon as possible but no longer than one year after the child is abducted; this is an obligation which is included in Art. 12 of the Hague Convention which is integral part of the Czech legal order (see above). According to this Article "[W]here a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith." The Czech Regional Court in Brno

²⁹ Idem, § 9.

³⁰ Idem, § 53.

³¹ Idem, § 75c.

³² Charter of Fundamental Rights and Basic Freedoms No 2/1993 Coll. Art. 37/3.

³³ Idem Art. 37/2.

³⁴ Idem Art. 36/3.

³⁵ Idem Art. 38/2.

³⁶ Idem Art. 38/2.

³⁷ Charter of Fundamental Rights and Basic Freedoms No 2/1993 Coll. Art. Art. 37/4.

³⁸ Law on Constitutional Court No. 182/1993 Coll. § 72.

occasionally repeats wording of the Hague Convention in the cases where it decides on international child abduction, e.g. in the Decision on the international child abduction No. 20 Co 297/2012-17339. The Court here also repeats the grounds for exceptions: "the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." The court underlines here the restrictive character of the provision of Article 13 of the Hague Convention and pleads for unified application of the provision in different countries.⁴⁰

4.2.6. Jurisdiction

4.2.6.1. Court where the Central Authority is located

The jurisdiction for child abduction cases is concentrated in the specialized senate of the district court having jurisdiction where the Central Authority is located.⁴¹ The Central Authority is The Office for International Legal Protection of Children in Brno – Úřad pro mezinárodní právní ochranu dětí, Šilingrovo náměstí 3 / 4, 602 00 Brno.⁴² The Court decides all applications made according to the Hague Convention on international Child abduction and the EU Regulation 2201/2003.⁴³

Under certain circumstances, the court may decide without a hearing.⁴⁴ There are tight time limits for the proceeding (three weeks after application).⁴⁵ Extraordinary means of appeal are not allowed.⁴⁶ It is not possible to stay the special proceeding or excuse a missed filing deadline.⁴⁷ The court must apply the promptest and most effective procedures and issue a decision on the merits within six weeks.⁴⁸ This time limit may be exceeded only if exceptional circumstances occur.

The court may speed up the return of the child by ordering return even before a final decision is handed down.⁴⁹

District courts are the courts having general jurisdiction in cases concerning parental responsibility.⁵⁰ Therefore, in these cases, a district court in the area of the child's residence will have jurisdiction. Prior to issuing its final decision, the court may, by means of a preliminary ruling, order the defendant to give the child over to the care of the other

³⁹ Regional Court in Brno, Decision No. 20 Co 297/2012-173 made on 24.4.2012. Source legal Database ASPI.

⁴⁰ Judicial principle of the Court in Czech: "... Soud vždy na izuje navrácení dítěte do obvyklého bydliště (pobytu), nikoliv navrácení do rukou druhého z rodičůTuto povinnost nemá pouze tehdy, je-li dána podmínka z výjimek uvedených v článku 13 nebo článku 20 Haagské úmluvy o obanskoprávních aspektech mezinárodních únosů dětí."

⁴¹ Law No. 293/2013 Coll.

⁴² Article 6 of the Convention requires the contracting states to designate a Central Authority to discharge the duties which are imposed by the Convention upon such Authorities. Article 7 of the Convention establishes the obligation of contracting states to co-operate with each other and to promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. This provision also contains a list of appropriate measures that shall be taken by the Central Authorities. In the Czech Republic, the tasks of the Central Authority are exercised by the Office for International Legal Protection of Children in Brno.

⁴³ Law on special courts proceedings No. 292/2013 Coll. § 478.

⁴⁴ *Idem*, § 486.

⁴⁵ *Idem*, § 487.

⁴⁶ *Idem*, § 491.

⁴⁷ *Idem*, § 485.

⁴⁸ *Idem*, § 489.

⁴⁹ *Idem*, § 484.

⁵⁰ Civil Procedure Code No. 99/1963 Coll., § 9.

parent or another individual determined by the court.⁵¹ It is possible to appeal the district court's decision on parental responsibility within fifteen days after the delivery of the written decision. Appellate courts are regional courts (or the Municipal Court in Prague). In addition, the district court may order that its decision be preliminarily enforceable.⁵² The regional court's decision can also be appealed if the regional court has modified or overturned a decision of the district court, or if a question of fundamental legal interest is involved.⁵³

4.2.6.2. The Constitutional Court

The Constitutional Court of the Czech Republic (Ústavní soud České republiky) is the judicial body responsible for the protection of constitutionalism, and its status and powers are enshrined directly in the Constitution of the Czech Republic.⁵⁴ According to Article 72 of the Constitutional Court Act,⁵⁵ a constitutional complaint may be submitted by a natural or legal person, if he/she alleges that his/her fundamental rights and basic freedoms guaranteed in the constitutional order have been infringed as a result of the final decision in a proceeding to which he/she was a party, of a measure, or of some other encroachment by a public authority. In general, the Czech Constitutional Court is not the appropriate institution for complaints concerning international child abduction and in the last five years all of the complaints concerning international child abductions to this Court were denied as ill-founded.⁵⁶ Generally, the complaints against judgments on child abductions were denied because they were not challenging the constitutionality and protection of rights and freedoms, but requesting review of the previous judgment. One of the very rare decisions was made in December 2000 (before accession of the Czech Republic to the European Union) in the Case III. US 440/2000.⁵⁷ The Constitutional Court decided to repeal the decisions of ordinary courts because it found a violation of constitutional rights, mainly Art. 36 paragraph 1 of the Charter of Fundamental Rights and Basic Freedoms.⁵⁸

4.2.6.3. The Supreme Court

The Supreme Court of the Czech Republic (Nejvyšší soud České republiky) is the court of highest appeal for almost all legal cases heard in the Czech Republic. In the history, it has decided fourteen cases on international child abduction.⁵⁹ The last case was the decision of the Supreme Court of the Czech Republic No. Nd 279/2009 of 21.12.2009.⁶⁰

4.2.7. Relevant Case law

4.2.7.1. National case law

The most interesting decisions of specialized jurisdiction concern two cases of international child abduction of 2012.

⁵¹ Civil Procedure Code No. 99/1963 Coll., § 76.

⁵² This means that the decision can be enforced even though it has not yet come into legal force, e.g. because an appeal has been filed. Civil Procedure Code No. 99/1963 Coll., § 76d.

⁵³ Civil Procedure Code No. 99/1963 Coll., § 237.

⁵⁴ Constitution of the Czech Republic No.1/1993 Coll. Art. 83.

⁵⁵ Constitution of the Czech Republic No. 1/1993 Coll.

⁵⁶ See the following Decisions of the court: IV.ÚS 132/14 from 11. 2. 2014; I.ÚS 70/13 of 10. 12. 2013; II.ÚS 1116/13 of 20. 6. 2013; II.ÚS 1116/13 of 14. 5. 2013; II.ÚS 3563/12 of 10. 10. 2012; II.ÚS 1421/11 of 30. 8. 2011; II.ÚS 2471/10 of 3. 3. 2011; I.ÚS 2057/10 of 2. 11. 2010; I.ÚS 1337/10 of 9. 6. 2010; I.ÚS 2807/08 of 10. 3. 2009; see the Database. <http://nalus.usoud.cz/Search/Search.aspx>.

⁵⁷ <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=36893&pos=1&cnt=1&typ=result>

⁵⁸ Charter of Fundamental Rights and Basic Freedoms No 2/1993 Coll. Art. 36/1: (1) Everyone may assert, through the prescribed procedure, her rights before an independent and impartial court or, in specified cases, before another body.

⁵⁹ <http://pravo4u.cz/judikatura/hledat/?q=%C3%BAnosy+d%C4%9Bt%C3%AD&t=on&v=on&o=on>

⁶⁰ <http://pravo4u.cz/judikatura/nejvyssi-soud-cr/4-nd-279-2009/> <20.01.2013>.

The first one⁶¹ deals with the application of Articles 12 and 13 of the Hague convention. The court considers as the essential aim of the Convention to return the wrongfully removed or retained child⁶². The obligation to return wrongfully removed or retained children is expressed, in the opinion of the Court, as an obligation of judicial or administrative authorities of the State where the child is located to order immediately the return of a wrongfully removed or retained child, if, on the date of the beginning of the proceedings, a period longer than one year from the date of the wrongful removal or retention has not elapsed. The Court states that the regulation set for in the Convention is relatively clear and strict ("Právní úprava obsažená v Úmluvě je jinak poměrně jasná a striktní").⁶³

The second case⁶⁴ challenges mostly the definition of habitual residence ("obvyklé bydliště"). According to the Court, the habitual residence of the child is not necessarily the child's permanent address. It is the place where the child actually lives for a longer period of time, where he/she goes to school or nursery school, has a doctor, has friends and the child's extended family lives.⁶⁵ The court also stated in this case that retention of the child abroad for a longer time than the time which was consented to by the other parent (which was the substance of the case) also constitutes international child abduction.⁶⁶

In determining the child's "habitual residence" for the purpose of the Convention, the court underlined the necessity to look back in time, not forward. Neither the intention of the abducting parent after the removal or retention, nor the child's citizenship is relevant. The court insisted to evaluate evidence on the habitual residence of the child after deliberation, considering every piece of evidence separately and all the evidence as a whole; in doing so, it took due account of every piece of evidence that had come to light in the course of the proceedings, including the statements of the parties.⁶⁷ Both cases were consequently anonymized by the court. Numerous quotations of common law commentaries may provide indications of the second country (jurisdiction) involved in the case.

4.2.7.2. The European Court of Human Rights

The European Court of Human Rights decided in the last five years three cases relevant to child abduction in the Czech Republic. In the first case (*Macready v. the Czech Republic* - 22 April 2010)⁶⁸ the applicant Mr. M., a U.S. national, lived with his wife E.M. and their son A.T.M. The parents had joint custody. In May 2004 the applicant learnt that E.M. had taken their son to the Czech Republic without his consent. In proceedings instituted by her in June 2004, E.M. obtained custody of the child by virtue of a decision given by the Czech court before it had been informed of A.T.M.'s wrongful removal. Mr. M. brought proceedings in the Czech Republic under the Hague Convention on the Civil Aspects of International Child Abduction. In April 2005, the court ordered the return of A.T.M. to the United States. It found that the child had been wrongfully removed in the sense of the Hague Convention and that the mother's ability to bring him up had been compromised because she was preventing the applicant from having contact with his son. On appeal by E.M., the court ordered an expert report. The expert concluded that A.T.M. needed to remain with his mother. The applicant challenged the expert's report. In June 2006 the court dismissed the applicant's action on the ground that his son's return to the United States might cause him irreparable harm. An appeal by Mr M. on points of law was

⁶¹ Case No. 20 Co 297/2012-173 from 24.4.2012. Source legal Database ASPI.

⁶² See also Case No. 20 Co 365/2012-411 from 15.5.2012, S. 3. Source legal Database ASPI.

⁶³ Case No. 20 Co 297/2012-173 from 24.4.2012, S. 2. Source legal Database ASPI.

⁶⁴ Case No. 20 Co 365/2012-411 from 15.5.2012. Source legal Database ASPI.

⁶⁵ Case No. 20 Co 365/2012-411 from 15.5.2012, S. 3. Source legal Database ASPI.

⁶⁶ Ibid.

⁶⁷ Case No. 20 Co 365/2012-411 from 15.5.2012, S. 3. Source legal Database ASPI. See also Civil Procedure Code No. 99/1963 Coll., § 132.

⁶⁸ *Macready contre République tchèque*, <http://www.juricaf.org/arret/CONSEILDELEUROPE-COUREUPEENNEDESROITSDDELHOMME-20100422-482406-1551208>.

dismissed, and his application to the Constitutional Court was also unsuccessful. Relying, in particular, on Article 6 § 1 of the European Convention of Human Rights (right to a fair hearing within a reasonable time) and Article 8 of the European Convention of Human Rights, Mr M. complained about the proceedings he had brought seeking his son's return after he had been removed by his ex-wife.

The European Court of Human Rights found that the Czech authorities had not secured the applicant's right to see his child during the proceedings to secure the boy's return to the United States.⁶⁹

In its two other judgments of 27 October and 20 December 2011 (cited below), the Court found a violation of the applicants' right to respect for family life protected by Article 8 of the Convention in disputes over parental contacts with minor children. Although in these cases international child abduction did not take place, the standards applicable to solve international child abduction were mentioned: thus, the cases are also relevant for the purposes of this report. In both cases, the violation of human rights depended on the State authorities' failures in the course of the proceedings on the determination of contact between a parent and a child.

In the case of *Prod Ialová*⁷⁰, the Court found the delays that had occurred during the proceedings on the part of the national courts to be excessive. In particular, the applicant, M. P., is a Czech national who was born and lives in the Czech Republic. In 1997 she gave birth to twins. After separating from the children's father, she agreed to share custody of the children with him. The father subsequently obtained an interim custody order, having complained that his parental rights were not being respected. The applicant was granted visiting rights for one week a month. In March 2004, in a judgment based on the findings of several reports by psychology experts, the competent District Court awarded custody of the children to their father. The applicant's visiting rights were limited to two hours every two weeks. Relying on Article 6 § 1 of the European Convention of Human Rights (right to a fair hearing) and Article 8 of the European Convention of Human Rights (right to respect for private and family life), she complained of the way in which the court proceedings were conducted and about being separated from her children for several years.⁷¹

In the case of *Bergmann*⁷² the applicant is a Czech national who was born and lives in the Czech Republic. In 2001, while he was serving a prison term, he became the father of a child. In 2003, custody of the child was awarded to the mother who, for several years, prevented the meetings between the father and the child provided for by the interim measure. Following a report by an expert, who considered that the positive affective relationship between the applicant and his son had broken down, the Regional Court announced that they were to have no contact. Alleging in particular that the procedure relating to his access rights did not meet the requirements of fairness, impartiality and reasonable time⁷³, the applicant argued that his right to respect for his family life⁷⁴ had been breached. In both cases the European Court of Human Rights found violation of

⁶⁹ See also Résolution CM/ResDH(2012)21[1] Exécution de l'arrêt de la Cour européenne des droits de l'homme *Macready contre République tchèque* <http://jurisprudence.cedh.globe24h.com/0/0/republique-tcheque/2012/03/08/affaire-macready-contre-la-republique-tcheque-109687-4824-06.shtml>.

⁷⁰ *Affaire Prod Ialová c. République tchèque* (no. 40094/08) – [http://hudoc.echr.coe.int/sites/fra/Pages/search.aspx#{"fulltext":\["Prod Ialová"\],"itemid":\["001-108226"\]}](http://hudoc.echr.coe.int/sites/fra/Pages/search.aspx#{).

⁷¹ See also Execution of the judgments of the European Court of Human Rights in the cases no. 8857/08 – *Bergmann v. the Czech Republic* and no. 40094/08 – *Prod Ialová v. the Czech Republic* Action Report submitted by the Czech Government on 3 December 2012 <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2246959&SecMode=1&DocId=1970770&Usage=2 <20.01.2013>>.

⁷² *Affaire Bergmann c. République Tchèque* (no 8857/08).

⁷³ Article 6 § 1 of the European Convention on Human Rights

⁷⁴ Article 8 of the European Convention of Human Rights

the applicants' rights. During the procedures, the Court made reference not only to child abductions but also to the standards for solving international child abduction cases.⁷⁵

4.2.7.3. Non-judicial tools available to the parties.

The alternative to court proceedings is mediation.⁷⁶ Mediation is an out-of-court resolution of a complicated family situation with the assistance of a third person who is a certified mediator.⁷⁷ Through mediation, the parents are enabled to find a solution which best suits their situation.⁷⁸ The Law on mediation⁷⁹ together with its executive regulation⁸⁰ stipulates the mediation rules in the Czech Republic with regard to European legislation.⁸¹ Mediation is usually a quicker and less expensive alternative to court proceedings. Moreover, the participants can choose on their own the best solution for them. Mediation is an informal process, but it is precisely structured.⁸² Parties to a dispute are not prevented from seeking access to the courts in enforcing their rights but the Law on mediation serves as a legal basis for the amicable settlement of disputes within mediation proceeding. Mediation can be ordered⁸³ or recommended⁸⁴ by a court or can be initiated⁸⁵ by parties to a dispute. The first mediation session ordered by the court (which may take no longer than three hours) means a suspension of the proceeding for up to three months.⁸⁶ The mediator is a trained professional who is responsible for leading the process and for effective communication among parties.⁸⁷ They must have university education with a master degree⁸⁸; they must pass Mediator's Exam⁸⁹, have no criminal record⁹⁰ etc. The register of mediators is kept by the Ministry of Justice.⁹¹ Mediation is performed under a contract which is a form of contractual relationship defined by the Law. It must identify the parties to a dispute, the mediator, the given conflict, the mediator's remuneration and the period of mediation, or possibly include a stipulation that mediation will be performed indefinitely.⁹² In contrast to the judge, the mediator does not resolve, judge or propose any solutions.⁹³ S/He is prepared to listen to both participants and to work with their emotions. S/He oversees the complicated situation, names the problems and presents them to the participants as topics for negotiation. The goal of mediation is to find new solutions and alternative views of the situation.⁹⁴

⁷⁵ See also Execution of the judgments of the European Court of Human Rights in the cases no. 8857/08 – Bergmann v. the Czech Republic and no. 40094/08 – Prod lalová v. the Czech Republic Action Report submitted by the Czech Government on 3 December 2012

⁷⁶ An alternative method for solving civil disputes outside the scope of the ordinary court proceedings is regulated in the Law on mediation No. 202/2012 Coll. It is the transposition of the Directive of the EU Parliament and the Council 2008/52/EC in the Czech legal order.

⁷⁷ The Law on mediation No. 202/2002 Coll. determines relatively stringent requirements for "registered mediators": university education with a master degree, without criminal record, passing the Mediator's Exam, other requirements - § 16 of the Law.

⁷⁸ For further information see http://www.umpod.cz/fileadmin/user_upload/unosy/International_Family_in_crisis.pdf

⁷⁹ Law on mediation No. 202/2012 Coll.

⁸⁰ Regulation No. 277/2012 Coll.

⁸¹ Directive of the EU parliament and the council 2008/52/EC.

⁸² Law on mediation No. 202/2012 Coll. § 4.

⁸³ Civil Procedure Code No. 99/1963 Coll., § 100/2.

⁸⁴ Idem, § 114°.

⁸⁵ Idem, § 99; Law on mediation No. 202/2012 Coll. § 7.

⁸⁶ Idem, § 100/2.

⁸⁷ Law on mediation No. 202/2012 Coll. § 8.

⁸⁸ Idem, § 16/1 (c).

⁸⁹ Idem, § 16/1 (d).

⁹⁰ Idem, § 16 (2).

⁹¹ Idem, § 15.

⁹² Idem, § 4.

⁹³ Idem, § 8.

⁹⁴ Despite othe Law on mediation, besides "registered mediators" also "private mediators" who are not registered with the Ministry of Justice can continue to perform their activities outside the scope of the Law on mediation.

The solutions are prepared by the participants. It is possible to have the court approve the settlement reached.⁹⁵ The dispute is sometimes resolved during one session, sometimes more than one session is needed.

In order for mediation to be suitable both parties must agree to participate in it. This offers place to seek a settlement suitable for both parties, provided that there are more than one or two possible solutions. Both parties are able to communicate with each other at least at a minimum level so that the exchange of new information is made possible.⁹⁶ A court order to follow a mediation procedure seems not a very suitable instrument in cases of international child abduction because such an order will conflict with the time limit imposed by Law.⁹⁷

Statistical information on frequency of mediation is not available.

4.2.8. Existing criminal sanctions

Parental abduction is a crime in the Czech Republic. This crime is punished with imprisonment for up to three years or a fine. In particular circumstances, punishment may be extended to ten years.⁹⁸ However, no decisions based on this provision are reported.

Art. 200 of the Czech Penal code sounds as follows: "(1) Whoever removes a child or person suffering from a mental disorder from the custody of the person who, under another legal regulation or an official decision, has the obligation to take care of them shall be punished by a prison sentence of up to three years or a monetary penalty. (2) An offender shall be punished by a prison sentence of one to five years if a) they committed an act referred to in Subsection 1 with the intention of acquiring material benefits for themselves or someone else, or b) the commission of such an act threatens the moral development of the kidnapped person. (3) An offender shall be punished by a prison sentence of two to eight years if a) they committed an act referred to in Subsection 1 as a member of an organised group, b) they caused grievous bodily harm by committing an act referred to in Subsection 1, or c) they procured a substantial benefit by committing such an act for themselves or another person. (4) An offender shall be punished by a prison sentence of three to ten years if a) they caused death by committing an act referred to in Subsection 1, or b) they procured another large scale benefit by committing such an act for themselves or another person. (5) Premeditation is punishable."⁹⁹

4.2.9. On-going projects of future legislation on child abduction

At the moment, the biggest practical challenge with regard to child abduction cases in the Czech Republic is to speed up the lengthy court proceedings and thus ensure the protection of the interests of children.¹⁰⁰

Since in the Czech Republic there are new (material and procedural) legal regulations valid as of 1 January 2014, authorities are awaiting initial experiences with the new national rules.

⁹⁵ Civil Procedure Code No. 99/1963 Coll., § 67.

⁹⁶ More information can be found for example here: <http://www.amcr.cz/co-je-to-mediace/>.

⁹⁷ Law on special courts proceedings No. 292/2013 Coll. § 489.

⁹⁸ § 200 of the Penal Code No. 40/2009: <http://trestnizakonik.cz/trestni-zakonik/cast2h4.php>.

⁹⁹ Sámal a kol., *Trestní zákoník II, Zvláštní část* (§ 140-421), 2. Ed., C.H.Beck, Prague 2012, S. 1945 – 1952. Also legal Database ASPI.

¹⁰⁰ See especially the decisions of the European Court on Human Rights quoted above.

Under the new Czech family law generally both parents have the parental responsibility even if (e.g. after divorce of their marriage) the child is entrusted the custody of a parent. Both parents have right to determine the child's residence. If they don't agree on this matter the court has to decide.

According to the new rules, „parental responsibility encompasses obligations and rights of parents when caring for a child, which comprise in particular of the care for the child's health, child's physical, emotional, intellectual and moral development, protection of a child, maintaining personal contact with a child, safeguarding child's upbringing and education, determination of the place of residence of a child, legal representation, and administration of child's property. Parental responsibility arises with the birth of a child and ceases when the child reaches full legal capacity. The duration and extent of parental responsibility can be modified only by the court“.¹⁰¹

Such responsibility „belongs to both parents equally. Each parent holds it, unless his or her parental responsibility has been terminated, by a Court.“¹⁰²

An interesting rule – that of § 887 - prescribes that „the exercise of the right of a parent to maintain personal contact with the child cannot be transferred to another person“.

In addition, a duty to cooperate is imposed to the parents by the following rules:

§ 888

A child who is placed in custody of one parent has a right to enjoy contact with the other parent in an extent which is in the interest of the child. Equally, a parent has the right to have contact with the child, unless the court limits the contact or terminates it. The court may also determine the terms of contact, especially location where a visitation should take place. The court may also identify persons who may, or mustn't respectively be present during the visitation. The custodial parent has a duty to prepare the child duly for the contact with the other parent, enable such contact and cooperate properly with the other parent on exercise of the right of contact.

§ 889

The custodial parent and the non-custodial parent must refrain from anything that either interferes with child's relationship to both of parents or makes child's upbringing difficult. Should the custodial parent groundlessly, consistently or repeatedly prevent the non-custodial parent's contact with the child, such behaviour shall be considered as a ground for modification of custody order.

§ 890

It is a duty of parents to share all important information concerning the child and its interests.

§ 891

(1) Both the custodial parent and the non-custodial parent shall come to an agreement regarding contact between a non-custodial parent and a child. If parents are unable to reach an agreement, or if the interest of the child's upbringing and family circumstances require it, the court will regulate the contact. In justified cases, the court may determine the location of the visitation between parent and child.

(2) When the interest of a child requires it, the court may restrict the parent's right to have contact with a child or prohibit such contact entirely.“

In sum, a synthesis of the Czech legal policies on child abduction suggests that cooperation between the parents before and/or after the removal of a child is considered paramount for preventing and reacting to child abduction in pursuit of the best interest of the child.¹⁰³

¹⁰¹ „§ 858 of the Civil code. The translation has been provided by the Czech Office for International Legal Protection of Children.

¹⁰² § 865 *ibid*.

¹⁰³ Last updated in November 2014.

4.3. Denmark

Glossary of terms

DI CAA

Danish International Child Abduction Act

Lov om international fuldbyrdelse af forældremyndighedsafgørelser mv.

available in English at:

http://www.boernebortfoerelse.dk/fileadmin/user_upload/temp/Act_on_International_Child_Abduction.pdf

4.3.1. Statistical Assessment

4.3.1.1. Key statistics overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	7046 (18.4%)	5542 (14.7%)	5753 (15.7%)	3331 (11.7%)
International divorces	3067 (21.3%)	3121 (19.8%)	2337 16.6%	2019 (12.9%)
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	11	12	15	23**
Outgoing return requests made under the Hague Convention	n/a	8	19	33

* Marriage and divorce figures based on centrally-collected Eurostat data. Percentages indicate international marriages/divorces as a proportion of all marriages/divorces.

** 2012 child abduction figures provided direct from relevant Danish Authority; however 2008 figures provided do not correspond to those given to Hague Study, and so 2012 figures may be based on different data.

4.3.1.2. Available national data

Marriages	2008	2009	2010	2011	2012	2013
International marriages ¹	6,360	6,286	6,481	5,547	5,783	6,063
All marriages	37,376	32,934	30,949	27,198	28,503	27,503

Source: www.statbank.dk

The overall trend the last six years is that both the number of international marriages and the total number of marriages are decreasing. However, the number of international marriages is decreasing at a comparatively slower pace and therefore counts for an increasing proportion of all marriages. For example, in 2008 17% of the registered marriages were international whereas the same figures for 2013 were 22%.

¹ Same-sex marriages became legal in Denmark on June 15, 2012 but these are not included in the table. Data are however available at <http://www.statbank.dk/>.

Divorces	2008	2009	2010	2011	2012	2013
International divorces ²	2,342	2,330	2,439	2,372	2,513	3,152
All divorces	14,695	14,940	14,460	14,484	15,709	18,875

Source: www.statbank.dk

The number of international divorces and the overall number of divorces have slightly increased from 2008 to 2012 although not in a consistent manner. In 2013, there were significant higher figures both for international divorces and all divorces. The proportion of international marriages appears to be rather constant; 16% in 2008 and 17% in 2013.

Child abduction requests	2009	2010	2011	2012	2013
received	16	14	15	15	15
made	19	26	26	23	19

Source: the Danish Central Authority

The data on child abduction shows that cases of registered parental child abduction under the Hague Convention on Child Abduction have increased significantly between 1999/2003 and 2008, in particular child abductions from Denmark. The figures for cases registered per year between 2008 and 2013 have, however, been relatively stable; between 14 and 16 for child abductions to Denmark and between 19 and 26 for child abduction from Denmark.

4.3.2. National laws implementing the Hague Convention

The Hague Convention on Child Abduction has been implemented through the Danish International Child Abduction Act (DICAA).³ DICAA addresses Denmark's obligations according to the Hague Convention on Child Abduction and the 1980 European Convention on Custody of Children.

4.3.3. Characterisation of parental child abduction in Denmark

Section 10 of the DICAA states that the removal of children to Denmark or the retention of children in Denmark is wrongful where it is in breach of rights of custody whether attributed to a person, an institution or another body, either jointly or alone and, at the time of the removal or retention, those rights were actually exercised. Section 11 of the Act provides that a return of an abducted child may be refused if: (1) at the time of the application for proceeding one year has elapsed since the removal or retention and the child is now settled in its new environment; (2) there is a serious risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; (3) the child objects to being returned and has attained an age and a degree of maturity at which it is appropriate to take account of its views; or (4) the return of the child is incompatible with the fundamental principles of Denmark relating to the protection of human rights and fundamental freedoms.

Given that the wrongfulness of the taking of a child depends on which person or persons have custody of the child, it becomes appropriate to examine the rules on custody.

² The data provided do not include divorces of same-sex couples. Data available at <http://www.statbank.dk/>

³ Act available in English at http://www.boernebortfoerelse.dk/fileadmin/user_upload/temp/Act_on_International_Child_Abduction.pdf

Rules on custody are laid down in Chapter 2 of the Act on Parental Responsibility (Forældreansvarslov).⁴ Section 6(1) of the Act provides that parents who are married or subsequently marry are vested with joint parental responsibility over the child. Parents who are not married have joint parental responsibility provided that they have submitted a declaration that they will jointly care for and assume responsibility for the child in accordance with the procedures in Section 2(1), 14(1), 14(3), or 19 of the Children Act (Børneloven)⁵, or if they have made an agreement on joint custody according to Section 9 of the Act on Parental Responsibility. Moreover, if a man is considered to be the legal father of a child by virtue of recognition or if paternity has been established by court judgment, the parents are vested with joint parental responsibility if they have, or have had, a joint address according to the Danish National Population Register within the ten months immediately preceding the birth of the child (section 7(3)) of the Act on Parental Responsibility). In case of parents separating or divorcing, or if their marriage has been annulled or they have ceased marital relations, the joint parental authority continues (Section 8). When the custody is disputed and no agreement can be reached by means of mediation arranged by the regional state administration (Statsforvaltningen), the district court decides on the matter (Section 11). Such a decision must be made with due consideration of the best interests of the child and the child shall be given the opportunity to make its views and opinions known (Section 34).

In 2012, the Superior Appellate Court (Østre Landsret) ruled in the so-called "Oliver case" that a father who removed his child to Denmark from the mother in Austria with whom the child had lived for two years, did not constitute an unlawful child abduction.⁶ Decisive for the court's ruling was that the father had sole parental responsibility over the child in Denmark at the time of the removal (see 4.3.8. below for further comments on this case).

In a case decided in 2010, the Superior Appellate Court (Østre Landsret) dismissed an application from the father on wrongful removal under Section 10 DICAA.⁷ The court found that the removal was not wrongful since the father was considered to have consented to the relocation of the child on the basis of Article 13(1)(a) of the Hague Convention on Child Abduction. Although there was no explicit agreement between the parents as to whether the boy's habitual residence should be in Norway or in Denmark, the father's behaviour implied that he had subsequently acquiesced in the removal and he had later consented to the change in the boy's habitual residence by signing a specific statement (see section 4 below for further comments on this case).

A case decided by the Superior Appellate Court (Østre Landsret) in 2008 concerned the question of habitual residence (Article 3 of the Hague Convention on Child Abduction).⁸ The child in question was born in 2007 and lived with her parents in France. The parents had joint parental responsibility. During the period from March 2008 to July 2008 both parents travelled between France and Denmark a number of times with the child and according to the mother the intention was to reside in Denmark. The father filed for the return of the child after the mother's removal of the child to Denmark in July 2008. The court found that the child's habitual residence had not changed from France to Denmark and that the removal was, therefore, unlawful (see 4.3.8. below for further comments on this case).

⁴ LOV nr 499 af 06/06/2007 Forældreansvarslov, available in English at http://www.familiestyrelsen.dk/fileadmin/user_upload/Engelsksproggede_filer/Danish_Act_on_Parental_Responsibility.pdf.

⁵ Børneloven available at <https://www.retsinformation.dk/Forms/r0710.aspx?id=158916#Kap1>.

⁶ B-3436-12, Superior Appellate Court (Østre Landsret).

⁷ B 11580-00 VL, Superior Appellate Court (Østre Landsret).

⁸ B-2346-08, Superior Appellate Court (Østre Landsret).

4.3.4. Judicial and non-judicial tools available to the parties, including mediation

Section 17 DICAA provides that the court may, upon receipt of the application, determine that during the proceedings on child abduction the child shall be placed with either of the parents or, if it finds necessary, in a neutral place decided by the social authorities. Section 16 of the same Act provides that the Bailiff's Court (Fogedretten), which is the court of first instance, shall hear the child in case of child abduction. Depending on the child's age and the issues raised, the inquiry is conducted either by a judge or a child psychologist. If a child who is habitually resident in Denmark is removed to another country, the Minister of Justice or any one authorised for the purpose (e.g., the Division of Family Affairs at the National Social Appeals Board (Familiestyrelsen) or the Danish courts) may determine that the removal is wrongful upon the application of the person having the parental responsibility over the child (Section 20 DICAA).

After a legislative reform in 2007, there are a number of situations where the parents now have joint parental responsibility over the child instead of the previous legal framework in which the mother had sole parental responsibility. One example of such a situation of joint parental authority is when the parents are unmarried and the father has recognised the child and the parties' residence at a shared joint address according to the Danish National Register within a ten month period immediately preceding the birth of the child. In case of joint parental responsibility, separated parents need to agree on where the child shall reside. If an agreement cannot be reached, it is possible for a parent to initiate court proceedings for sole custody. However, he or she may be reluctant to initiate such proceedings considering that they are likely to be burdensome both for the parents and the child. Hence, the current legislation, which increases the number of situations in which parents have joint parental responsibility in combination with the reluctance of parents to initiate court proceedings, favours amicable solutions between the parents on questions on inter alia where the child shall reside.⁹ Following an amendment to the Act on Parental Responsibility in 2012, the courts now have greater discretionary powers to award sole parental responsibility if the parents are unable to cooperate and provided that such a decision is motivated by the best interest of the child (Section 11).

Section 31 of the Act on Parental Responsibility states that an application by a parent for a decision regarding parental responsibility or the child's place of residence shall be submitted to the regional state administration (Statsforvaltningen) that will arrange a meeting with the parties if this is not considered unnecessary or inappropriate. Section 32 of the same act provides that the regional state administration has an obligation to offer parents and children child welfare counselling or family mediation in cases of disagreement about custody, the child's place of residence or contact rights. In other matters, the regional state administration can offer child welfare counselling or family mediation if there is a special need. If no agreement can be reached, the regional state administration will determine the matter. At the request of one of the parties, the regional state administration shall refer the case to a court (Section 31 of the Act on Parental Responsibility).

Usually when the judge receives the case, he calls the parents for a meeting and attempts to reconcile them. This measure is not regulated by law, but rather a practical approach to the issues at hand.¹⁰ Section 536 in the Administration of Justice Act (Retsplejeloven) provides that enforcement may be carried out by direct use of force or by use of default fines.

⁹ A Kronberg, *Ulovlige børnebortførelser*, in T Baumbach et al., *Festskrift til Jørn Vestergard*, Copenhagen: Jurist- og Økonomiforbundets Forlag 2008, p. 333.

¹⁰ A. Kronborg & P. Gjørtler, *Comparative study on enforcement procedures of family rights*, T.M.C Asser Instituut, 2005/06, p. 8.

4.3.5. Existing criminal sanctions

Section 215 of the Danish Criminal Code (Straffeloven, lovbekendtgørelse 2013-08-22 No. 1028) provides that an unauthorised removal of a child from his or her custodian from Denmark to another country constitutes a crime.¹¹ It includes cases where the child is abducted by a parent having joint custody with the parent left behind. A person carrying out such an unauthorised removal shall be sentenced to a fine or imprisonment of maximum four years. In certain aggravated cases the punishment may vary from one year to twelve years imprisonment. In a case from 2005, the Supreme Court (Højesteret) sentenced a father to two and a half years imprisonment for having taken his children to Lebanon. He had retained them there against the will of the children's mother who had the sole parental responsibility over the children.¹² An aggravating factor in the case was that the father had previously been sentenced to one and a half years imprisonment for the retention of the children against the will of the mother.

4.3.6. Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages

Damages may be awarded for personal injury in case the unlawful removal of a child falls under Section 215 of the Danish Criminal Code.

Compensation was not awarded for costs of bringing back an abducted child from Iran to Denmark.¹³

4.3.7. Enforcement methods

The Ministry of Social Affairs and Integration (Social-, Børne- og Integrationsministeriet) is the central authority for international child abduction. The Ministry's Child Abduction Unit receives and transmits specific applications for the return of children under the Hague Convention on Child Abduction and facilitates the contact between the authorities and the parties in the two countries on a continuous basis. The Child Abduction Unit helps a parent to an abducted child to bring proceedings to secure the return of the child and provides guidance about such proceedings and the options available to the parent. It also coordinates administrative procedures with other Danish authorities. One of the duties is to ascertain where the child is located and work out an amicable solution. In these situations, it can obtain assistance from the police and the courts.¹⁴ To our knowledge, the central authority has no standard mediation procedure.

The Bailiff's court (Fogedretten), as the court of first instance, decides how the rules on child abduction shall be enforced in each particular case. If the abducting parent does not comply with a decision on return, the requesting parent can apply for enforcement at the Bailiff's court. The judge may grant a stay of enforcement pending the acquisition of a child welfare report. The social welfare department where the child resides may be called upon by the court to assist in matters regarding child abduction. The court may be assisted by the police in order to locate an abducted child.

The task of the police is to investigate whether the other parent wrongfully removed the child from Denmark. If the investigation shows that there is a risk of abduction of the child

¹¹ The Danish Penal Code is available at <https://www.retsinformation.dk/Forms/r0710.aspx?id=152827> .

¹² U.2005.969H, the Supreme Court (Højesteret).

¹³ Case FED2003.2457/1ERN.

¹⁴ Further information concerning the central authority is available at <http://www.boernebortfoerelse.dk/en/authorities/>.

and that the parents have joint parental responsibility, the Division of Family Affairs at the National Social Appeals Board (Familiestyrelsen) can temporarily suspend the joint parental responsibility and grant one parent sole parental responsibility.

4.3.8. Sensitive issues featured in national case law

Neither EU Regulation 2201/2003 nor its predecessor EU Regulation 1347/2000 apply or have been applied in Denmark. Hence, no case law exists on the application of this regime. As regards the DICAA, the case law and commentary is rather limited. Nevertheless, a few recent cases from the Danish appellate courts may be mentioned.

In a case decided 2010, the Superior Appellate Court of Eastern Denmark (Østre Landsret) dismissed an application from the father for wrongful removal under Section 10 DICAA.¹⁵ The court found the removal was not wrongful since the father was considered to have consented to the relocation of the child on the basis of Article 13(1)(a) of the Hague Convention on Child Abduction. The facts of the case were as follows. The family had lived together in Norway for a couple of years until the mother in January 2009 returned to Denmark with the child who was 6 months old at the time. The local authority in Denmark contacted the father several times to inform him that they needed his consent to change the boy's habitual residence. The father did not respond to the letters. In March 2009 the father came to Denmark to visit the boy. The parents disagreed whether the father had consented to changing the boy's habitual residence from Norway to Denmark during his visit. The father claimed he had only signed a statement of consent so the boy could see a doctor and obtain day-care, and he had not signed a statement authorising the change of habitual residence. The local authority lost the form, but claimed that the father had signed a statement of change of the boy's habitual residence. In the autumn of 2009 the mother petitioned for separation and full custody. In February 2010 the father petitioned for return. The court concluded that there had been no agreement between the parents as to whether the boy's habitual residence should be in Norway or in Denmark, but the father's behaviour implied that he had subsequently acquiesced in the removal and had later consented to the change in the boy's habitual residence by signing the statement. It was unlikely that the father, a Danish citizen, did not know what the meeting at the local authority was related to. Thus, since the father had consented to the change of the habitual residence, there was no wrongful removal.

A case decided by the Superior Appellate Court of Western Denmark (Vestre Landsret) in 2009 concerned a girl who was 10 years old at the time of the alleged wrongful removal.¹⁶ She was born and had lived in the Netherlands until April 2009, when her father, a Nigerian citizen, moved to Denmark. After the parents' divorce in 2008 they had joint rights of custody. In May 2008 a Dutch court decided that the girl should remain with her father and the mother should have a right to contact. The mother had multiple sclerosis and received treatment for depression. In December 2008 the father married a Danish woman and moved to Denmark, subsequently taking the child with him in April 2009. The mother issued proceedings for the return of the child. The court found that the removal was wrongful. It stated that the mother had contact rights and had not provided her permission to the father to take the girl to Denmark. It was thus a violation of the rights of custody (Article 3 of the Hague Convention on Child Abduction). As regards Art 13(1)(b) of the Hague Convention on Child Abduction, the court ruled that there was no grave risk of harm to the girl of returning to the Netherlands. The girl had daily contact with her mother and had seen her on a regular basis before the wrongful removal. Preparations had also been made for the girl's return to the Netherlands, taking her dyslexia problems into account.

¹⁵ B 11580-00 VL, Superior Appellate Court (Østre Landsret).

¹⁶ V.L B-1572-09, Superior Appellate Court (Vestre Landsret).

Finally, there was no proof that the girl would resist a return to the Netherlands (Art. 13(2) of the Convention).

In 2008, the Østre Landsret decided a case concerning the question of habitual residence (Article 3 of the Hague Convention on Child Abduction).¹⁷ The child in question was born in 2007 and lived with her parents in France. The parents had joint parental responsibility. The mother, a Danish citizen, retained her apartment in Denmark during her stay in France and consulted doctors in both France and Denmark during her pregnancy. In January 2008, both parents signed a lease for an apartment in Denmark and agreed to stay in Denmark from 27 February 2008 to 13 March 2008. They disagreed about the nature of the stay; the mother argued that they had moved to Denmark permanently, while the father thought they were on vacation. Between March 2008 and July 2008 both parents travelled between France and Denmark a couple of times with the child. The father filed for the return of the child after the mother's last stay in France, on 14 July 2008. The court ruled that the habitual residence had not changed from France to Denmark. There was no indication from the father that their stay in Denmark in February and April was more than just a vacation and no proof that the father had given his consent to change the child's habitual residence. Therefore, the court ruled that the removal was wrongful and thus ordered the return of the child to France.

A case decided by the Superior Appellate Court (Østre Landsret) in 2012 has been subject to considerable attention in the Danish and Austrian media.¹⁸ The case concerned a boy, Oliver, who was taken from Denmark by his Austrian mother against the will of the Danish father. The boy was born in 2006. The parents subsequently divorced in 2007. After the divorce, he stayed with the mother who had the parental responsibility, but he regularly spent time with the father. In 2010, the mother took the boy to Austria shortly after the father had applied for joint parental responsibility. The Danish courts decided that the father should have sole parental responsibility of the child. In 2012, the father took the child back to Denmark. The mother, who had been granted sole custody of the child in Austria, applied for the return of the child in accordance with the Hague Convention on Child Abduction. The court ruled that the boy had his habitual residence in Denmark at the time when the father took him to Denmark and that it was, therefore, lawful. Hence, the mother's application was dismissed. Decisive for the court's ruling was the fact that the father had sole parental responsibility in Denmark at the time of the removal.

4.3.9. Justifications for refusing to return a child relocated to Denmark

As described above, the Hague Convention on Child Abduction is implemented into Danish law by the means of the DICAA. In a report from the Ministry of Justice containing the proposal for the International Child Abduction Act, it is stated that the main goal of the Convention is the effectiveness of the return mechanism.¹⁹ However, the report also raises the question on whether the best interests of the child will be sufficiently protected in the act implementing the Convention. Thus, the protection of the best interest of the child is a factor taken into account. The report concludes that the exceptions laid down in Article 13 of the Hague Convention on Child Abduction provide for a regime with sufficient balance between efficiency and the protection of the child.²⁰

It should be mentioned that the "best interest of the child" (barnets bedste) is not specific to the area of child abduction, but is a general principle that shall be respected in all kinds

¹⁷ B-2346-08, Superior Appellate Court (Østre Landsret).

¹⁸ B-3436-12, Superior Appellate Court (Østre Landsret).

¹⁹ Internationale børnebortførelser, afgivet af en arbejdsgruppe under justitsministeriet, 1989 (Report from the Ministry of Justice), p. 37.

²⁰ Internationale børnebortførelser, afgivet af en arbejdsgruppe under justitsministeriet, 1989 (Report from the Ministry of Justice), p. 39 and Børnebortførelser, Rapport fra en arbejdsgruppe under justitsministeriet, 2003 (Report from the Ministry of Justice), p. 17.

of decisions involving children, e.g., on custody, residence and right of access. For example, Section 4 in the Act on Parental Responsibility provides that decisions made pursuant to the Act shall be based on the best interests of the child.

The courts have in a number of cases in which Section 11 DCAA is applied (i.e. Article 13 Hague Convention on Child Abduction) argued that the child is now settled in the new environment and / or that there is a serious risk that the child's return would expose the child to psychological harm or otherwise place the child in an intolerable situation. Under such circumstances, it is not considered to be in the "best interests of the child" for the child to be returned.

In a case before the Supreme Court,²¹ the court ruled that a child abducted by her mother from Turkey to Denmark should not be returned. The child in question had been living in Denmark for more than one year and had learned Danish and started kindergarten. Moreover, the mother's family lived in the same region. Based on these facts, the court considered that the child had adapted well to her new life in Denmark and applied the exception in Section 11(1) DCAA, thus dismissing the father's return application.

4.3.10. Existing critique and comments of the legal rules in force

Although, to our knowledge, the existing regime has been subject to very limited commentary, an author observed that the best interests of the child are not sufficiently protected in the Hague Convention on Child Abduction. Kronberg considers that the return of the child in many cases is not in the best interest of the child.²² She argues that the basic principle of the Convention that a return is generally in the best interest of the child needs to be reconsidered. Kronberg refers to the fact that when the Hague Convention on Child Abduction was adopted, the general view was that it was often the father who abducted the child. However, today the abducting parent is often the mother who generally is the child's primary care-taker. According to Kronberg, it is regrettable that the development in legislation and case law does not indicate any changes of the interpretation of the best interests of the child in situations where the mother as the child's primary care-taker abducts the child.²³

Kronberg also argues that the character of the Convention as a return mechanism without any rules on custody may lead to an additional procedural burden for families since the question on custody and child abduction is decided in two distinct court proceedings.²⁴ The child and the parent abducting the child may be obliged to return to the country they left and wait for the court proceeding on the custody, before they can start a new life.²⁵

²¹ U.2004.2816V, Supreme Court.

²² A Kronberg, *Ulovlige børnebortførelser*, in T Baumbach et al., *Festskrift til Jørn Vestergard*, Copenhagen: Jurist- og Økonomforbundets Forlag 2008, p. 329.

²³ A Kronberg, *Ulovlige børnebortførelser*, in T Baumbach et al., *Festskrift til Jørn Vestergard*, Copenhagen: Jurist- og Økonomforbundets Forlag 2008, p. 331.

²⁴ A Kronberg, *Ulovlige børnebortførelser*, in T Baumbach et al., *Festskrift til Jørn Vestergard*, Copenhagen: Jurist- og Økonomforbundets Forlag 2008, p. 329.

²⁵ Last updated on 22nd December 2014.

4.4. Germany

Glossary of terms

AG	Amtsgericht (Local Court)
BayOLG	Bayerisches Oberstes Landesgericht (Bavarian Regional Court)
BGB	Bürgerliches Gesetzbuch (Civil Code) Available at Bundesministerium der Justiz und für Verbraucherschutz (Federal Ministry for Justice and Consumer Protection), Gesetze im Internet, BGB: http://www.gesetze-im-internet.de/bgb/index.html (German), http://www.gesetze-im-internet.de/englisch_bgb/index.html (English).
BGH	Bundesgerichtshof (Federal Court of Justice)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Act to the Civil Code) Available at Bundesministerium der Justiz und für Verbraucherschutz (Federal Ministry for Justice and Consumer Protection), Gesetze im Internet, EGBGB: http://www.gesetze-im-internet.de/bgbeg/index.html (German), http://www.gesetze-im-internet.de/englisch_bgbeg/index.html (English).
FamFG	Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (Act on the Procedure in Family Matters and Matters of Voluntary Jurisdiction)
GG	Grundgesetz (Basic Law, Constitution) Available at Bundesministerium der Justiz und für Verbraucherschutz (Federal Ministry for Justice and Consumer Protection), Gesetze im Internet: http://www.gesetze-im-internet.de/gg/index.html (German), http://www.gesetze-im-internet.de/englisch_gg/index.html (English).
IntFamRVG	Gesetz zur Aus- und Durchführung bestimmter Rechtsinstrumente auf dem Gebiet des internationalen Familienrechts (International Family Law Procedure Act) Available at Bundesministerium der Justiz und für Verbraucherschutz (Federal Ministry for Justice and Consumer Protection), Gesetze im Internet, IntFamRVG: http://www.gesetze-im-internet.de/intfamrvg/index.html (German), http://www.gesetze-im-internet.de/englischintfamrvg/index.html (English).
KG	Kammergericht (Regional Court in Berlin)
LG	Landgericht (Regional Court)
OLG	Oberlandesgericht (Higher Regional Court)
StGB	Strafgesetzbuch (Criminal Code) Available at Bundesministerium der Justiz und für Verbraucherschutz (Federal Ministry for Justice and Consumer Protection), Gesetze im Internet, StGB, http://www.gesetze-im-internet.de/stgb/index.html (German), http://www.gesetze-im-internet.de/englisch_stgb/index.html (English).

4.4.1. Statistical Assessment

4.4.1.1. Key statistics overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	73073 (17.5%)	65457 (16.5%)	50840 (13.8%)	52457 (13.5%)
International divorces	28475 (14.6%)	36933 (17.3%)	32967 (16.3%)	28164 (15.7%)
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	70	80	115	152
Outgoing return requests made under the Hague Convention	n/a	109	146	191

* Marriage and divorce figures based on centrally-collected Eurostat data, save for 2012, which was provided by relevant national statistical authority. Percentages indicate international marriages/divorces as a proportion of all marriages/divorces. Note that figure for marriages in 2012 do not include marriages between two foreigners, as this data was not made available.

4.4.1.2. Available national data

The German Federal Statistical Office (Statistisches Bundesamt) provides the following statistics on international marriages.¹

According to these, the total number of marriages in Germany rose from about 377'000 in 2008 by more than 10'000 until 2012 with a slight drop in 2011. In 2013 however, it dropped again by nearly 15'000. Although international marriages between a German wife and a foreign husband had their peak in 2012 with more than 19'300 marriages, the most significant change in numbers took place between 2008 and 2009, when the amount of these marriages rose by over 1'000, to slightly drop afterwards. International marriages between a foreign wife and a German husband also experienced their most significant rise between 2008 and 2009 by nearly 1'000 marriages to over 25'100. In the following years, the numbers stayed quite stable around 24'800. International marriages between two foreigners rose by nearly 1'000 from 2008 till 2012, with the most significant rises in 2011 and 2012 by roughly 330 and 460. The number of marriages between two foreigners in 2013 has not yet been published.

¹ See tables 3 to 8 below, established by the Statistisches Bundesamt (Federal Statistical Office), Bevölkerung und Erwerbstätigkeit: Natürliche Bevölkerungsbewegung, available at https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/Bevoelkerungsbewegung/Bevoelkerungsbewegung2010110127004.pdf?__blob=publicationFile, p. 134.

Table 3:

International marriages	2008	2009	2010	2011	2012	2013
German wife, foreign husband	18'154	19'167	19'103	18'708	19'337	18'934 ²
Foreign wife, German husband	23'288	25'119	24'695	24'803	24'838	24'793 ³
Foreign wife and husband	7'302	7'373	7'495	7'824	8'282	
Total number of marriages	377'055	378'439	382'047	377'816	387'423	373'655 ⁴

The German Statistical Office provides the following data on international dissolutions of marriages in Germany.⁵ These statistics show that the total number of dissolutions of marriages dropped substantially by more than 20'000 from nearly 192'000 in 2008 to nearly 170'000 in 2013. It rose just slightly in 2010 and 2011 compared to 2009. Dissolutions of international marriages between German wives and foreign husbands, between foreign wives and German husbands as well as between two foreigners dropped constantly from 2008 till 2013: Dissolutions of marriages between a German wife and a foreign husband dropped from over 13'400 to about 10'100, those concerning a foreign wife and a German husband from over 11'600 to nearly 9'400 and those between two foreigners from over 7'900 to nearly 6'600. The later only showed a rise up to nearly 7'950 in 2011.

Table 4:

Dissolutions of international marriages	2008	2009	2010	2011	2012	2013
German wife, foreign husband	13'440	12'289	11'958	11'274	11'003	10'105
Foreign wife, German husband	11'616	10'591	10'498	10'174	10'041	9'397
Foreign wife and husband	7'911	7'448	7'419	7'946	7'120	6'594
Total number of dissolutions of marriages ⁶	191'948	185'817	187'027	187'640	179'147	169'833

² Statistisches Bundesamt (Federal Statistical Office), Population movement: Marriages between German and foreigner, available at <https://www.destatis.de/EN/FactsFigures/SocietyState/Population/Marriages/Tables/MarriagesGermanForeigner.html>.

³ Statistisches Bundesamt (Federal Statistical Office), Population movement: Marriages between German and foreigner, available at <https://www.destatis.de/EN/FactsFigures/SocietyState/Population/Marriages/Tables/MarriagesGermanForeigner.html>.

⁴ Statistisches Bundesamt (Federal Statistical Office), Eheschliessungen, Eheschliessungen je 1000 Einwohner: Deutschland, Jahre, available at <https://www-genesis.destatis.de/genesis/online/link/tabelleErgebnis/12611-0001>.

⁵ Statistisches Bundesamt (Federal Statistical Office), Ehescheidungen nach der Staatsangehörigkeit der Ehepartner, Bevölkerung und Erwerbstätigkeit: Statistik der rechtskräftigen Beschlüsse in Eheauflösungssachen (Scheidungsstatistik), available at https://www.destatis.de/DE/Publikationen/Thematisch/Bevoelkerung/Bevoelkerungsbewegung/Scheidungsstatistik2010140137004.pdf?__blob=publicationFile, p. 24.

⁶ Statistisches Bundesamt (Federal Statistical Office), Eheschliessungen, Ehescheidungen, Deutschland, Anzahl, available at https://www.destatis.de/DE/ZahlenFakten/GesellschaftStaat/Bevoelkerung/Ehescheidungen/Tabellen/_lrbev06.html.

The available statistics on dissolutions of marriages in Germany which involve children do not differentiate between nationalities.⁷

The German Federal Office of Justice (Bundesamt für Justiz) offers very detailed statistics about parental child abduction in Germany.⁸

Table 5:

	Direction		Legal Basis			Subject Matter			Rejection (CA)		Dispatch by Court Order		Reasons for Rejection (HC)			Dispatch for Other Reasons		Children Returned		
	Outgoing	Incoming	HC	BR	EEC or 1996 HC	Return	Personal Contact	Number of Children	Lack of Custody	Other Reason	Return Ordered, 1 st or 2 nd Inst.	Return Refused, 1 st or 2 nd Inst.	Art. 3	Art. 13 para. 1 lit. a)	Art. 13 para. 1 lit. b)	Art. 13 para. 2	Voluntary Return	Extra-/Judicial Settlement/Withdrawal	Yes	No
2011	419	246	388	472	30	333	57	862	1	14	66	41	7	4	2	8	67	49	137	88
2012	444	302	414	530	28	343	71	950	4	8	15	9	1	2	4	0	58	32	78	46

HC = 1980 Hague Child Abduction Convention, BR = Brussels II bis Regulation, EEC = European Custody Convention, 1996 HC = 1996 Hague Child Protection Convention, CA = Central Authority, Inst. = Instance

These statistics list (anonymously) for every single case and in detail, upon which legal basis (e.g. Hague Convention on Child Abduction, EU Regulation 2201/2003) proceedings were taken, which country was involved, which measures were taken and how the proceedings ended. As to the amount of requests for returning the child under the Hague Convention on Child Abduction, the total number of requests rose from 332 in 2011 to 343 in 2012 to 357 in 2013. This is mainly due to the rising amount of incoming return requests from 147 to 152 to 169 over these three years. The number of outgoing requests to return a child only rose only from 185 to 191 and dropped to 188 in the same period.

Table 6:

Requests to return the child	2011 ⁹	2012	2013
Return requests	147	152	169
Outgoing requests	185	191	188
Total requests	332	343	357

⁷ Statistisches Bundesamt (Federal Statistical Office), Divorces: Divorces and affected minor children, available at <https://www.destatis.de/EN/FactsFigures/SocietyState/Population/Divorces/Tables/DivorcesChildren.html>.

⁸ Bundesamt für Justiz (Federal Office of Justice), Statistics, available at https://www.bundesjustizamt.de/EN/Topics/citizen_services/HKUE/Statistics/Statistics_node.html.

⁹ This information is not available online anymore but we were able to extract the table concerning the years 2011 and 2012.

Additionally, the German Statistical Office provides very detailed statistics in German about criminal cases from 2011¹⁰ and 2012¹¹ involving § 235 StGB, the norm criminalising child abduction in general. Although this information does not differentiate between acts according to § 235 para. 1 and § 235 para. 2 StGB, whereat only the latter concerns cross-border child abduction, the statistics show how many perpetrators were of a foreign nationality. Both the amount of proceedings and the amount of convictions rose from 2011 till 2012, the number of proceedings by 16 to 126, the number of convictions by 9 to 78. While only 2 proceedings more than in 2011 ended with a dismissal in 2012, 7 persons were acquitted instead of just 2. The proceedings in total as well as the convictions concern more men than women, yet the amount of dismissals and acquittals is roughly equal between men and women. From the persons convicted in 2011 for national or international child abduction, 36 were German and 33 foreigners, so nearly as much. In both cases, about two-thirds were male. While in 2012 the amount of Germans convicted rose by 7, only three of them were male, the amount of convicted foreigners rose by 2, but at the same time the number of convicted male foreigners dropped by 2.

Table 7:

	Total Proceedings		Convictions		Dismissals		Acquittals	
	Total	Male	Total	Male	Total	Male	Total	Male
2011	110	61	69	45	39	15	2	1
2012	126	72	78	46	41	22	7	4

Table 8:

	Total Convictions		Germans Convicted		Foreigners Convicted	
	Total	Male	Total	Male	Total	Male
2011	69	45	36	23	33	22
2012	78	46	43	26	35	20

4.4.2. National laws implementing the Hague Convention

The most important German national law implementing the Hague Convention on Child Abduction as well as the EU Regulation 2201/2003 is the International Family Law Procedure Act ("IntFamRVG"). Although the international conventions lay down the substantive regulations, i.e., those rules dealing with the actual facts, preconditions and consequences of a subject matter, the IntFamRVG provides the necessary procedural law. It thus stipulates inter alia which court shall be competent, what periods are applicable, whether and how decisions can be appealed and how they can be enforced. This act also provides a set of procedural rules designed to implement the Hague Convention on Child Abduction with regard to application, accelerated procedures, cooperation with the Central Authority, legal force, appeal, attestations, filing application as well as procedural costs.¹²

Both the Hague Convention on Child Abduction and EU Regulation 2201/2003 provide substantive law and regulate some of the main aspects necessary in order to define international child abduction and its consequences. However, they also refer to national

¹⁰ Statistisches Bundesamt (Federal Statistical Office), Rechtspflege: Strafverfolgung 2011, available at https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafverfolgung2100300117004.pdf?__blob=publicationFile, pp. 66 f., 467, for more information also pp. 34 f., 98 f., 130 f., 162 f., 202 ff., 248 f., 280 f., 304 f., 330 f., 362 f., 390 f., 412 f., 444 f., 484 f.

¹¹ Statistisches Bundesamt (Federal Statistical Office), Rechtspflege: Strafverfolgung 2011, available at https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafverfolgung2100300127004.pdf?__blob=publicationFile, pp. 66 f., for more information also pp. 34 f., 487, 100 f., 234 f., 168 f., 210 ff., 256 f., 288 f., 316 f., 378 f., 408 f., 434 f., 464 f., 504 f.

¹² §§ 37-43 IntFamRVG.

law, as crucial for defining whether a parent has custody for the child according to the respective national law.¹³ Similarly, also the German national law provides for private international law provisions. The Introductory Act to the Civil Code (EGBGB) states that a child's descent¹⁴ as well as the legal relation between parents and their child¹⁵ is subject to the law in the country in which the child is habitually resident.

As a consequence, if the abducted child is habitually resident in Germany, German national law will define whether the parent, from whom the child has been withdrawn, has custody over the child. Only if this is the case, the removal or retention of the child is considered wrongful under the Hague Convention on Child Abduction and/or the EU Regulation 2201/2003.¹⁶ German national custody law is mainly set out in the Civil Code (BGB).¹⁷ As a general rule, married parents have joint custody over their child¹⁸ and unmarried parents can obtain joint custody by declaration or court decision.¹⁹ Under German law, custody means both personal care and care for the child's legal estate,²⁰ whereas personal care for its part also comprises the right to decide the child's residence.²¹ If the parents have joint custody and actually exercised it,²² the removal of the child by one parent will violate the other parent's custody rights to decide the child's place of residence, therefore rendering the removal of the child wrongful.

Apart from these civil law regulations aimed at returning the child to the other parent, the criminal law also has to be taken into account if a parent abducts her/his child. In this regard, the German Criminal Code (StGB) is relevant, since §235 StGB criminalises child abduction in general and §235 para. 2 subparas. 1, 2 criminalises cross-border child abduction. Due to this international notion, jurisdictional problems might arise if the child is not actively withdrawn from Germany, but brought to another country rightfully and then withheld wrongfully. In order to avoid lacunae in criminal liability, the German legislator explicitly put these cases under German penal jurisdiction, irrespective of the country in which the abduction has allegedly been committed.²³

4.4.3. Characterisation of parental child abduction in Germany

Both the Hague Convention on Child Abduction and EU Regulation 2201/2003 provide a parent the right to request for her/his child's return, if the child is being withheld wrongfully from the parent. Yet, both instruments define "wrongful" merely as violations of the parent's rights of custody²⁴ and thus leave it to the national laws to set out when withholding a child is unlawful. As already mentioned, German private international law²⁵ rules determine that German custody law to be applicable, if the child had been habitually resident in Germany before being removed.

German national law does not provide for an own legal definition of what constitutes wrongful parental child abduction. Although also under German custody law "[t]he care for

¹³ Art. 3 para. 1 lit. a) Hague Convention on Child Abduction; Art. 2 para. 11 lits. a), b) EU Regulation 2201/2003.

¹⁴ Art. 19 EGBGB.

¹⁵ Art. 21 EGBGB.

¹⁶ Art. 3 paras. 1 lit. a), 2 Hague Convention on Child Abduction; Art. 10 in conjunction with Art. 2 para. 11 lits. a), b) EU Regulation 2201/2003.

¹⁷ §§ 1626-1895 BGB, whereat §§ 1626-1626b, 1628, 1631 f., 1671, 1684, 1697a, 1773 f., 1779, 1789, 1791b f., 1793, 1837 BGB are of particular interest in this context.

¹⁸ §§ 1626 para. 1 s. 1, 1626a para. 1 subpara. 2 BGB.

¹⁹ § 1626° para. 1 subparas 1, 3 BGB.

²⁰ § 1626 para. 1 s. 2 BGB.

²¹ § 1631 para. 1 BGB.

²² Art. 3 para. 1 lit. b) Hague Convention on Child Abduction; Art. 2 para. 11 lit. b) EU Regulation 2201/2003.

²³ § 5 para. 6a StGB.

²⁴ Art. 3 para. 1 lit. a) Hague Convention on Child Abduction; Art. 2 para. 11 lits. a), b) EU Regulation 2201/2003.

²⁵ Art. 21 EGBGB.

the person of the child includes the right to require surrender²⁶ of the child from any person who is unlawfully withholding it from the parents or from one parent” pursuant § 1632 para. 1 BGB, there is no legal definition of when withholding a child is to be regarded as wrongful. Hence, one has to look at German custody law in more detail in order to define what constitutes unlawful parental child abduction.

To begin with, the parent required to return the child has to have custody over the child. Under German national law, the parents generally both have the right and the duty to take care of their child.²⁷ In case the parents are not married to each other at the time the child is born, the legislature decided to generally grant the mother sole custody for the child (§ 1626a para. 3 BGB). This choice was to ensure that there is at least one person who can take care of the child; therefore the mother was chosen because she is present at the birth and can be identified more easily.²⁸

The law stipulates that parents may have joint custody for the child if they unconditionally declare this,²⁹ or if the family court vested both parents with joint custody.³⁰ In this way, unmarried couples can have joint custody for the child from the moment it is born, if they declare this before the child’s birth. However, both the European Court for Human Rights and the German Federal Constitutional Court have declared this to be incompatible with the father’s rights, since he depends upon the mother’s consent to joint custody.³¹ Until a new law enters into force, the regulation remains in force in order to avoid that there is no custody regulation at all for children of unmarried couples.

Apart from these provisions, there are also other possibilities under German law for a parent to have sole custody for the child. Parents living permanently apart can either agree on sole custody for one of them³² or the court can assign sole custody with respect to the child’s well-being.³³ If both parents cannot act as custodian, e.g., if they have both died, the court will appoint a legal guardian³⁴ or the youth welfare office will become the guardian under certain conditions.³⁵ Yet, since international child abduction mainly occurs between the parents, this report will focus on parents as custodians.

In contrast to German custody law, the Hague Convention on Child Abduction and the EU Regulation 2201/2003 both explicitly stipulate that having custody itself is not sufficient to be entitled to demand the return of the child. In addition to having custody, the parent also has to have actually exercised this custody.³⁶ A child shall not be returned to a custodian who did not take care of and bond with the child in the past, or if they did not even attempt to create such a bond.³⁷

It is of course difficult to determine whether custody and especially the right to decide the child’s residence is “actually exercised”. Hence, certain indications have to be taken into account. Regarding sole custody for one parent, actual exercise of this custody will for example mostly be presumed, if the parents agreed in writing for the child to habitually live with one parent and to only visit the other parent in her/his country.

²⁶ Surrender is employed to indicate « return » in the translation of the law provided by the Ministry of Justice and quoted between brackets in the text.

²⁷ § 1626 para. 1 BGB.

²⁸ Coester, in: Staudinger (ed.), Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 4: Familienrecht, Berlin 2007, § 1626, para. 9 f.

²⁹ § 1626a para. 1 subpara. 1 in conjunction with § 1626b para. 1 BGB.

³⁰ § 1626a para. 1 subpara. 2 BGB.

³¹ Regarding Arts. 8, 14 of the European Convention for the Protection of Human Rights and Fundamental Freedom: European Court for Human Rights, 3.12.2009, Zaunegger v Germany, 22028/04; regarding Art. 6 para. 2 GG: BVerfG, 21.7.2010 – 1 BvR 420/09, in: Zeitschrift für das gesamte Familienrecht 2010, pp. 1403 ff.

³² § 1671 para. 1 subpara. 1, para. 2 subpara. 1 BGB.

³³ § 1671 para. 1 subpara. 2, para. 2 subpara. 2 BGB.

³⁴ § 1773 f. BGB.

³⁵ §§ 1791b f. BGB.

³⁶ Art. 3 para. 1 lit. b) Hague Convention on Child Abduction; Art. 2 para. 11 lits. b) EU Regulation 2201/2003.

³⁷ BVerfG, 2.9.2002 – 1 BvR 1863/01, para. 1; Bundestag printed papers 11/5314, pp. 49 f.

When it comes to joint custody, it is oftentimes more complicated to determine whether one parent is merely passively exercising his or her custody rights,³⁸ or if she/he is actually not exercising it. There is for example no consensus, whether the parents have to live in the same home or just in the same country for a rather passive role of one parent to suffice as actual exercise of custody.³⁹ Equally unclear is the exact extent to which a parent has to exercise custody rights in the light of the Hague Convention on Child Abduction and the EU Regulation 2201/2003. However, there is consensus that the parent exercising custody more actively has to consent at least implicitly to the other parent remaining passive. Two years without any contact with the child has been considered insufficient.⁴⁰ On the other hand, there are varying opinions whether interaction comparable to the extent of mere visitation rights (§ 1684 BGB) qualifies as actual exercise of custody rights as is the case in Anglo-American case law.⁴¹

The question remains, under which conditions withholding a child by one parent is to be regarded as wrongful. It is at any rate not wrongful if the parents have agreed to it.⁴² In general, in cases of joint custody, withholding the child is wrongful, since the other parent cannot exercise her/his right as a custodian to decide upon the child's residence. At the same time, this does not automatically mean that the child has to be returned. Here, the child's well-being is decisive for the decision whether the abducting parent has to return the child.

On the other hand, if the removing parent is not vested with custody over the child, but the parent demanding the child's return has sole custody, withholding the child is wrongful and will generally lead to a court order to return the child. The child's well-being will only become relevant in extreme cases, where returning the child would infringe the child's dignity (Art. 1 para. 1 of the Basic Constitutional Law (GG)).⁴³

However, in order to determine whether the abducting parent violated someone's custody rights, it is authoritative whether these rights existed at the moment the removal took place. It is irrelevant if later decisions changed custody.⁴⁴

4.4.4. Judicial and non-judicial tools available to the parties, including mediation

Under German national law, custody decisions cannot be taken by authorities, but only by courts. As a consequence, administrative measures only play a small role in the context of international child abduction.

³⁸ Which shall be protected due to the best interest of the child as set out in § 1697a BGB.

³⁹ Joint residence necessary: OLG Düsseldorf, 14.7.1993 – 4 UF 66/93, in: Zeitschrift für das gesamte Familienrecht 1994, p. 181 (181), AG Hamburg-Altona, 11.9.1991 – 351 F 128/91, in: Praxis des internationalen Privat- und Verfahrensrechts 1992, p. 390 (390); no joint residence necessary: Bruch, Erfahrungen mit dem Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung, in: Zeitschrift für das gesamte Familienrecht 1993, p. 745 (748 f.), Pirrung, in: Staudinger (ed.), Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Internationales Kindschaftsrecht 2, Berlin 2009, para. D 32.

⁴⁰ KG, 13.12.1995 – 3 UF 1573/95, in: Zeitschrift für das gesamte Familienrecht 1996, p. 691 (692).

⁴¹ Insufficient: OLG Zweibrücken, 15.11.2000 – 5 UF 112/00, in: Zeitschrift für das gesamte Zivilrecht 2001, p. 643 (644); OLG Rostock, 4.7.2001 – 10 UF 81/01, in: Zeitschrift für das gesamte Familienrecht 2002, p. 46 (47); OLG Dresden, 21.1.2002 – 10 UF 753/01, in: Zeitschrift für das gesamte Familienrecht 2002, p. 1136 (1137); Pirrung, in: Staudinger (ed.), Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Internationales Kindschaftsrecht 2, Berlin 2009, para. D 32; sufficient: OLG Düsseldorf, 14.7.1993 – 4 UF 66/93, in: Zeitschrift für das gesamte Familienrecht 1994, p. 181 (181); AG Weilburg, 22.6.1994 – 2 F 174/93, in: Zeitschrift für das gesamte Familienrecht 1995, p. 242 (243).

⁴² Palandt, Bürgerliches Gesetzbuch, 73rd edn., Munich 2014, § 1632, para. 5; Veit, in: Bamberger/Roth (eds.), Beck'scher Online-Kommentar BGB, Munich 2013, § 1632, para. 5.

⁴³ Palandt, Bürgerliches Gesetzbuch, 73rd edn., Munich 2014, § 1632, para. 6.

⁴⁴ OLG Düsseldorf, 14.7.1993 – 4 UF 66/93, in: Zeitschrift für das gesamte Familienrecht 1994, 181 (181).

Germany provides of a Central Authority in the terms of the Hague Convention on Child Abduction⁴⁵ and the EU Regulation 2201/2003 and is regulated in the IntFamRVG^{46, 47}. It is the German Federal Office of Justice that serves as the Central Authority and that thus serves as an intermediary between foreign and German courts and authorities. This is due to the transnational character of both the Hague Convention on Child Abduction and EU Regulation 2201/2003. The Central Authority is part of the Federal Office of Justice's department II (international private law), subdivision 3 (law on custody, child abduction, protection of children, protection of adults).⁴⁸ The working area of the respective employees in this division is divided by countries, which has proven useful since this system has been integrated in 2007, since it guarantees more in-depth knowledge of the legal systems concerned.⁴⁹ The Central Authority fulfils its task set out in the Hague Convention on Child Abduction⁵⁰ by forwarding requests to the respective country. It offers the general public the opportunity to download the necessary forms in a variety of languages on its website⁵¹ and most applicants make use of this possibility in practice.⁵² We have no knowledge whether the Central Authority follows a specific protocol when treating cases, since no such protocol is available publicly. In order to provide the Central Authority with the possibility to reach amicable solutions, courts are also asked to inform the Central Authority in case they decided against a child's return.⁵³

The most important administrative measures are those regarding mediation, although there are no laws for mediation in cases of international child abduction. The German Federal Office of Justice as the Central Authority in terms of Art. 6 para. 1 Hague Convention on Child Abduction recommends mediation if mutual understanding seems to be at risk. On their website, the Office suggests contacting MiKK e.V. or ZAnK, two non-profit organisations specialised in cross-border custody conflicts and the former with a focus on mediation in cases of child abduction.⁵⁴

On 1st July 2011, the Central Authority and MiKK e.V. have signed a contract ensuring that mediation with MiKK e.V. will be planned and executed. Hence, in 2011, seven mediations were conducted, one of them financed by the Central Authority, all of which resulted in agreements.⁵⁵ In 2012, twelve mediations initialised by the Central Authority have been carried out, whereat nine of these have been financed by the Central Authority. In eight cases, mediation led to an agreement between the conflicting parties.⁵⁶ MiKK e.V. explains the process of mediation in cases of international child abduction as follows: The first step

⁴⁵ Art. 6 para. 1 Hague Convention on Child Abduction.

⁴⁶ §§ 39, 41, 45-47 IntFamRVG.

⁴⁷ Art. 53 EU Regulation 2201/2003.

⁴⁸ Bundesamt für Justiz (Federal Office of Justice), Organisationsplan Stand 1. Dezember 2014, available at https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/BfJ/Organisationsplan.pdf?__blob=publicationFile&v=49.

⁴⁹ Bundesamt für Justiz (Federal Office of Justice), Zentrale Behörde für internationale Sorgerechtskonflikte: Tätigkeitsbericht 2013, p. 1.

⁵⁰ Art. 7 para. 2 lit. f) in conjunction with Art. 26 para. 2 s. 1 Hague Convention on Child Abduction.

⁵¹ Bundesamt für Justiz (Federal Office of Justice), Application forms, available at https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/HKUE/Formulare/Formulare_node.html;jsessionid=798C6D7CD03187FB008EF6E71F6A5DDE.1_cid386.

⁵² Schulz, Das Internationale Familienrechtsverfahrensgesetz, in: Zeitschrift für das gesamte Familienrecht 2011, p. 1273 (1275 f.).

⁵³ § 39 IntFamRVG.

⁵⁴ Bundesamt für Justiz (Federal Office of Justice), Hinweise zur Rückführung entführter Kinder und zu grenzüberschreitenden Umgangs- und Sorgerechtskonflikten, at https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/HKUE/Hinweise/Hinweise_node.html#doc3453212bodyText26.

⁵⁵ Bundesamt für Justiz, (Federal Office of Justice), Zentrale Behörde für internationale Sorgerechtskonflikte: Tätigkeitsbericht 2011, available at https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/HKUE/Taetigkeitsbericht_2011.pdf?__blob=publicationFile&v=3, p. 10.

⁵⁶ Bundesamt für Justiz, (Federal Office of Justice), Zentrale Behörde für internationale Sorgerechtskonflikte: Tätigkeitsbericht 2012, available at https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/HKUE/Taetigkeitsbericht_2012.pdf?__blob=publicationFile&v=4, p. 11.

is to introduce mediation by making contact and by working out the framework of mediation. In a second step, the parties will agree upon topics and questions that shall be discussed through mediation. The next step is then to deal with conflicts by having a look at the background and the feelings. In the fourth step, possible solutions will be developed and criteria for decisions negotiated. Finally, mediation is concluded by making a binding contract and by reviewing the process in a self-reflected way.⁵⁷

Aside from this, the Central Authority takes part in the Mediation working group initialised in 2011 by the European Judicial Network of the European Union. Additionally, representatives of the Central Authority are steadily working on strengthening and developing bilateral cooperation in cases of cross-border mediation, e.g. with Poland and Spain.⁵⁸ Since 2002, MiKK e.V. also has several bilateral cooperation programmes, namely with Spain, Poland, the United States, the United Kingdom and France.⁵⁹ The Central Authority has also contributed to the development of the Guide to Good Practice on Mediation.⁶⁰ Similarly, MiKK e.V., together with Child Focus Belgium and Katholieke Universiteit Leuven, launched a programme, resulting in the Network of Cross-Border Mediators based in Brussels. This network comprises of over 70 mediators from all over Europe, specially trained in mediation in cross-border child abduction.⁶¹ These different initiatives show that mediation is indeed taken seriously, although only a relatively small number of parents opt for this method.

Another relevant administrative measure is to appoint a guardian ad litem. These guardians assist children or other persons in need of assistance throughout the process. They are trained in the law and ensure that the child's rights and needs are respected. As child abduction mainly takes place in cases in which the parents are at odds and moreover afraid not to be able to see the child in the future, both court and parents tend to focus on the parents instead of on the child.⁶² Subsequently, the guardian ad litem will explain the situation in an adequate manner taking into account the age and maturity of the child and will try to find out the child's opinion about returning. She/he will furthermore contact both parents and work towards finding an amicable solution.⁶³ Hence, the guardian ad litem acts in the very best interest of the child and gives the child a voice.

Apart from administrative measures, other relevant national rules can apply, most notably §§ 37-43 IntFamRVG on procedural aspects in the context of international child abduction. This law has been specifically designed and enacted in order to implement international instruments in the field of family law. It thus governs proceedings in cross-border cases in the context of family law taking place in German courts. Topics covered by the IntFamRVG are inter alia the jurisdiction of the court, the notion of accelerated procedures, the validity and enforcement of decisions, the placement of a child, as well as costs.

⁵⁷ MiKK e.V., Length and process of a mediation, available at <http://www.mikk-ev.de/english/information/length-and-process-of-a-mediation/>.

⁵⁸ Bundesamt für Justiz, (Federal Office of Justice), Zentrale Behörde für internationale Sorgerechtskonflikte: Tätigkeitsbericht 2011, available at https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/HKUE/Taetigkeitsbericht_2011.pdf?__blob=publicationFile&v=3, p. 10; id., Zentrale Behörde für internationale Sorgerechtskonflikte: Tätigkeitsbericht 2012, available at https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/HKUE/Taetigkeitsbericht_2012.pdf?__blob=publicationFile&v=4, p. 12.

⁵⁹ MiKK e.V., Bi-national projects, available at <http://www.mikk-ev.de/english/bi-national-projects/>.

⁶⁰ Bundesamt für Justiz, (Federal Office of Justice), Zentrale Behörde für internationale Sorgerechtskonflikte: Tätigkeitsbericht 2011, available at https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/HKUE/Statistik/Statistik_node.html, p. 10; id., Zentrale Behörde für internationale Sorgerechtskonflikte: Tätigkeitsbericht 2012, available at https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/HKUE/Statistik/Statistik_node.html, p. 12.

⁶¹ MiKK e.V., EU Training Project TIM, available at <http://www.mikk-ev.de/english/eu-training-project-tim/>; Network of Cross-border Mediators, Who we are, available at <http://www.crossbordermediator.eu/>.

⁶² Carl, Aufgaben des Verfahrenspflegers in Fällen von internationaler Kindesentführung und anderen grenzüberschreitenden Kindschaftskonflikten, in: Familie Partnerschaft Recht 2006, p. 39 (40).

⁶³ Carl, Aufgaben des Verfahrenspflegers in Fällen von internationaler Kindesentführung und anderen grenzüberschreitenden Kindschaftskonflikten, in: Familie Partnerschaft Recht 2006, p. 39 (40).

The family court has exclusive jurisdiction.⁶⁴ The territorial competence belongs to the Court of the District where the child resides.⁶⁵ Currently, 22 German family courts serve as courts of first instance,⁶⁶ since only one local court has competency within each jurisdiction of a Higher Regional Court.⁶⁷ Accordingly, a higher expertise in matters of international child abduction is guaranteed.⁶⁸

Since the unresolved situation throughout the judicial process can burden both parents and child, accelerated procedures shall take place, in order to attempt to reach a solution as quickly as possible. Yet, the legislature decided against interim relief proceedings since the impact of court decisions in this field is too great on the parents and the child.⁶⁹ Instead, in order to protect the child's well-being, the court shall take all necessary measures to ensure an accelerated procedure and to comply with the EU Regulation 2201/2003,⁷⁰ which sets a limit of six weeks to a judgment being granted.⁷¹ In order to avoid harm to the child, the court may take any interim measures that are believed to be necessary, particularly to ensure the child's residence.⁷² The goal to expedite the process is also reflected in the fact that the Court of Appeal has to decide without delay⁷³ whether an appeal is obviously without merit and, if this is the case, has to declare the appealed decision to be effective immediately.⁷⁴ On the other hand, in order to protect the child from being moved back and forth,⁷⁵ decisions ordering a child's return shall only become effective upon the decision becoming final and binding.⁷⁶ At the same time and deviating from the less strict regulations,⁷⁷ an appeal and its reasoning are only possible within two weeks.⁷⁸ Hence, the family court cannot itself declare its decision to be immediately effective.⁷⁹

The EU Regulation 2201/2003 allows for children to be placed in institutional care or with a foster family, if the court considers this necessary. However, the court must consult with a local authority before deciding upon a placement.⁸⁰ In case the placement shall take place in Germany, the regional youth welfare offices (Landesjugendamt) are the authority to be consulted,⁸¹ being the authorities with the most expertise regarding institutional care and

⁶⁴ §§ 11-13 IntFamRVG; for determinations according to Art. 15 Hague Convention on Child Abduction: § 41 IntFamRVG.

⁶⁵ § 11 para. 1 IntFamRVG.

⁶⁶ Bundesamt für Justiz (Federal Office of Justice), Liste der zuständigen Familiengerichte nach den §§ 10-12, 47 IntFamRVG, available at https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/HKUE/Famliengerichte.pdf?__blob=publicationFile&v=9.

⁶⁷ § 12 para. 1 IntFamRVG.

⁶⁸ Gottwald, in: Rauscher (ed.), Münchener Kommentar zum FamFG: Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG) mit internationalem und europäischem Zivilverfahrensrecht in Familiensachen (IZVR, EuZVR), 2nd edn., Munich 2013, § 12 IntFamRVG, para. 1; Gruber, Das HKÜ, die Brüssel II-Verordnung und das Internationale Familienrechtsverfahrensgesetz, in: Familie Partnerschaft Recht 2008, p. 214 (215).

⁶⁹ Wagner, Internationales Familienrechtsverfahrensgesetz, 1st edn., Baden-Baden 2012, § 38, para. 2.

⁷⁰ Art. 11 para. 3 s. 2 EU Regulation 2201/2003.

⁷¹ § 38 para. 1 IntFamRVG.

⁷² § 15 IntFamRVG.

⁷³ § 40 para. 3 IntFamRVG.

⁷⁴ Borth/Grandel, in: Musielak (ed.), Familiengerichtliches Verfahren 1. und 2. Buch, 4th edn., Munich 2013, § 40, para. 1.

⁷⁵ §§ 63 f. FamFG; Gottwald, in: Rauscher (ed.), Münchener Kommentar zum FamFG: Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG) mit internationalem und europäischem Zivilverfahrensrecht in Familiensachen (IZVR, EuZVR), 2nd edn., Munich 2013, § 40 IntFamRVG, para. 1.

⁷⁶ § 40 para. 1 IntFamRVG.

⁷⁷ Gottwald, in: Rauscher (ed.), Münchener Kommentar zum FamFG: Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG) mit internationalem und europäischem Zivilverfahrensrecht in Familiensachen (IZVR, EuZVR), 2nd edn., Munich 2013, § 40 IntFamRVG, para. 3.

⁷⁸ § 40 para. 2 s. 2 IntFamRVG.

⁷⁹ Wagner, Internationales Familienrechtsverfahrensgesetz, 1st edn., Baden-Baden 2012, § 40, para. 1.

⁸⁰ Art. 56 EU Regulation 2201/2003.

⁸¹ § 45 IntFamRVG.

foster families. To guarantee expertise also in the field of cross-border cases, only the regional youth welfare offices shall be competent, not the local ones.⁸²

If however, the parent does not follow a court order, the question arises whether these decisions are enforceable. The IntFamRVG⁸³ stipulates that they can indeed be enforced by means of an administrative fine or, if this is not sufficient, arrest for contempt of court. If a child has to be returned, the court has to enforce the decision *ex officio*, unless the decision's beneficiary requests otherwise.⁸⁴ A German execution clause will be added upon request for the execution of a foreign enforcement order,⁸⁵ except for enforcement orders under Art. 41 ff. EU Regulation 2201/2003, which are enforceable by operation of law.

Finally, the IntFamRVG also regulates the costs of the proceedings. In this regard, German law⁸⁶ deviates from the Hague Convention on Child Abduction⁸⁷ by stipulating that both judicial and extrajudicial proceedings shall only be free of charge within the limits of legal aid.⁸⁸ Upon ratification of the Hague Convention on Child Abduction, Germany has entered a respective reservation to the treaty, as the Hague Convention on Child Abduction allows in Art. 42 para. 1. Nevertheless, no additional costs shall arise if the parent files an application directly at a foreign court or at a German court. Accordingly, the Hague Convention on Child Abduction's goal to facilitate the child's return is implemented.

4.4.5. Existing criminal sanctions

§ 235 para. 2 StGB criminalises child abduction in cross-border settings, also in cases in which parents are the perpetrator.⁸⁹ Yet, this law only applies to minors under the age of 14.

As already explained earlier, the German legislature even introduced a rule with regard to the German jurisdiction.⁹⁰ Through this regulation, also those cases can be tried in German courts where the abduction has taken place by not returning back to Germany from abroad. Since the actual crime takes place in another country in these cases, Germany would not have jurisdiction to try them without this specific regulation.

The preconditions for a criminal offence are very similar to those under the Hague Convention on Child Abduction and the EU Regulation 2201/2003 for the right to ask for returning the child. In order to commit cross-border child abduction in the criminal sense, the perpetrator has to withdraw the child from the custodian by bringing her/him to another country without the other parent's permission.⁹¹ Likewise, the crime can also be committed by not returning the child back after taking her/him abroad with the other parent's consent.⁹²

Interestingly, in contrast to comparable acts within Germany,⁹³ cross-border child abduction does not require that the withdrawal was forced, under threat, or by means of deceit. This is due to the invasive consequences of bringing a child to another country for

⁸² Wagner, Internationales Familienrechtsverfahrensgesetz, 1st edn., Baden-Baden 2012, § 45, para. 2.

⁸³ § 44 para. 1 IntFamRVG.

⁸⁴ § 44 para. 3 IntFamRVG.

⁸⁵ § 16 para. 1 IntFamRVG.

⁸⁶ § 43 IntFamRVG.

⁸⁷ Art. 26 para. 2 Hague Convention on Child Abduction.

⁸⁸ These limits are set out in §§ 76 ff. FamFG in conjunction with §§ 114 ff. ZPO.

⁸⁹ BGH, 13.9.1957 – 1 StR 269/57 (LG Konstanz), in: Neue Juristische Wochenschrift 1957, p. 1642; BGH, 11.2.1999 – 4 StR 594-98 (LG Bielefeld), in: Neue Juristische Wochenschrift 1999, pp. 1344 (1344 ff.); Fischer, Strafgesetzbuch und Nebengesetze, 61st edn., Munich 2014, § 235, para. 3; Kühl, Strafgesetzbuch, 27th edn., Munich 2011, § 235, para. 3.

⁹⁰ § 5 para. 6a StGB.

⁹¹ § 235 para. 2 subpara. 1 StGB.

⁹² § 235 para. 2 subpara. 2 StGB.

⁹³ § 235 para. 1 StGB.

both child and parent. Additionally, it is much more difficult to implement one's rights in cross-border contexts due to differing laws, conflicts in competences, and often the language barrier.⁹⁴

Additionally, the Criminal Code specifically criminalises particularly severe cases.⁹⁵ Not only does this norm criminalise cases in which the child's life is at risk as a consequence of the withdrawal. It also stipulates that the child's mental development must not be in danger because of the removal. This can happen if the child is brought into a very different culture.⁹⁶

As for most crimes, the abducting parent has to act at least with contingent intent, meaning that she/he has to be aware of the possible violation of the other parent's custody rights and has to accept this possibility. Regarding the fact that the withdrawal takes place in a cross-border setting, however, this is not sufficient. The abductor has to act with full intent to either cross the border (when removing the child) or to not cross it (when withholding the child) in order to place a real barrier between the other parent and the child. Concerning particularly severe cases, the perpetrator has to act with contingent intent regarding the risk for the child's mental development in another culture.⁹⁷

Yet, there can be so-called defects in the abducting parent's contingent or full intent, as well as in her/his responsibility. If for example she/he is mistaken and believes that the other parent granted permission to remove the child,⁹⁸ then she/he cannot be punished.⁹⁹ It is another matter of mistake if the perpetrator unavoidably misinterprets the legal consequences of her/his rights of custody.¹⁰⁰

As regards the punishment, abductors will be punished with up to five years imprisonment or with a fine. In the aforementioned particularly severe cases, the sentence will be between one and ten years imprisonment. In both cases, also the attempt to commit the crime is punishable.¹⁰¹

It is noteworthy that child abduction will only be prosecuted if the parent having custody for the child lodges a complaint or if prosecution is of particular public interest.¹⁰² Hence, in cases where the parents find an agreement, e.g. by mediation, it is unlikely that the custodian will lodge a complaint. Prosecution will then depend on whether the act is of particular public interest.

4.4.6. Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages

In the event of child abduction, the parent demanding the child's return may sue the abducting parent for damages. As a basic rule, compensation for both damages in general as well as immaterial damages is possible. Whereas damages in general can be claimed in

⁹⁴ Sonnen, in: Kindhäuser/Neumann/Paeffgen (eds.), Strafgesetzbuch, 4th edn., Baden-Baden 2013, § 235, para. 19; Kühl, Strafgesetzbuch, 27th edn., Munich 2011, § 235, para. 5; Fischer, Strafgesetzbuch und Nebengesetze, 61st edn., Munich 2014, § 235, para. 11.

⁹⁵ § 235 para. 4 StGB.

⁹⁶ Kühl, Strafgesetzbuch, 27th edn., Munich 2011, § 235, para. 5; Fischer, Strafgesetzbuch und Nebengesetze, 61st edn., Munich 2014, § 235, para. 16a.

⁹⁷ BGH, 29.11.1989 – 2 LStR 319/89 (LG Berlin), in: Neue Juristische Wochenschrift 1990, pp. 1489 (1489 f.) (Pakistan); BGH, 9.2.2006 – 5 StR 564/05 (LG Berlin), in: Neue Zeitschrift für Strafrecht 2006, pp. 447 (447 f.) (Egypt); LG Koblenz, 15.3.1988 – 101 Js 34.054/87 – 9 KLS, in: Neue Zeitschrift für Strafrecht 1988, p. 312 (313) (Lebanon); Fischer, Strafgesetzbuch und Nebengesetze, 61st edn., Munich 2014, § 235, para. 16a.

⁹⁸ Constituting a mistake of fact pursuant § 16 para. 1 s. 1 StGB.

⁹⁹ Fischer, Strafgesetzbuch und Nebengesetze, 61st edn., Munich 2014, § 235, para. 13; Sonnen, in: Kindhäuser/Neumann/Paeffgen (eds.), Strafgesetzbuch, 4th edn., Baden-Baden 2013, § 235, paras. 26 ff.

¹⁰⁰ Constituting a mistake of law pursuant § 17 s. 1 StGB.

¹⁰¹ §§ 22, 23 para. 1 StGB, regarding cross-border child abductions in conjunction with § 235 para. 3 StGB.

¹⁰² § 235 para. 7 StGB.

cases of child abduction, if the parent has actually suffered damages, a claim for immaterial damages will only be justified in exceptionally severe cases within the context of parental child abduction.

Under German tort law, damages will be awarded if certain preconditions are fulfilled. First, one of the rights explicitly mentioned in § 823 para. 1 BGB as the central tort norm has to be violated unlawfully. Although the wording does not specifically name custody as one of those rights, custody is broadly considered to be an absolute right in terms of § 823 para. 1 BGB.¹⁰³ This is not only due to the fact that the Hague Convention on Child Abduction and the EU Regulation 2201/2003 regard this as such, but also because German custody law in § 1632 BGB provides for a right to demand return of the abducted child. Custody is thus a right that can be enforced as opposed to others.¹⁰⁴

Secondly, this violation has to be committed either intentionally or negligently. Since negligence is also covered, the scope of civil sanctions is broader than that of criminal sanctions, where for a child abduction within the meaning of § 235 StGB an intentional act is necessary. Whether the abducting parent was at the very least negligent with regard to the custody violation has to be defined on a case-by-case basis. If the other parent already went to court and the court decided in her/his favour, then the abductor will be aware that she/he violates the other parent's custody rights.¹⁰⁵

If these preconditions are present, i.e. if the abducting parent is at least aware of the fact that unlawfully withholding the child wrongfully violates the other parent's custody rights, then the harmed parent can ask for damages. Yet, this is only possible if she/he actually suffered financial loss. For example, this can be the case if the parent had travel expenses.¹⁰⁶ The German Federal Judicial Court acknowledged costs for private detectives as damages, since the claimant had to hire detectives in order to ascertain the location of her child.¹⁰⁷

In addition to this basis for a claim, the parent whose custody rights have been violated can also refer to the second paragraph of § 823 BGB. This rule requires that a crime has been committed. As already discussed, German law also forbids the abduction of children in cross-border settings. As such, the preconditions for a claim based on § 823 para. 2 s.1 BGB are fulfilled if the abductor is punishable under criminal law. In cases of international parental child abduction, the main difference between these two bases for demanding

¹⁰³ BGH, 24.4.1990 – VI ZR 110/98 (KG), in: *Neue Juristische Wochenschrift* 1990, p. 2060 (2061); OLG Koblenz, 8.11.1957 – 2 U 607/57, in: *Zeitschrift für das gesamte Familienrecht* 1958, p. 137 (138); OLG Nuremberg, 11.11.1958 – 2 U 128/58, in: *Zeitschrift für das gesamte Familienrecht* 1959, p. 71 (71); OLG Cologne, 27.11.1962 – 9 U 78/62, in: *Zeitschrift für das gesamte Familienrecht* 1963, p. 447 (447 f.); OLG Schleswig, 31.7.1964 – 5 U 65/64, in: *Zeitschrift für das gesamte Familienrecht* 1965, p. 224 (224); Wagner, in: Sacker/Rixecker (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 5: Schuldrecht Besonderer Teil III, §§ 705-853, Partnerschaftsgesellschaftsgesetz, Produkthaftungsgesetz*, 6th edn., Munich 2013, § 823, para. 233; Spindler, in: Bamberger/Roth (eds.), *Beck'scher Online-Kommentar BGB*, Munich 2013, § 823, para. 91; Katzenmeier, in: Dauner-Lieb/Langen (eds.), *BGB Schulrecht Band 2*, 2nd edn., Baden-Baden 2012, § 823 para. 79; Hohloch, *Schadensersatz bei Verletzung des Umgangsrechts? Zu den Rechtsgrundlagen und zum Umfang*, in: *Forum Familienrecht* 2004, p. 202 (202).

¹⁰⁴ BGH, 24.4.1990 – VI ZR 110/98 (KG), in: *Neue Juristische Wochenschrift* 1990, p. 2060 (2061); OLG Koblenz, 8.11.1957 – 2 U 607/57, in: *Zeitschrift für das gesamte Familienrecht* 1958, p. 137 (138); OLG Nuremberg, 11.11.1958 – 2 U 128/58, in: *Zeitschrift für das gesamte Familienrecht* 1959, p. 71 (71); OLG Cologne, 27.11.1962 – 9 U 78/62, in: *Zeitschrift für das gesamte Familienrecht* 1963, p. 447 (447 f.); OLG Schleswig, 31.7.1964 – 5 U 65/64, in: *Zeitschrift für das gesamte Familienrecht* 1965, p. 224 (224); Wagner, in: Sacker/Rixecker (eds.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 5: Schuldrecht Besonderer Teil III, §§ 705-853, Partnerschaftsgesellschaftsgesetz, Produkthaftungsgesetz*, 6th edn., Munich 2013, § 823, para. 233; Spindler, in: Bamberger/Roth (eds.), *Beck'scher Online-Kommentar BGB*, Munich 2013, § 823, para. 91; Hohloch, *Schadensersatz bei Verletzung des Umgangsrechts? Zu den Rechtsgrundlagen und zum Umfang*, in: *Forum Familienrecht* 2004, p. 202 (203).

¹⁰⁵ BGH, 24.4.1990 – VI ZR 110/98 (KG), in: *Neue Juristische Wochenschrift* 1990, p. 2060 (2061).

¹⁰⁶ Hohloch, *Schadensersatz bei Verletzung des Umgangsrechts? Zu den Rechtsgrundlagen und zum Umfang*, in: *Forum Familienrecht* 2004, p. 202 (207).

¹⁰⁷ BGH, 24.4.1990 – VI ZR 110/98 (KG), in: *Neue Juristische Wochenschrift* 1990, p. 2060 (2061).

damages lies in the default. § 823 para. 2 BGB in conjunction with the criminal law¹⁰⁸ requires the abductor to act with intent, whereas for § 823 para. 1 BGB negligence also suffices. Since the claimant does not have to specify on which legal basis she/he grounds the claim for damages, she/he does not have to know this difference.

As already outlined, generally speaking immaterial damages are also possible. Within the context of a parental child abduction, the preconditions will, however, rarely be met. The reason for this is that under German law, immaterial damages are only awarded if specific rights have been violated, namely body, health, freedom or sexual self-determination.¹⁰⁹ Out of these protected interests, in general only health and freedom have to be considered in the event of parental child abductions.

With regard to the child's freedom, there is a violation if she/he cannot move around freely, e.g. due to the fact that the abducting parent keeps the child in a locked room.¹¹⁰ Parental child abduction differs greatly from child abduction by a third party, since the abductor's aim is not to harm the child, but to spend time with her/him. Hence, only in very few cases will the abducting parent lock her/his own child up and thus violate her/his freedom.

The same can be said for the child's health, as it will only be harmed in particularly severe cases. At the same time, the other parent's health has to be taken into account. According to well-established German case law regarding damages for shock for a victim's relatives she/he has to suffer from a mental or physical injury going beyond the mere shock of having one's child abducted. The court will assess whether the parent had a strong pathological reaction to the situation than an average person would have in her/his place.¹¹¹

Hence, not generally, but only in particularly severe cases can immaterial damages be considered, namely if the child has been kept locked up, if she/he has been physically or mentally hurt or if the parent having custody has suffered injury going beyond the reaction that can be expected in such a situation. In addition, the abducting parent has to intentionally or negligently violate these rights in order to fulfil the preconditions for immaterial damages. This limits the possibility of immaterial damages even more.

4.4.7. Enforcement methods

The German Federal Office of Justice is the Central Authority as set out in the Hague Convention on Child Abduction and in the EU Regulation 2201/2003.¹¹² The Central Authority serves as an intermediary between the respective courts and authorities in Germany and abroad. It is hence not responsible for actually enforcing rules.

The competent court is the family court situated in the same place as the respective Higher Regional Court (Oberlandesgericht).¹¹³

The Higher Regional Court (Oberlandesgericht) is in charge of executing enforceable titles.¹¹⁴

¹⁰⁸ § 235 para. 2 StGB.

¹⁰⁹ § 253 para. 2 StGB; according to § 253 para. 1 BGB, immaterial damages can only be claimed on the basis of rules explicitly granting immaterial damages and with regard to international child abduction, only § 253 para. 2 BGB suits as such a legal basis.

¹¹⁰ Palandt, Bürgerliches Gesetzbuch, 73rd edn., Munich 2014, § 253, para. 12 and § 823, para. 6.

¹¹¹ Cf. BGH, 11.5.1971 – VI ZR 78/70 (Munich), in: Neue Juristische Wochenschrift 1971, p. 1883 (1885); BGH, 4.4.1989 – VI ZR 97/88 (Munich), in: Neue Juristische Wochenschrift 1989, pp. 2317 (2317 f.); OLG Nuremberg, 27.2.1998 – 6 U 3913/97, in: Neue Juristische Wochenschrift 1998, pp. 2293 (2293 f.); Palandt, Bürgerliches Gesetzbuch, 73rd edn., Munich 2014, § 253, para. 11 and Introduction to § 249, para. 40.

¹¹² § 3 para. 1 subparas. 1, 3 IntFamRVG in conjunction with Art. 6 Hague Convention on Child Abduction and Art. 53 EU Regulation 2201/2003.

¹¹³ § 12 para. 1 IntFamRVG.

4.4.8. Sensitive issues featured in national case law

In the years 2009-2013, the German courts delivered at least 17 published decisions and rulings in civil law matters with regard to international child abduction.¹¹⁵ About two thirds of these dealt with matters of substantive international law, i.e. the preconditions for a wrongful withdrawal of a child,¹¹⁶ for returning a child¹¹⁷ and for counter-arguments not to return the child.¹¹⁸

Issues were particularly the notion of habitual residence¹¹⁹ and its definition, in which the court considered it as a minimum to have lived six months in a place in order to qualify as habitual residence.¹²⁰ Furthermore, the question whether a parent not only had custody, but also had actually exercised it, as is necessary in order to constitute an unlawful withdrawal, has been discussed on different occasions.¹²¹ Another topic was whether the other parent had given his consent to removing the child in the first place.¹²²

With regard to the child's return, the court had to decide whether the child's opinion about returning is relevant and considered this not to be the case in one decision, since the child was only five years old and thus too young to fully understand the situation.¹²³ Another issue was that the abducting parent refused to return together with the child, which often facilitates the return for the child and is thus in her/his best interest.¹²⁴ The child's best interest was also in other cases relevant when it came to her/his well-being. Additionally, the question arose how much time has to pass after the child has (been) returned, until the return is actually finished and the court order hence fulfilled. The court stipulated that this shall be the case as soon as the parent claiming the return has had enough time to initiate a decision ordering the child's whereabouts.¹²⁵

Procedural aspects of international law apart from recognition and validity of foreign judgments especially under the EU Regulation 2201/2003¹²⁶ were seldom relevant.

With regard to German national law, family and custody law became relevant only in a few cases.¹²⁷ On the other hand, German courts had to deal with foreign custody law. As

¹¹⁴ § 44 para. 2 IntFamRVG.

¹¹⁵ BGH, 28.4.2011 – XII ZB 170/11, in: Beck-Rechtsprechung 2011, 10616; BGH, 25.7.2012 – XII ZB 170/11 (OLG Bamberg), in: Beck-Rechtsprechung 2012, 17391; OLG Stuttgart, 13.1.2009 – 17 UF 234/08, in: Beck-Rechtsprechung 2009, 21290; OLG Frankfurt a.M., 19.2.2009 – 1 UF 162/08, in: Beck-Rechtsprechung 2010, 20213; OLG Cologne, 10.6.2009 – 21 UF 86/09, in: Beck-Rechtsprechung 2010, 07989; OLG Cologne, 29.10.2009 – 21 UF 158/09, in: Beck-Rechtsprechung 2010, 14227; OLG Nuremberg, 26.2.2010 – 7 UF 20/10, in: Beck-Rechtsprechung 2010, 08702; OLG Saarbrücken, 5.11.2010 – 9 UF 112/10, in: Beck-Rechtsprechung 2010, 29590; OLG Düsseldorf, 2.2.2011 – II-1 UF 110/10, 1 UF 110/10, in: Beck-Rechtsprechung 2011, 03691; OLG Karlsruhe, 11.11.2011 – 2 UF 227/11, in: Beck-Rechtsprechung 2012, 06553; OLG Celle, 21.5.2012 – 18 UF 171/11, in: Beck-Rechtsprechung 2013, 04241; OLG Bremen, 5.3.2013 – 4 UF 10/13, in: Beck-Rechtsprechung 2013, 06605; OLG Schleswig, 28.6.2013 – 12 UF 4/12, in: Beck-Rechtsprechung 2013, 16699; KG, 12.8.2013 – 16 UF 122/13, in: Beck-Rechtsprechung 2013, 18219; AG Bamberg, 12.1.2011 – 211 F 1651/10, in: Beck-Rechtsprechung 2011, 10651; AG Koblenz, 23.8.2012 – 202 F 248/12, in: Beck-Rechtsprechung 2013, 00476; AG Augsburg, 18.7.2013 – 411 F 2778/11, in: Beck-Rechtsprechung 2013, 12966.

¹¹⁶ Art. 3 Hague Convention on Child Abduction; Art. 2 para. 11 EU Regulation 2201/2003.

¹¹⁷ Art. 12 Hague Convention on Child Abduction.

¹¹⁸ Art. 13 Hague Convention on Child Abduction.

¹¹⁹ OLG Saarbrücken, 5.11.2010 – 9 UF 112/10, in: Beck-Rechtsprechung 2010, 29590.

¹²⁰ KG, 12.8.2013 – 16 UF 122/13, in: Beck-Rechtsprechung 2013, 18219.

¹²¹ OLG Frankfurt a.M., 19.2.2009 – 1 UF 162/08, in: Beck-Rechtsprechung 2010, 202130; OLG Nuremberg, 26.2.2010 – 7 UF 20/10, in: Beck-Rechtsprechung 2010, 08702 LG Bremen, 5.3.2013 – 4 UF 10/13, in: Beck-Rechtsprechung 2013, 06605.

¹²² OLG Nuremberg, 26.2.2010 – 7 UF 20/10, in: Beck-Rechtsprechung 2010, 08702.

¹²³ OLG Düsseldorf, 2.2.2011 – II-1 UF 110/10, 1 UF 110/10, in: Beck-Rechtsprechung 2011, 03691.

¹²⁴ OLG Celle, 21.5.2012 – 18 UF 171/11, in: Beck-Rechtsprechung 2013, 04241.

¹²⁵ OLG Nuremberg, 26.2.2010 – 7 UF 20/10, in: Beck-Rechtsprechung 2010, 08702. OLG Schleswig, 28.6.2013 – 12 UF 4/12, in: Beck-Rechtsprechung 2013, 16699.

¹²⁶ BGH, 28.4.2011 – XII ZB 170/11, in: Beck-Rechtsprechung 2011, 10616; BGH, 25.7.2012 – XII ZB 170/11 (OLG Bamberg), in: Beck-Rechtsprechung 2012, 17391; AG Bamberg, 12.1.2011 – 211 F 1651/10, in: Beck-Rechtsprechung 2011, 10651; AG Augsburg, 18.7.2013 – 411 F 2778/11, in: Beck-Rechtsprechung 2013, 12966.

already mentioned, foreign custody law shall apply as the law of the country in which the child was habitually resident prior to being removed. As a consequence, German courts may have to apply foreign custody law when deciding whether withholding the child violates the other parent's custody and is thus wrongful. Parental custody agreements for example, in which the parents jointly declare who shall have custody of the child, generally have no legal effect under German law.¹²⁸ Yet, if they are binding under the applicable foreign law, the German court will respect them¹²⁹ irrespective of whether the agreements are in accordance with German public policy.¹³⁰ The same is true for custody decisions determined by foreign authorities. Despite the fact that these decisions on custody can only be taken by courts in Germany,¹³¹ a foreign decision by an administrative authority will be binding before a German court, if this is the case in the respective foreign applicable law.¹³² As a last example, German courts will also accept the common law concept of so-called wards of court, i.e., a court having custody for a child, even though courts cannot have custody for a child according to German national law.^{133 134}

As a consequence of the fact that German law is predominantly only relevant in procedural matters, German domestic law was only relevant in enforcement matters.¹³⁵ Furthermore, the recognition of foreign decisions played an important role.¹³⁶

Finally, also criminal proceedings have taken place in the context of international child abduction, although only very few. Between 2000 and 2013, only five decisions or rulings have been published with regard to § 235 para. 2 StGB¹³⁷ and only two of them actually related to criminal proceedings.¹³⁸ One of these dealt with the question whether the preconditions for a particularly severe case¹³⁹ were fulfilled.¹⁴⁰ The other one reviewed the sentencing and the preconditions for a less serious case, stressing the abductor's emotional motivation to remove his child, stemming from the fact that he had been deprived of his rights of contact.¹⁴¹

¹²⁷ OLG Bremen, 5.3.2013 – 4 UF 10/13, in: Beck-Rechtsprechung 2013, 06605; AG Bamberg, 12.1.2011 – 211 F 1651/10, in: Beck-Rechtsprechung 2011, 10651.

¹²⁸ Examples of the very few cases, in which parental custody agreements are allowed, are § 1671 para. 2 subpara. 1 BGB, § 17 para. 2 semi-clause 2 of the Eighth Book of the Social Code (Sozialgesetzbuch Aches Buch: Kinder- und Jugendhilfe, "SGB VIII"), § 156 para. 1 s. 1 FamFG.

¹²⁹ OLG Frankfurt, 25.2.1997 – 6 UF 30/97, in: Zeitschrift für das gesamte Familienrecht 1997, pp. 1100 (1100 f.); OLG Celle, 24.5.2007 – 17 UF 72/07, in: Zeitschrift für das gesamte Familienrecht 2007, pp. 1587 (1587 f.).

¹³⁰ OLG Frankfurt, 25.2.1997 – 6 UF 30/97, in: Zeitschrift für das gesamte Familienrecht 1997, p. 1100 (1100 f.).

¹³¹ E.g. §§ 1628, 1632 para. 3 BGB.

¹³² OLG Stuttgart, 22.12.2000 – 17 UF 393/00, in: Zeitung für das gesamte Familienrecht 2001, 645 (646).

¹³³ This results from §§ 1774, 1779, 1789 in conjunction with § 1837 BGB, which all set out the family court's role as a merely regulating and not as custodial body.

¹³⁴ OLG München, 30.9.2004 – 12 UF 1381/04, in: Zeitschrift für das gesamte Familienrecht 2005, p. 1002 (1003); Siehr, Entführung eines "Mündels des Gerichts" (ward of court) nach Deutschland (zu OLG, München, 30.9.2004 – 12 UF 1381/04, in: Praxis des internationalen Privat- und Verfahrensrechts 2005, p. 526 (527)).

¹³⁵ OLG Stuttgart, 13.1.2009 – 17 UF 234/08, in: Beck-Rechtsprechung 2009, 21290; OLG Schleswig, 28.6.2013 – 12 UF 4/12, in: Beck-Rechtsprechung 2013, 16699.

¹³⁶ BGH, 28.4.2011 – XII ZB 170/11, in: Beck-Rechtsprechung 2011, 10616; BGH, 25.7.2012 – XII ZB 170/11 (OLG Bamberg), in: Beck-Rechtsprechung 2012, 17391.

¹³⁷ BVerfG, 27.12.2006 – 2 BvR 1895/05, in: Beck-Rechtsprechung 2006, 18575; BGH, 9.2.2006 – 5 StR 564/05 (LG Berlin), in: Beck-Rechtsprechung 2006, 02664; BayOLG, 20.3.2001 – 1 St RR 27/01, in: Beck-Rechtsprechung 2001, 30168443; VG Ansbach, 3.7.2003 – AN 5 K 02.0086, in: Beck-Rechtsprechung 2003, 29852; AG Brühl, 17.1.2012 – 35 F 339/11, in: Beck-Rechtsprechung 2013, 02602.

¹³⁸ BGH, 9.2.2006 – 5 StR 564/05 (LG Berlin), in: Beck-Rechtsprechung 2006, 02664; BayOLG, 20.3.2001 – 1 St RR 27/01, in: Beck-Rechtsprechung 2001, 30168443.

¹³⁹ § 235 para. 4 subpara. 1 StGB

¹⁴⁰ BGH, 9.2.2006 – 5 StR 564/05 (LG Berlin), in: Beck-Rechtsprechung 2006, 02664.

¹⁴¹ BayOLG, 20.3.2001 – 1 St RR 27/01, in: Beck-Rechtsprechung 2001, 30168443.

4.4.9. Existing critics and comments of the legal rules in force

There are only very few comments on when the removal of a child constitutes an abduction and whether the right to free movement conflicts with the notion of child abduction. These point out that the parent having custody for the child has not only the right, but also the duty to take care of the child, which includes the decision where the child should live. Furthermore, they question whether the distance between the parent having custody on the one hand and the removed child on the other should play a more important role.

As Art. 3 para. 1 Hague Convention on Child Abduction states, a removal is wrongful if custody rights have been violated. Later on, the Hague Convention on Child Abduction¹⁴² specifies that the term "rights of custody" shall be defined as personal care for the child and particularly the right to decide upon the child's residence. As soon as a parent having custody for the child cannot fully exercise her/his personal custody rights, there is a violation of these rights.¹⁴³ With regard to child abduction, this is most importantly the case if the parent is disbarred from deciding the child's residence, although she/he has the right to do so. It is the national law of the country in which the child had her/his habitual residence up until the removal that sets out which rights the respective parent has.¹⁴⁴

The right to free movement has only very rarely been discussed in the context of international child abduction. It has been pointed out by Jürgen Rieck that Art. 11 EU Regulation 2201/2003 differs from Arts. 8-20 Hague Convention on Child Abduction in several aspects, because the former seeks a compromise between the free movement of persons on the one hand, and the consequences of this free movement on the other.¹⁴⁵ Unfortunately, the commentator does not elaborate on this, leaving a very broad range of possible regulations that could be referred to.¹⁴⁶

According to Kurt Siehr, if the parent having custody exercises her/his right to decide the child's residence, this does not infringe the other parent's right to free movement.¹⁴⁷ Yet, the author of the annotation argues that exercising the right to decide the child's residence does violate the child's right to free movement. This latter infringement is nevertheless not wrongful, yet on the contrary legitimate, since the parent has the right and duty to take care of the child, which also includes the right to determine the child's residence.¹⁴⁸

Furthermore, the author questions whether it makes sense to differentiate only between countries instead of distance within the regime of the Hague Convention on Child Abduction and the EU Regulation 2201/2003. In the event where the parents live in neighbouring communities, which happen to be in different countries, the author argues that the small distance may render specific instruments as these two international treaties superfluous.¹⁴⁹

4.4.10. Justifications for refusing to return a child relocated to Germany

In general, returning the removed child to the parent is considered to be the Hague Convention on Child Abduction's main goal. To prove this, the authors refer to Art. 1 Hague

¹⁴² Art. 5 lit. a) Hague Convention on Child Abduction.

¹⁴³ Pirrung, in: Staudinger (ed.), Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Internationales Kindschaftsrecht 2, Berlin 2009, para. D 33.

¹⁴⁴ Pirrung, in: Staudinger (ed.), Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Internationales Kindschaftsrecht 2, Berlin 2009, para. D 27.

¹⁴⁵ Rieck, Kindesentführung und die Konkurrenz zwischen dem HKÜ und der EheEuGVVO 2003 (Brüssel IIa), in: Neue Juristische Wochenschrift 2008, p. 182 (183).

¹⁴⁶ Ibidem.

¹⁴⁷ Siehr, in: Säcker/Rixecker (eds.), Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 10: Internationales Privatrecht: Rom I-Verordnung; Rom II-Verordnung; Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-24), 5th edn., Munich 2010, Annex II to Art. 21 EGBGB, para. 28.

¹⁴⁸ Ibidem.

¹⁴⁹ Ibidem.

Convention on Child Abduction, which explicitly states that “[t]he objects of the present Convention are a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State”.¹⁵⁰ At the same time, at least as important as a return mechanism is the prevention of child abduction in the first place.¹⁵¹ Both returning the child and preventing abduction at the outset thus guarantee a stable and secure standard of life for the child in its place of habitual residence.¹⁵² In addition to that, the return mechanism and especially its preventive effect also influences the courts and authorities in the first place, in order to ensure adequate decisions with respect to issues of custody as well as the right to personal interaction.¹⁵³

Although the commentators agree that it is not within the scope of the Hague Convention on Child Abduction to assign or regulate custody, there are different opinions whether the child’s well-being itself actually constitutes a goal of the Hague Convention on Child Abduction. On the one hand, returning the child is considered to be in his or her best interests. This is based on the fact that a wrongful removal contradicts a custody decision, which in turn had been found with regard to the child’s well-being.¹⁵⁴ On the other hand, the Hague Convention on Child Abduction remains very technical in only referring to custody without scrutinising whether the present custody decision actually is in the child’s best interest. The court will do the latter only within the bounds of Art. 13 para. 1 lit. b) Hague Convention on Child Abduction, whereas the latter requires a grave risk of physical or psychological harm for the child.¹⁵⁵

Hence, there is consent that the return mechanism and its inherent preventive effect are the most important goals of the Hague Convention on Child Abduction. At the same time, the commentary differs in the question whether this main goal actually serves the child’s well-being.

When deciding upon a petition to return the child, the court does not factor the child’s well-being into its decision, since it is only decisive whether domestic custody rules have been violated.¹⁵⁶ The abducting parent can, however, veto the other parent’s demand for return *inter alia* with a claim that returning the child severely violates the best interest of the child.¹⁵⁷ A range of determining aspects has been laid down in case law, which are considered most important for determining the child’s best interests.

The Federal Constitutional Court (Bundesverfassungsgericht) bases the child’s well-being on the German Constitution (Art. 6 para. 2 in conjunction with Art. 2 para. 1 GG).¹⁵⁸ Through this, the court values the child’s well-being and places it on the same level as a parent’s equally fundamental right to take care of her/his child. As already mentioned, the Hague Convention on Child Abduction is built on the premise that it is best for the child to restore her/his environment to what it was before the removal. As a consequence, only in

¹⁵⁰ Finger, Haager Abkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung, in: Familienrecht und Familienverfahrensrecht 2012, p. 316 (317); Rieck, Kindesentführung und die Konkurrenz zwischen dem HKÜ und der EheEuGVVO 2003 (Brüssel IIa), in: Neue Juristische Wochenschrift 2008, p. 182 (182).

¹⁵¹ Siehr, in: Säcker/Rixecker (eds.), Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 10: Internationales Privatrecht: Rom I-Verordnung; Rom II-Verordnung; Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-24), 5th edn., Munich 2010, Annex II to Art. 21 EGBGB, para. 3; Vogel, Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung, in: Familie Partnerschaft Recht 2012, p. 403 (403).

¹⁵² Vogel, Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung, in: Familie Partnerschaft Recht 2012, p. 403 (403).

¹⁵³ Vogel, Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung, in: Familie Partnerschaft Recht 2012, p. 403 (403).

¹⁵⁴ Siehr, in: Säcker/Rixecker (eds.), Münchener Kommentar zum Bürgerlichen Gesetzbuch Band 10: Internationales Privatrecht: Rom I-Verordnung; Rom II-Verordnung; Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-24), 5th edn., Munich 2010, Annex II to Art. 21 EGBGB, para. 2.

¹⁵⁵ Finger, Haager Abkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung, in: Familienrecht und Familienverfahrensrecht 2012, p. 316 (317).

¹⁵⁶ Art. 12 para. 1 Hague Convention on Child Abduction.

¹⁵⁷ Art. 13 para. 1 lit. b) Hague Convention on Child Abduction.

¹⁵⁸ BVerfG, 29.10.1998 – 2 BvR 1206/98, in: Beck-Rechtsprechung 1998, 23133.

exceptional cases involving severe violations of the child's well-being may the court decide not to return the child.¹⁵⁹ As an example, imminent political riots may contravene the child's well-being, especially if the situation in the country was calm and stable before the removal.¹⁶⁰

In general, the most commonly referred to factors in determining the child's best interests are: who is the strongest figure for the attachment of the child,¹⁶¹ whether the child has to adapt herself/himself with a new environment¹⁶² such as the school system¹⁶³ and whether she/he already speaks the language of the respective country.¹⁶⁴

The court will discuss appropriate measures to ensure the child's well-being is taken care of. The most important measure in this regard is the possibility that the abducting parent returns together with the child. This becomes relevant if the abductor has become the main attachment figure for the child, so that a return not alone to the other parent, but together with her/his present attachment figure may facilitate the return for the child.¹⁶⁵ The value attributed to the child's best interests is illustrated by the fact that the court will even order the abductor to return together with the child, unless the parent will be criminally prosecuted because of the abduction.¹⁶⁶ Yet, there can be exceptions to this rule, for example if a woman had been beaten by her husband and it would thus be unreasonable to order her to return.¹⁶⁷

A difficult aspect is the child's opinion, where she/he wants to live and feels most comfortable. In contrast to the Hague Convention on Child Abduction, the EU Regulation 2201/2003¹⁶⁸ stipulates that hearing the child is compulsory.¹⁶⁹ This rule has been criticised on different grounds.

First, one has to bear in mind that parents influence their children and that especially an abducting parent might intentionally influence the child. On the other hand, even if the child's opinion is the result of such an influence, it may still be her/his established desire and thus has to be respected. It is only natural that one forms one's will based upon different experiences and influences. A court explained that a ten-year old child can in general form such an own mind.¹⁷⁰

The second criticism is rather pragmatic. It states that in practice, most children seem to say that they want to stay with the abducting parent. However, this does not change the legal situation, unless there is a "grave risk" of harming the child by returning her/him. The return mechanism relies only on the question whether the other parent's custody rights have been violated.

¹⁵⁹ BVerfG, 29.10.1998 – 2 BvR 1206/98, in: Beck-Rechtsprechung 1998, 23133; OLG Karlsruhe, 23.2.2006 – 2 UF 2/06, in: Neue Juristische Online-Zeitschrift 2006, p. 1374 (1378); OLG Stuttgart, 13.1.2009 – 17 UF 234/08, in: Beck-Rechtsprechung 2009, 21209; AG Nuremberg, 5.5.2008 – 110 F 1027/08, in: Neue Juristische Online-Zeitschrift 2008, p. 3681 (3684).

¹⁶⁰ OLG Stuttgart, 13.1.2009 – 17 UF 234/08, in: Beck-Rechtsprechung 2009, 21209.

¹⁶¹ BVerfG, 29.10.1998 – 2 BvR 1206/98, in: Beck-Rechtsprechung 1998, 23133; OLG Karlsruhe, 23.2.2006 – 2 UF 2/06, in: Neue Juristische Online-Zeitschrift 2006, p. 1374 (1379); AG Nuremberg, 5.5.2008 – 110 F 1027/08, in: Neue Juristische Online-Zeitschrift 2008, p. 3681 (3685).

¹⁶² OLG Karlsruhe, 23.2.2006 – 2 UF 2/06, in: Neue Juristische Online-Zeitschrift 2006, p. 1374 (1377).

¹⁶³ OLG Nuremberg, 17.7.2007 – 7 UF 681/07, in: Beck-Rechtsprechung 2007, 12895; OLG Nuremberg, 26.2.2010 – 7 UF 20/10, in: Beck-Rechtsprechung 2010, 08702.

¹⁶⁴ OLG Nuremberg, 26.2.2010 – 7 UF 20/10, in: Beck-Rechtsprechung 2010, 08702.

¹⁶⁵ OLG Karlsruhe, 23.2.2006 – 2 UF 2/06, in: Neue Juristische Online-Zeitschrift 2006, p. 1374 (1379).

¹⁶⁶ BVerfG, 29.10.1998 – 2 BvR 1206/98, in: Beck-Rechtsprechung 1998, 23133.

¹⁶⁷ AG Nuremberg, 5.5.2008 – 110 F 1027/08, in: Neue Juristische Online-Zeitschrift 2008, p. 3681 (3685).

¹⁶⁸ Art. 11 para. 2 EU Regulation 2201/2003.

¹⁶⁹ Rieck, Kindesentführung und die Konkurrenz zwischen dem HKÜ und der EheEuGVVO 2003 (Brüssel IIa), in: Neue Juristische Wochenschrift 2008, p. 182 (184).

¹⁷⁰ OLG Karlsruhe, 23.2.2006 – 2 UF 2/06, in: Neue Juristische Online-Zeitschrift 2006, p. 1374 (1377).

Finally, the third argument is also quite pragmatic. In her comment, Elisabeth Mach-Hour states that hearing the child poses problems if the court's decision does not follow the solution correspondent to the child's will.¹⁷¹

In addition to hearing the child, the court may also obtain a psychological appraisal of the child, though this takes time and thus contravenes with the principle of accelerating the process.¹⁷² The court will hence rather base its decision upon the aforementioned factors.¹⁷³

4.4.11. On-going projects of future legislation on child abduction

There is little commentary involving either criticism or praise on the existing regime itself. Most commentators rather summarise the different instruments. This can be seen as an indication that the authors value the treaties as important on the one hand, and see relatively few causes for criticism on the other. Some topics have, however, arisen. Two aspects with regard to the instruments are considered unnecessary, two more issues deal with provisions that are absent in the instruments and the last two relate to the relationship between the Hague Convention on Child Abduction and the EU Regulation 2201/2003.

According to various commentators, two provisions are in fact superfluous, one in the Hague Convention on Child Abduction and one the EU Regulation 2201/2003.

Authors claim that the regulations with regard to rights of access has proven useless in practice.¹⁷⁴ Art. 21 Hague Convention on Child Abduction allows parents to demand that their rights of access to the child be actually exercised. Statistics confirm that parents only rarely made use of this possibility: Whereas in 2011 only three proceedings took place in this regard in Germany,¹⁷⁵ there were no such proceedings at all in 2012.¹⁷⁶ As to the proceedings in 2011, all three request have been approved.¹⁷⁷

In addition, Art. 11 para. 2 EU Regulation 2201/2003 requires the child to be heard in proceedings concerning its return. As already mentioned, hearing the child in court is considered difficult for various reasons. Only if the child is sufficiently mature to explicitly object to being returned¹⁷⁸ does it make sense to hear the child according to Dutta and Scherpe.¹⁷⁹ In these cases, the child will, however, be heard at any rate. The authors are thus of the opinion that Art. 11 para. 2 EU Regulation 2201/2003 is superfluous.¹⁸⁰

¹⁷¹ Mach-Hour, Elisabeth, Kindeswohl und Kindeswille im Haager Entführungsabkommen, in: Familien- und Familienverfahrensrecht 2013, p. 143, commenting OLG Hamm, 27.11.2012 – II-11 UF 250/12, in: Beck-Rechtsprechung 2012, 02420.

¹⁷² Art. 11 Hague Convention on Child Abduction, Art. 11 para. 3 s. 2 EU Regulation 2201/2003.

¹⁷³ OLG Karlsruhe, 23.2.2006 – 2 UF 2/06, in: Neue Juristische Online-Zeitschrift 2006, p. 1374 (1378).

¹⁷⁴ Dutta/Scherpe, Die Durchsetzung von Rückführungsansprüchen nach dem Haager Kindesentführungsübereinkommen durch deutsche Gerichte, in: Zeitschrift für das gesamte Familienrecht 2006, p. 901 (901); Rieck, Kindesentführung und die Konkurrenz zwischen dem HKU und der EheEuGVVO 2003 (Brüssel IIa), in: Neue Juristische Wochenschrift 2008, p. 182 (185).

¹⁷⁵ Bundesamt für Justiz (Federal Office of Justice), Overview by country 2011, available at https://www.bundesjustizamt.de/EN/SharedDocs/Public/HKUE/statistics_2011.pdf?__blob=publicationFile&v=3.

¹⁷⁶ Bundesamt für Justiz (Federal Office of Justice), Overview by country 2012, available at https://www.bundesjustizamt.de/EN/SharedDocs/Public/HKUE/statistics_2012.pdf?__blob=publicationFile&v=3.

¹⁷⁷ Bundesamt für Justiz (Federal Office of Justice), Overview by country 2011, available at https://www.bundesjustizamt.de/EN/SharedDocs/Public/HKUE/statistics_2011.pdf?__blob=publicationFile&v=3.

¹⁷⁸ Art. 13 para. 2 Hague Convention on Child Abduction.

¹⁷⁹ Dutta/Scherpe, Die Durchsetzung von Rückführungsansprüchen nach dem Haager Kindesentführungsübereinkommen durch deutsche Gerichte, in: Zeitschrift für das gesamte Familienrecht 2006, p. 901 (905).

¹⁸⁰ Ibidem.

It has been criticised that the Hague Convention on Child Abduction does not provide enough procedural regulations.¹⁸¹

The Hague Convention on Child Abduction primarily lays down the substantive law, meaning rights and duties, preconditions, and consequences, but it only rarely states how these instruments must or can be implemented in court or by the authorities. On the other hand, regulating procedural aspects might prove difficult in multilateral treaties. Procedures in court and authorities vary greatly in the different countries and cannot easily be changed, since this would affect the whole procedural system. The Member States are thus requested to introduce implementing rules to the Hague Convention on Child Abduction, as Germany did through the IntFamRVG with its procedural regulations.

During one trial, the court became aware of a lacuna in procedural law to which a solution had not been provided for either in the Hague Convention on Child Abduction or in German national law. In general, decisions concerning a child's return can only be appealed once and are then considered final and binding. However, in this case the facts had significantly changed since the appeal. After the appeal decision, but before the child had actually been returned to her/his father in South Africa, the father had been accused of robbing diamonds and it was possible that he may face a prison sentence. The court found it unreasonable to return the child with regard to this new situation and thus applied a German rule analogously in order to prevent the return.¹⁸²

Finally, the relationship between the Hague Convention on Child Abduction and the EU Regulation 2201/2003 has been questioned, since they contradict each other in some cases. The two most important issues, in which the instruments differ, are the scope of the child's age as well as of the other parent's custody.

As regards the age of the child, the EU Regulation 2201/2003 applies to all minors, whereas the Hague Convention on Child Abduction's applicability is limited to minors under the age of 16.¹⁸³ If the respective child is 16 or 17 years old, it is thus unclear under international law whether the parent can ask for the child's return. The Hague Convention on Child Abduction is specifically designed for cases of international child abduction, while the EU Regulation 2201/2003 has a broader scope. Hence, one can argue that the Hague Convention on Child Abduction should be authoritative.¹⁸⁴ On the other hand, by also protecting minors between the age of 16 and 18, the EU Regulation 2201/2003 is even stricter than the Hague Convention on Child Abduction. Applying the former thus supplements the protection of children from abduction, which is the main goal of the Hague Convention on Child Abduction. This argument would lead to applying the broader age limit of EU Regulation 2201/2003.¹⁸⁵

Another conflict between the two regimes occurs with regard to the notion of the actual exercise of custody. In contrast to the Hague Convention on Child Abduction,¹⁸⁶ the EU Regulation 2201/2003 provides for a rule of interpretation, according to which "[c]ustody shall be considered to be exercised jointly when [...] one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility."¹⁸⁷ This regulation in fact contravenes the notion of actual exercise of custody, since it declares a mere custody right sufficient, irrespective of the parent

¹⁸¹ Krüger, Das Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung, in: *Monatsschrift für deutsches Recht* 1998, p. 694 (697).

¹⁸² OLG Karlsruhe, 3.4.2000 – 2 WF 31, 33/00, in: *Zeitschrift für das gesamte Familienrecht* 2000, p. 1428 (1428); Vogel, Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung, in: *Familie Partnerschaft Recht* 2012, p. 403 (407 f.).

¹⁸³ Art. 4 para. 1 s. 2 Hague Convention on Child Abduction.

¹⁸⁴ Rieck, Kindesentführung und die Konkurrenz zwischen dem HKÜ und der EheEuGVVO 2003 (Brüssel IIa), in: *Neue Juristische Wochenschrift* 2008, p. 182 (183).

¹⁸⁵ Siehr, Zum persönlichen Anwendungsbereich des Haager Kindesentführungsübereinkommens von 1980 und die EuEheVO: „Kind“ oder „Nicht-Kind“ – das ist hier die Frage! (zu OGH, 18.9.2009 – 6 Ob 181/09z), in: *Praxis des internationalen Privat- und Verfahrensrechts* 2010, p. 583 (585).

¹⁸⁶ Art. 3 para. 1 lit. b) in conjunction with Art. 13 para. 1 lit. a) Hague Convention on Child Abduction.

¹⁸⁷ Art. 2 para. 11 lit. b) s. 2 EU Regulation 2201/2003.

actually exercising this right. Rieck argues that this regulation constitutes a cross-national regulation within the terms of Art. 36 Hague Convention on Child Abduction, since it aims at accelerating and facilitating the return.¹⁸⁸ As a consequence, the author considers it prevailing between EU Member States.¹⁸⁹

¹⁸⁸ Rieck, Kindesentführung und die Konkurrenz zwischen dem HKÜ und der EheEuGVVO 2003 (Brüssel IIa), in: Neue Juristische Wochenschrift 2008, p. 182 (183).

¹⁸⁹ The present report was last updated on 12 December 2014.

4.5. Ireland

4.5.1. Statistical Assessment

4.5.1.1. Key statistics overview

Marriages and Divorces	2000	2004	2007	2012
International marriages	n/a	n/a	n/a	n/a
International divorces	n/a	n/a	n/a	n/a
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	38	33	48	45
Outgoing return requests made under the Hague Convention	n/a	26	50	55

4.5.1.2. Available national data

Currently there is no data on international marriages celebrated in Ireland. Current statistics only refer to marriages registered in the State without any reference to type.¹

There is currently no data recorded in Ireland on international dissolution of marriages generally or the dissolution of marriages which involve children specifically.

The only data available on registered child abduction in the state pertains to the number of child abduction cases issued in the High Court under the 1980 European Convention on custody of children which is broken down according to cases issued and orders made.² In the most recent annual report from the Central Authority on Child Abduction in Ireland, a summary of key statistics was released which included the following:

In 2013, the Central Authority dealt with a combined total of 346 applications relating to child abduction, access and placement of children in care. These applications were made under the following international instruments:

124 applications were made under the Hague Convention on Child Abduction; 122 under EU Regulation 2201/2003; 100 under the Hague Convention on Child Abduction and EU Regulation 2201/2003.

Of these, 208 applications were new applications and 138 applications were on-going from the previous year.

¹ See most recent statistics here - http://www.cso.ie/en/releasesandpublications/ep/p-vs/vitalstatisticsfirstquarter2014/#.VCe4_efbbs0.

² For most recent statistics please see <http://www.courts.ie/courts.ie/library3.nsf/66d7c83325e8568b80256ffe00466ca0/8e49cfde23c22bf280257a760059d245?OpenDocument>.

A total of 152 incoming cases and 194 outgoing applications were being processed by the Irish Central Authority in liaison with other national Central Authorities.³

In general, the number of applications to the Irish Central Authority in 2013 is evidence of the continuing rise in new applications concerning child abduction in Ireland. Indeed, the increase in 2013 marked a 42% rise in applications from the previous year. Since Ireland first became a party to the Hague Convention on Child Abduction, there has been nearly a 500% present rise in applications (42 applications in 1992, 208 applications in 2013).

4.5.2. National laws implementing the Hague Convention

Ireland is a dualist country and requires that any international treaty be duly incorporated into Irish Law through the Constitution or relevant legislation. In the case of child abduction, legislation incorporates international law into domestic law.

Ireland first signed the Hague Convention on Child Abduction on 23th May 1990; ratification took place on 16th July 1991 and it entered into force in Ireland when incorporated through the relevant legislation – namely, the Child Abduction and Enforcement of Custody Orders Act 1991 – which marked the entry into force of the Convention in Ireland on 1st October 1991.⁴

In addition to the Hague Convention on Child Abduction, Ireland is party to the following:

- a. The 1996 Hague Convention on Parental Responsibility; This Convention was signed by Ireland in 1st April 2003 ; was ratified on 30th September 2010 and came into force 1st January 2011. The Protection of Children (Hague Convention) Act, 2000 gives the force of law in the State to the 1996 Convention.⁵
- b. The 1980 European Convention on Custody of Children (known as the Luxembourg Convention in Ireland); This Convention was signed on 20th May 1980 ; ratified 28th June 1991 and entered into force 1st October 1991 reflected in the Child Abduction and Enforcement of Custody Orders Act 1991.
- c. EU Regulation 2201/2003. The European Council Regulation complements the Hague Conventions by enhancing the role of the country with habitual residence and by enabling speedier resolution of such cases. The Regulation applies to abductions between Ireland and EU Member States, as well as to the procedures for the recognition and enforcement of other types of orders relating to children.

4.5.3. Characterisation of parental child abduction in Ireland

In Ireland, child abduction is deemed to have occurred where a child is removed from a parent who is a lawful custodian without his/her consent. Furthermore, child abduction also applies to a case of wrongful retention where consent is initially given for a stated period of time but removal is extends beyond this period of time (and thus beyond the consent of the custodian) and is then deemed to be a case of wrongful retention. Section 6 of the Child Abduction and Enforcement of Custody Orders Act 1991 duly incorporates the Hague Convention on Child Abduction into Irish Law. Section 7 of the Act provides that the Irish High Court is the judicial or administrative authority with jurisdiction to hear child abduction cases.

³ See www.justice.ie/en/JELR/ChildAbductionAnnualReport2013.pdf/Files/ChildAbductionAnnualReport2013.pdf for further information.

⁴ See <http://www.irishstatutebook.ie/1991/en/act/pub/0006/>.

⁵ See <http://www.irishstatutebook.ie/pdf/2000/en.act.2000.0037.pdf>

Where a child has been removed from Ireland without the parent's/guardian's consent; to a country that has signed the Hague Convention, an applicant may make an application to the Irish Central Authority for International Child Abduction or to the Central Authority for Child Abduction in the state to which the child has been removed - to request to have the child returned. In Ireland, the central authority is the responsibility of the Department of Justice and, Equality.

The Central Authority may be of assistance to applicants in the following ways:

1. Completing the application forms
2. Arranging for a translation if necessary
3. Sending the Application to the Central Authority in a different country
4. Monitoring the progress of the application and keep the applicant informed
5. Make inquiries to assist in locating a child/children removed to Ireland.

The Central authority does not cover the cost of actually sending or bringing the child back to the "left behind parent". The restore order is designed to restore the status quo which existed before the wrongful removal or protection, and to deprive the wrongful parent of any advantage that might otherwise be gained by the abduction.

The requirements to be met by an applicant for a return order are strict. He/she must establish:

- that the child was habitually residing in the other State
- that the removal/retention of the child constituted a breach of custody rights attributed by the law of that State or these rights are the subject of pending proceedings or an application for one of these orders is about to be made
- that the applicant was actually exercising those rights at the time of the wrongful removal or retention.

The Hague Convention on Child Abduction applies if all the following criteria are met:

- The removal or retention was in breach of the applicant's rights of custody which were being exercised at that time (Art. 3 of the 1980 Hague Convention). Rights of custody under the Hague Convention on Child Abduction include rights relating to the care of a child and, in particular, the right to determine a child's place of residence. Under Irish law, these rights are vested in the guardians of a child unless a court has ordered otherwise;
- The child is under sixteen;
- The child was habitually resident in Ireland immediately prior to the abduction;
- The child was abducted to or retained in a Hague Convention country at a time when the Convention was in force between Ireland and that country.

The provisions of the 1996 Hague Convention on Parental Responsibility are similar to the provisions of EU Regulation 2201/2003. This Convention is broad in scope and provides for children up to the age of 18 years. The main aims of the Convention are the following:

- To determine what competent authorities can take measures to protect a child and/or its property;
- Which law is to be applied by these authorities in doing this;
- What law applies to parental responsibility;
- Recognition and enforcement of measures of protection in Contracting States.

The measures referred to may deal with amongst other things:

- Parental responsibility;
- Rights of custody and in particular the right to determine a child's place of residence;
- Guardianship;
- The placement of a child in a foster family or in care;
- The supervision by a public authority of the care of a child;
- The administration of a child's property.

Under Irish law, it is very clear that the person seeking return of the child must establish that he/she has "rights of custody" over the child in the state in which the child is habitually resident.

Habitual Residence

The question concerning what constitutes habitual residence is one which has been considered under Irish case law since neither the 1991 Act nor the Convention define what is meant by this term. According to the Court in *EM v. JM*,⁶ habitual residence and ordinary residence are in effect the same thing and essentially refer to the place where one ordinarily resides. According to the Court in *T v. O*,⁷ when a person moves from one location to another with a clear intention never to return to that location, then the person can be said to have ceased to be habitually resident in that location. According to the Court in *CM v. Delagacion de Malaga*⁸, a person can only acquire a new habitual residence after they have spent some time in a particular location and they must have a settled intention to do so. The Court opined that the question pertaining to habitual residence is one of fact rather than a theoretical concept. Habitual residence is not based on rules of dependency. However, where a child is residing in the lawful custody of one parent, its habitual residence will be the same as that parent. However, this is not rigid and is something that ought to be decided according to the factual circumstances of the case.

Rights of Custody

The question as to whether rights of custody were exercised at the time of removal is one which has received quite a lot of attention before the Irish Courts. Generally the interpretation given to rights of custody under the Hague Convention is much broader than that given under Irish domestic law. Two issues are of relevance in this context.

- (a) that a right of custody existed and
- (b) that such rights were exercised at the time of removal.

The case of *H.I. v M.G. (Child Abduction: Wrongful Removal)*⁹ reached the highest court in Ireland - the Supreme Court in February 1999. The case involved parents who had undergone a Moslem wedding ceremony in New York, which was not recognised as valid under the law of New York. The couple lived together in New York and had one son. When the relationship broke down, the mother was granted interim custody of the boy and the father had applied for contact. However, the mother returned to Ireland before these proceedings were concluded. The father lodged an application for the return of the child before the Irish courts. The courts had to consider whether or not the removal was

⁶ 18 July 2002 unreported.

⁷ [2007] IEHC 326.

⁸ [1999] 2 ILRM 103.

⁹ INCADAT HC/E/IE 284

wrongful and so this was heard as a preliminary issue. In the Irish High Court, the trial judge accepted the submissions that the removal was wrongful as the father had an inchoate right of custody.

Although Keane C.J., giving the majority judgment in the Supreme Court, rejected the inclusion of inchoate rights within the definition of rights of custody for the purposes of the Convention, he did accept that the concept of custody was broader under the Convention than under Irish domestic law. In cases where during pending proceedings a court had issued an order restricting removal from the jurisdiction, this would vest custody rights in the court and a removal in breach of the order would be a removal in breach of custody rights and thus wrongful. If the proceedings in question concerned a parent seeking rights of custody in relation to the child, this would also give rise to custody rights, even if no order had been issued. While he emphasised the distinction between access rights and custody rights under the Convention, he stated that if under the law of the habitual residence the granting of a right of access implicitly prohibited the removal of the child without the consent of the other parent or order of the court, this could also give rise to custody rights under the Convention. However, he did question whether the appropriate mechanism in such a case would be a return or an application under Art. 21 of the Convention. Because in case the application was for access only and there was no order restricting removal, no custody rights were breached.

The Supreme Court again considered the issue in the case of *WPP v SRW*¹⁰. Here the parents were divorced. The order of the Californian court granted custody to the mother and rights of access to the father. Furthermore, the court stated that both parents had to agree to discuss any out of State trips with the child and the other parent. The mother left for Ireland with the children. She had mentioned that she was considering returning to Ireland although she never revealed that she had concrete plans to do so. Keane C.J. found that although the removal of a child in breach of access arrangements is a breach of the Californian penal code, Californian law does not provide that the existence of rights of access require permission to removal being obtained. He accepted that a right to determine residence without a right to physical custody comes within the Convention's definition of custody rights. He also reiterated his acceptance of the position that a court may have custody rights which can be breached if it issues an order which contains a restriction on the removal of the child from the jurisdiction. Keane C.J. recommended the use of Art. 21 as the appropriate machinery to enforce such access rights and felt that to order the return of the children and their custodial parent to their former habitual residence merely so as to entitle the non-custodial parent to exercise access rights is not warranted by the terms of the Convention.

In accordance with the latter reasoning of the court, it is arguable that if a natural father has been granted guardianship rights under the provisions of the Guardianship of Children Act 1964, there are no grounds for treating them differently to married fathers. The decision to make an unmarried father guardian of his child should be seen as accepting that he then has the right to decide questions such as residence of the child and so will have "rights of custody" under the Convention.

In *RC v. IS*,¹¹ the Irish Court considered whether rights of guardianship (right to have a say in the care and upbringing of the child but not rights of physical custody) under Irish Domestic law amounted to rights of custody in the context of the Hague Convention. The Court was of the opinion that the rights to guardianship included the right to have a say in decisions concerning where the child is habitually resident and this would be embraced by the broad definition of afforded custody under the Hague Convention.

¹⁰ INCADAT HC/E/IE 271. (Child Abduction: Wrongful removal) [2000] 4 IR 401.

¹¹ INCADAT HC/E/IE 389; [2003] 4 IR 431.

In *McB v. LE*,¹² *McMenamin J*, when considering the rights of custody and rights of access, asserted that

The removal of a child in breach of access (as opposed to custody) rights does not give rise to an order directing the return of the child. Instead this question is dealt with at Article 21 of the Convention which places access rights at a lower level and remits measures in aid of access to be taken by the Central Authorities established under the Convention which must provide assistance to a parent seeking to exercise access rights.

Defences

Consent: What is acquiescence?

In *A.S. v. P.S.*,¹³ the parties and their two children had lived in England until July 1996, when the respondent wife took the children to Ireland without the consent of the husband. The following month, the wife told the husband that she was not returning to England. In October 1996, the husband instituted proceedings under the Hague Convention on Child Abduction. The wife argued that the husband had acquiesced to the retention of the children in Ireland within the meaning of Article 13(a) of the Convention and claimed there was a grave risk that the return of the children would expose them to psychological harm of a serious nature and that Article 13(b) of the Convention should therefore be invoked. Exercising his discretion, *Geoghegan J.* refused an order for return. He said: "I want to make it clear that I entirely accept...that it is only in rare circumstances that, where there has been a wrongful removal or wrongful retention, an order for return should not be made. But I am satisfied that this is one of the exceptions." The decision was appealed and *Denham J.* delivered the judgment of the Supreme Court on March 26, 1998. One of the issues under appeal was whether there had been acquiescence pursuant to Article 13(a) of the Hague Convention; and whether there was a grave risk of psychological harm, such that Article 13(b) of the Hague Convention should be invoked. *Denham J.* held that there had been no acquiescence on the part of the husband as the facts and circumstances showed that during that time he was seeking reconciliation with his wife and children. Furthermore, whilst accepting that there was a grave risk at issue in the case and that the Court should not order the return of *V.* to the appellant pending full custody proceedings, the judge believed that there was no evidence that there was a grave risk in returning *V.* to the jurisdiction of England and Wales or indeed to the family home in the absence of the appellant. She said:

"The learned trial judge fell into error in law in determining that there was a grave risk, without giving due accord to the practical option of the children living in the family home with the respondent in the absence of the appellant, pending custody hearings. He also erred on the evidence in determining that the English jurisdiction and the family home posed a grave risk. The grave risk in issue is that of the presence of the appellant. This can be excluded. As such, the learned trial judge wrongly exercised his discretion."

Listening to Children

It has been acknowledged that

"The Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive, provided it has, according to the competent authorities attained an age and degree of maturity sufficient for its views to be taken into

¹² [2010] 4 IR 433.

¹³ INCADAT HC/E/IE 389; [1998] 2 IR 244.

account. In this way, the Convention gives children the possibility of interpreting their own interests.”¹⁴

However, the Court has also noted that this could be “dangerous” if it were applied to young people who “have a clear grasp of the situation but could be suffering from psychological harm if they think they are being forced to choose between two parents.”

The Irish Courts are of the opinion that - according to the Hague Convention on Child Abduction - a child, who is of a certain age and maturity, is entitled to have his or her view taken into account and that the trial judge can rely on the child's view. The decision concerning whether or not to return a child to its habitual residence is a decision of the Court and that care should be taken that it is not, nor does it appear to be, the decision of the child.

4.5.4. Judicial and non-judicial tools available to the parties, including mediation

There are no additional national rules or administrative measures dealing directly or indirectly with regulating international child abduction in Ireland. This is an issue largely left to the courts for judicial determination on a case by case basis.

Mediation, compulsory or otherwise, is not currently legislatively enshrined in Ireland nor is it legally regulated. The decision as to whether or not a child abduction case will be sent for mediation is one that lies with the parties concerned. There is no standard mediation procedure. There are proposals to regulate mediation in the future with the Mediation Bill¹⁵ but this will not be specific to the area of child abduction.

The Irish Central Authority for Child Abduction currently only deals with cases specifically to do with child abduction and not kidnapping more generally. The latter is something which is within the remit of the Garda Síochána in Ireland under the Non-Fatal Offences Against the Person Act 1997.

4.5.5. Existing criminal sanctions

The Non-Fatal Offences against the Person Act 1997¹⁶ deals with the crime of international child abduction.

Section 16 of the Act applies to parents, guardians or any person to whom custody of the child has been granted by a court. It does not apply to a parent who is not a guardian of the child. It applies if a parent unlawfully sent or kept a child under the age of 16 out of the State or if the parent caused a child to be unlawfully taken, sent or kept. Unlawfully means in defiance of a court order or without the consent of the other parent or guardian.

Section 17 applies to people who are not covered by Section 16 and who unlawfully detain a child or cause a child to be detained:

“A person, other than a person to whom section 16 applies, shall be guilty of an offence who, without lawful authority or reasonable excuse, intentionally takes or detains a child under the age of 16 years or causes a child under that age to be so taken or detained—

(a) so as to remove the child from the lawful control of any person having lawful control of the child; or

¹⁴ INCADAT HC/E/IE 272 ; TMM v MD [1999] No. 162/99M S.C. (Supreme Court).

¹⁵ www.justice.ie/en/JELR/MedBillGSFinal.pdf/Files/MedBillGSFinal.pdf

¹⁶ <http://www.irishstatutebook.ie/1997/en/act/pub/0026/index.html>

(b) so as to keep him or her out of the lawful control of any person entitled to lawful control of the child.”

In a famous case,¹⁷ an uncle was sentenced to a 6 year sentence for removing his nephew from Ireland and bringing him to Egypt. This sentence was subsequently upheld by the Court of Criminal Appeal.

The sentencing by His Honour Judge McCartan in the case of the DPP-v-Moustafa Ismaeil in July 2011 highlights the seriousness with which child abduction cases are treated under the criminal law: “It is important and in the public interest that others who might be tempted to abduct children in this fashion should realise in advance that this offence is viewed by the judicial system as very grave indeed and that, absent strong mitigating factors, they are likely to face a condign punishment if convicted. The facts of this case are, moreover, sufficiently grave as to make one wonder whether the maximum penalty of seven years prescribed by the Oireachtas is truly sufficient to dissuade those who are determined to abduct a child in the calculated and pre-meditated fashion in which this was done in the present case.”

4.5.6. Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damage

While there are no civil sanctions including the prospect of damages set out under the legislation per se, section 40 of the 1991 Act provides for the payment of costs:

(1) The costs of any proceedings under any provision of this Act shall be in the discretion of the court concerned.

(2) Without prejudice to the generality of subsection (1) of this section, a court in making an order for costs in any proceedings under this Act—

(a) may direct the person who removed or retained a child, or who prevented the exercise of rights of access in relation to a child, to pay any necessary expenses incurred by or on behalf of the applicant in the proceedings, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant and those of returning the child;

(b) shall otherwise have regard to the provisions of Article 26 of the Hague Convention (where proceedings under Part II of this Act are concerned) or Article 5.3 of the Luxembourg Convention (where proceedings under Part III of this Act are concerned).

4.5.7. Enforcement methods

In Ireland, the Central Authority facilitates applications for the return of children taken by a parent to another State as well as applications relating to access and the care of children in another jurisdiction. If a child is abducted to Ireland, the Department of Justice and Equality may ask the Legal Aid Board to take proceedings in the High Court. It is possible to negotiate a voluntary settlement of such issues. If a child has been abducted out of Ireland, the Central Authority will assist the parent in returning the child by liaising with the Central Authorities of other States.

¹⁷ DPP -v- Moustafa Ismaeil [2012] IECCA 36.

4.5.8. Sensitive issues featured in national case law

One of the major issues which has received attention in Ireland is the definition of rights of custody as referred to above. In the case of *McB v. LE*,¹⁸ MacMenamin J noted the interrelationship between EU Regulation 2201/2003 and the Hague Convention on Child Abduction in this context. He pointed out that references to the Hague Convention are to "include" the Council Regulation. An Article 15 Hague application is to be determined within the meaning of Article 2 EU Regulation 2201/2003 in this case, having regard to the provisions of S. 15 of the Act of 1991. In the case of any conflict between the two, the Court was of the opinion that the Regulation must take precedence over the Hague Convention. The Court noted that in order for there to be a wrongful removal, such removal of the child must be in breach of a right of custody which has legal effect in the law of the member state where the child was habitually resident immediately preceding the removal, and that right of custody must have been actually exercised. The court also rejected the plaintiff's assertion in this case that he had rights of custody based on his de facto family status based on a Supreme Court decision¹⁹ which rejected the existence of a de facto family under Irish Law.

The issue of rights of custody can be problematic where the parties have sought to informally resolve such issues without any involvement of the law. This was the situation in the case of *G v. R*²⁰ where since their divorce the custody and access issues between the parties had been mainly resolved by way of agreement. In effect this meant that there was no written agreement between the parties and no legal order for custody and access in place. In this case, the parties did not contest the fact that there were rights of custody in accordance with Article 3 of the Hague Convention but in any case the court highlighted the fact that for Article 3, there did not need to be a formal written agreement in place to confirm such arrangements between the parties concerned.

There is evidence to suggest that the Irish Courts are reluctant to allow a parent to rely on the notion of resettlement reflected in Article 12 of the Convention as a basis for refusing to return a child particularly in cases where there is evidence of concealment.²¹ The Irish Courts have also demonstrated a reluctance to stretch the defence of grave risk to incorporate grave risk to the respondent parent.²²

In relation to the other defence of where a child objects to return, the Courts are aware of the obligation to take into account the views of the child but there is no obligation on the Court to implement those views.²³ However more recently, the Irish Supreme Court has noted the "growing understanding of the importance of listening to the children involved in children's cases... just as the adult may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents" views.²⁴

In the recent case *C.M.H. v J.P.D.*²⁵ before Ms. Justice Finlay Geoghegan, the only defence advanced to the mother's application for the order for return was a defence under Article 13 of the Hague Convention on Child Abduction. The child allegedly objected to being returned to England to his mother. The response to the defence was two-fold. Firstly, it was contended on behalf of the mother that as a matter of fact, the Court should not find, on the basis of the interview conducted with the child that an objection had been made. It was contended that the views which he expressed in the interview had been obtained as result of manipulation by the father to form or express such a view. Secondly, it was submitted

¹⁸ [2010] 4 IR 433.

¹⁹ in *J McD v. L* [2008].

²⁰ [2012] IEHC 16.

²¹ *MM v. RR* [2012] IEHC 450; *ZD v. KD* [2008] IEHC 176.

²² *EM v. JM* [2003] 3 IR 178; *EH v SH* [2004] 2 IR 564.

²³ [2011] 3 IR 683.

²⁴ [2011] 3 IR 683, 694.

²⁵ *C.M.H. v J.P.D.* [2014] IEHC 261.

that even if the Court finds that the son does object to returning to England, that the Court should, nevertheless in accordance with the Case law referred to in the exercise of its discretion under Article 13, make an order for the return of Edward.

The Court noted the three stage approach adopted in the case of *C.A. v. C.A. (otherwise C)*²⁶, when considering a child's objections as set out by Potter P. in *Re M. (Abduction: Child's Objections)*,²⁷ where he stated:

"[60] Where a child's objections are raised by way of defence, there are of course three stages in the court's consideration. The first question to be considered is whether or not the objections to return are made out. The second is whether the age and maturity of the child are such that is appropriate for the court to take account of those objections (unless that is so, the defence cannot be established). Assuming a positive finding in that respect, the court moves to the third question, whether or not it should exercise its discretion in favour of retention or return."

The Court in this case took account of the Supreme Court judgment in *A.U. v. T.N.U. (Child Abduction)*²⁸ which considered the proper approach, both to determining whether a child objects and to the exercise by the Court of its discretion.

Denham C.J. gave the sole judgment with which the other members of the Court agreed, stated at paras. 27 and 28:

"[27] A court, in deciding whether a child objects to his or her return, should have regard to the totality of the evidence.[28] The range of considerations may be wide. As was stated in *In re M. (Abduction: Rights of custody)*:²⁹

"[46] In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are: "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances".

In the instant case, Ms. Justice Finlay Geoghegan agreed with this analysis. While the court in this case did take the views of the child concerned into consideration, it did not in fact agree with these views and ordered the return of the child to the country of his habitual residence.

In a recent case³⁰ in a determination of the meaning of habitual residence under the Hague Convention on Child Abduction, the Court highlighted the following as being of particular importance:

²⁶ McC [2009] IEHC 460, [2010] 2 I.R. 162.

²⁷ [2007] EWCA Civ. 260, [2007] 2 FLR 72 at p. 87.

²⁸ [2011] IESC 39, [2011] 3 I.R. 683.

²⁹ [2007] UKHL 55, [2008] 1 A.C. 1288, at p. 1308.

"The only issue before the Court is whether Sue was habitually resident in State A in October 2012. On the undisputed facts set out above, Sue never resided in State A prior to October 2012, save for short holiday periods. She had never resided with her parents in State A in a settled home environment since birth and never went to school in State A, save summer camp. Since birth, Sue resided with her parents in a family unit in State B, State C and State D and attended school in the latter two States. On those facts, applying the principles set out above the Court finds as a fact that Sue was not habitually resident in State A in October, 2012'. The case law also discloses that the Court's approach to determining the habitual residence of a child will vary depending upon the age of the child:³¹ In the case of all children, where the evidence discloses where a child has been resident in a particular country, the Court must then consider whether that residence has acquired the necessary degree of stability or integration to become habitual. The Court will look at the integration of the child in a social and family environment in the relevant country or State. There is potentially a further relevant matter in relation to adolescent children such as Sue, who is 15, namely, the state of mind of the child. This issue is considered in the judgments given in the matter of L.C. by the U.K. Supreme Court. It is unnecessary on the facts of this application for the Court to consider whether or to what extent the Court should take this into account in deciding upon habitual residence."

4.5.9. Existing critics and comments of the legal rules in force

As acknowledged by Shannon, "Child Abduction...occurs when a child is removed from a person who has the legal right to custody of the child without that person's authority or consent".³² An act of wrongful retention occurs when a child is lawfully removed from the jurisdiction where he or she is habitually resident for a holiday or an access visit but is unlawfully retained in that jurisdiction. Removal of a child is not considered to be abduction where it legitimately fits within the Article 20 defence of fundamental principles. This refers to a situation where the return of a child may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms including the right to free movement and family life.

In the case of *Nottinghamshire Co Council v. K.B. and K.B.*³³ Justice Finlay Geoghegan stated the following in relation to the application of Article 20 in Ireland:

- (i) The onus is on the person opposing return to establish that article 20 applies
- (ii) Article 20 is a rare exception to the general principle of return and must be narrowly construed and
- (iii) A court can only refuse to return a child where the fundamental principles of its laws do not permit return of the child. Where reliance is placed on the Irish Constitution, it must be proved that the relevant article of the Constitution does not allow return of the child.

Based on the latter reasoning, some cases have been taken on the basis of the constitutional family under Articles 41 and 42 of the Irish Constitution 1937 which protects the family based on marriage.

³⁰ A. J. v L. J. [2014] IEHC 92.

³¹ In re L.C. (Children) [2014] UKSC 1, [2014] 2 W.L.R. 124.

³² Shannon G., *Child Law* (Dublin: Roundhall, 2010) 558.

³³ INCADAT HC/E/IE 1139; Unreported High Court, Jan 26, 2010.

4.5.10. Justifications for refusing to return a child relocated to Ireland

The main aim of both the international and domestic legal frameworks as well as the interpretation thereof is to reinstate the status quo ante as soon as possible. The guiding principle adhered to strictly by the Irish Courts is that the courts of the habitual residence of the child are the most appropriate forum for determination of the rights of the child including his or her best interests. The Irish Supreme Court has explicitly stated on a number of occasions that proceedings which are instituted under the Hague Convention on Child Abduction "are intended to be summary and completed in a speedy fashion."³⁴ Other factors which have been gaining increasing recognition before the Irish Courts include the principle of respect for the views of the child and the right of a child to have a meaningful relationship with both parents.

It is clear from a perusal of the recent Irish case law that the courts are adopting a unified approach to the issue of child abduction. The courts have expressed a clear view that their duty under the Convention is not to decide what is ultimately best for the child, but rather to return the child speedily to the courts of his or her habitual residence so that those courts may determine what orders should be made to protect the child and safeguard the child's best interests. The courts here have upheld the view that it is not in children's best interests to be abducted from one country to another and that such actions must be strongly discouraged.

The case law illustrates that only in exceptional circumstances will the Irish courts refuse to return a child to the courts of the child's habitual residence where the situation is one of grave risk and the return would place the child in imminent danger or in a truly intolerable situation. If undertakings can be given and circumstances created to protect children prior to the court hearings in the country of their habitual residence, the Irish judiciary will normally make an order for return, in accordance with the policy of the Convention.

It appears that the Irish courts' strict approach to the interpretation of the Hague and Luxembourg Conventions is likely to deter abductions in all but the most exceptional of circumstances. However, it has been argued that the Courts in their enthusiasm towards adhering to the objectives of the Hague Convention on Child Abduction may be losing sight in what is considered to be at the heart of these proceedings: the welfare of the child. Undertakings, no matter how detailed, given by a person who is desperate to obtain the return of his or her child, should not always be relied upon. Whilst fully appreciating the legal sanctions applicable to unobserved undertakings, it must be remembered that in child abduction cases emotions are at their highest and applicants under the Convention might say or do anything to obtain the return of their children.

However, there have been some cases where the courts have expressly acknowledged the importance of maintaining a balance between the welfare of the child and adhering to the objectives of the Convention. In the case of *B.B. v. J.B.* [1998] 1 IR 299³⁵, the Supreme Court set out a number of factors to be considered in determining whether to exercise discretion in accordance with Article 13 of the Hague Convention on Child Abduction where the return mechanism is sought to be avoided:

The Supreme Court held that Article 13 of the Convention was not only limited to unlawful or non-consensual removals. It also gave the court discretion to consider all the circumstances before deciding whether or not to return a child to the country of the child's habitual residence. Denham J. said the factors to be considered when deciding whether to exercise a discretion under Article 13 included:

- the habitual residence of the child at the time of the removal;
- the law relevant to custody and access;

³⁴ INCADAT HC/E/IE 272; *TMM v MD* unreported SC 1999. INCADAT HC/E/IE 272 .

³⁵ INCADAT HC/E/IE 287.

- any previous related litigation in the courts of the child's habitual residence;
- the circumstances and social background of the child;
- the nature of the appellant's consent;
- the circumstances of the making of the consent;
- the matter of undertakings; and
- the overall object of the Convention to ensure that custody and access rights under the law of one contracting state are respected in other contracting states.

It is clear from Denham J.'s list that the Irish judiciary, whilst being aware of the child's best interests, must aim to achieve a balance between safeguarding the interests of the child and observing the objectives of the Convention.

Similarly in the case of *ML v. JL* the applicant sought an order pursuant to Article 12 of the Hague Convention on Child Abduction that his child be returned to his former place of residence in the UK for the purpose of enforcing the applicant's rights of custody with respect to the child.³⁶ Mr L and the respondent were married in 1995. Their son was born in July 1997. The couple divorced in 2001. Thereafter, the child continued to reside in England with his mother. The father continued to live separately but in close proximity and for some time had access to the child pursuant to a contact order.

The applicant gave evidence that in 2004, the respondent sought permission from him to move to Australia with their son which he refused. He claimed that after this the respondent made it very difficult for him to see his son and even made allegations of sexual abuse against him, which were never substantiated. The respondent chose not to enforce his contact order through the courts. Since 2004, the respondent claimed that he kept abreast of his son's life from a far. The respondent removed their son from school in 2008, stating that she wanted to protect him from bullying by home schooling him. The home schooling became non-existent in the last 18 months before she left for Ireland. A pre-proceedings meeting had been arranged by social services for some time in February 2011 to determine whether an application for a child assessment order should proceed in respect of P. The respondent did not attend this meeting, and three days earlier, took P. to Ireland without notifying Mr L. or seeking his consent, and without notifying any of the relevant authorities.

The child was reported missing and British police eventually tracked them to Dublin, where the mother made herself known to Gardai in February 2011. Mrs L. was unemployed in Wiltshire and remained unemployed in this State. She had no means and had been living in emergency accommodation provided by the Health Service Executive (HSE), who had been in contact with Wiltshire social services.

Since arriving in Ireland, the mother and child had engaged with the HSE (now the Child and Family Agency) to a reasonable extent, and P. was enrolled in school. In making its decision to return the boy to the United Kingdom, the court took into account the best interests of the child. The court deemed that in the case of P., it was in his best interests to return to England with his mother, who must work in co-operation with the authorities as a matter of urgency to ensure that P.'s basic needs are met, in particular in terms of his education and social exposure.

The court concluded that the removal of P. from the United Kingdom was wrongful within the meaning of the Hague Convention on Child Abduction. An order pursuant to art. 12 of the Hague Convention was made directing that the child be returned to his place of habitual residence in England. The court sought to hear from counsel on the precise terms of the order and the ancillary undertakings necessary so as to ensure that an adequate care plan was in place for P. upon his return to England.

³⁶ *ML v. JL* [2011] IEHC 554.

4.5.11. On-going projects of future legislation on child abduction

a) Unmarried fathers

One area of child abduction law which has been highlighted as problematic in Ireland is that concerning the rights of unmarried fathers. For example, Geoffrey Shannon, the Special Rapporteur for Child Protection points out the following:

“An unmarried father with no agreement or court order in his favour giving him guardianship may find that the mother has legitimately determined the residence of the child within or outside the jurisdiction without any reference to him. The only remedy available is to apply under s.11(2)(a) of the Guardianship of Infants Act 1964, as amended, for an order for custody/access to the child, and apply under s.6A of the Act to be appointed as a legal guardian. The rights of unmarried fathers under the 1980 Hague Convention present particular difficulties and need to be addressed, given the fact that in Ireland unmarried fathers do not have an automatic right to guardianship equivalent to that of married parents.’ See Shannon, G., “Editorial”, Irish Journal of Family Law [2010] 1.”

That said, in the Irish case of *G (T) v. KAO* (unrep, High Court, September 2007), McKechnie J found that the applicant father who was unmarried (and had no automatic guardianship rights as a result) had in fact rights of custody under EU Regulation 2201/2003. In this case, the Judge took into consideration ECHR case law when recognizing that the father and the children were a *de facto* family in accordance with Article 8 ECHR bearing “nearly all the characteristics of a constitutionally protected family”.

b) Criminal abductions and victims of domestic violence

Shannon also notes the problem with the gaps in the criminal law as it applies in this context. As mention above s16 of the Non-Fatal Offences against the Person Act 1997 establishes a criminal offence of child abduction. However, this section only makes abduction of a child out of Ireland an offence and not child abduction inside the State.³⁷ He suggests that section should be amended to cater for both eventualities. He also claims that the Hague Convention on Child Abduction can operate unfairly against victims of domestic violence who may flee the State to escape their abusers.³⁸

c) The conduct of proceedings

Furthermore, Kilkelly notes in the Irish context that “if the child’s abduction has not caused him or her harm, then the subsequent acrimonious proceedings will... it is positive that increasing attention has focused on the need to introduce alternative dispute resolution into the child abduction process”.³⁹ Particular attention shall be paid, in this respect, the conduct of the proceedings in practice.⁴⁰

³⁷ Shannon G., *Child Law* (Dublin: Roundhall, 2010) 622.

³⁸ *Ibid*, p. 623.

³⁹ Kilkelly U., *Children’s Rights in Ireland* (Dublin: Tottel Publishing, 2008) 200.

⁴⁰ This report was completed by Dr. Aisling Parkes, School of Law, University College Cork, completed on 15th December 2014.

4.6. Spain

Glossary of terms

CC	Spanish Código Civil: Real Decreto de 24 de julio de 1889, texto de la edición del Código Civil mandada publicar en cumplimiento de la Ley de 26 de mayo último http://noticias.juridicas.com/base_datos/Privado/cc.html
LEJ	Spanish Ley de enjuiciamiento civil: Real Decreto de 3 de febrero de 1881, de promulgación de la Ley de Enjuiciamiento Civil http://noticias.juridicas.com/base_datos/Privado/r7-lec.html
Organic Law 1/1996	Ley Orgánica 1/1996, de 15 de enero, de protección jurídica del menor, de modificación del Código Civil y de la Ley de Enjuiciamiento Civil (implementation of the Hague Convention on Child Abduction) http://noticias.juridicas.com/base_datos/Privado/lo1-1996.t2.html#a12 .

4.6.1. Statistical Assessment

4.6.1.1. Key statistics overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	n/a	n/a	18.7 %	17.5%
International divorces	n/a	n/a	11.8%	15.7%
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	36	87	88	81**
Outgoing return requests made under the Hague Convention	n/a	34	92	133

* 2007 figures not available from Eurostat; 2008 data provided by Spanish Statistical Authority used instead. Only percentages and not actual numbers were provided for international marriages and divorces. Percentages indicate international marriages/divorces as a proportion of all marriages/divorces.

**The 2012 data for incoming and outgoing return requests also includes access requests as these figures are not provided in broken-down form by Spanish authorities.

4.6.1.2. Available national data

The National Institute of Statistics (INE)¹ publishes annual statistics of marriages and divorces in Spain.

Its basic source of information are the birth, death and marriage bulletins that are completed at the time of the registration of demographic events in the Civil Register, and transmitted by those responsible for this to the Provincial Delegations of the INE. These operations are carried out in partnership with the statistical services of the Autonomous Communities, pursuant to the agreement signed with them for this purpose.

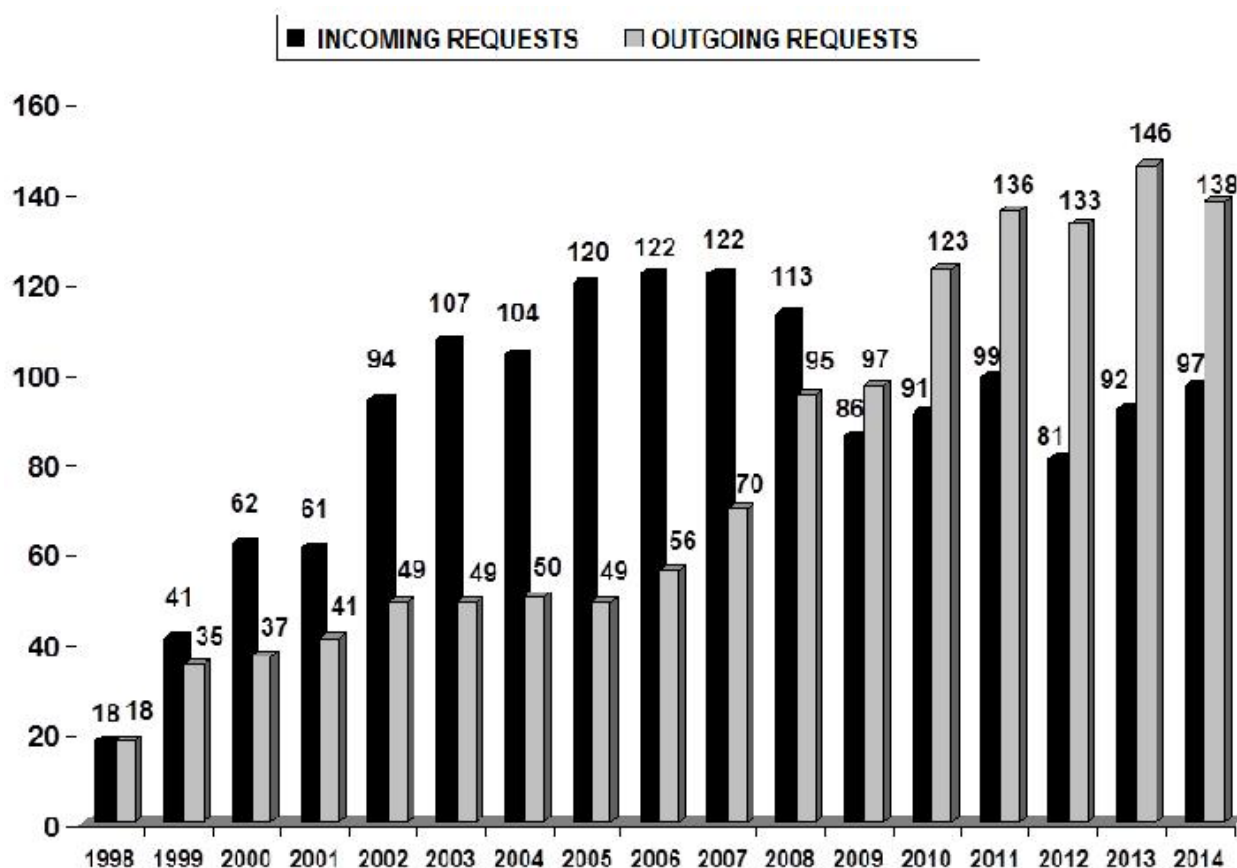
According to these data² 84.3% of all annulments, separations and divorces recorded in 2013 occurred between Spanish spouses, whereas in 10.3% of cases one of the former spouses was a foreigner and in 5.4% of cases both were foreigners. In 2008, 88.2% of the marriage dissolutions registered had occurred between spouses of Spanish nationality, while in 7.7% of the cases one spouse wasn't Spanish and in 3.8% of cases both spouses were foreigners. In light of the statistics of the whole period between 2008 and 2013 it is possible to describe a constant trend towards a slight increase of "international separations and divorces."³

For child abduction requests, the following graph was provided by the Spanish Central Authority. Note, however, that incoming and outgoing requests do not differentiate between access and return requests. Return requests alone are therefore likely to be smaller in number than that shown.

¹ Instituto Nacional de Estadística: <http://www.ine.es/en/welcome.shtml>.

² Statistics concerning international marriages are available at: <http://www.ine.es/jaxi/menu.do?type=pcaxis&file=pcaxis&path=%2Ft20%2Fe301%2Fmatri%2Fa2011> points 5.1-5.6; Statistics concerning dissolution of marriages in Spain, including international Marriages are available at the website <http://www.ine.es>, following the links to: INEbase/Sociedad/Seguridad y Justicia/Estadística de Nulidades, Separaciones y Divorcios where statistics are available for each year. Last available report concerns the year 2013 and it is available at: <http://www.ine.es/jaxi/menu.do?type=pcaxis&path=/t18/p420/p01/a2013/&file=pcaxis>. For previous periods, it is necessary to follow the link of each year.

³ <http://www.ine.es/prensa/np567.pdf>.



4.6.2. The national legal framework

The Spanish national laws implementing the Hague Convention on Child Abduction are the following:

4.6.2.1. Organic⁴ Law 1/1996⁵

Additional Provision 19⁶ modified the Spanish LEJ, to include provisions concerning cases where the restitution of an abducted child is subject to an international Treaty (art. 1901 LEJ).⁷

- Art. 1902 LEJ⁸ attributes competence to the court of first instance in whose judicial district the abducted minor is present. The procedure can be initiated by the person,

⁴ In Spain, an Organic Law has an intermediate status between that of an ordinary law and of the constitution itself. A special majority of the Congress of Deputies must pass it. The Spanish Constitution specifies which areas of law must be regulated through this procedure. Unless differently specified, English translations of Spanish rules are not official and were made only for the purpose of the present study.

⁵ Ley Orgánica 1/1996, de 15 de enero, de protección jurídica del menor, de modificación del Código Civil y de la Ley de Enjuiciamiento Civil, available at http://noticias.juridicas.com/base_datos/Privado/lo1-1996.t2.html#a12.

⁶ LEJ, Disp. Ad. 19: «La Ley de Enjuiciamiento Civil quedará modificada en el siguiente sentido [...] 2. La Sección Segunda del Título IV del Libro III, se denominará «Medidas relativas al retorno de menores en los supuestos de sustracción internacional» y comprenderá los artículos 1.901 a 1.909, ambos inclusive, con el siguiente contenido [...]».

⁷ Art. 1.901 LEJ: «En los supuestos en que, siendo aplicable un convenio internacional, se pretenda la restitución de un menor que hubiera sido objeto de un traslado o retención ilícita, se procederá de acuerdo con lo previsto en esta Sección».

institution or body having custody rights over the child, by the Spanish Central Authority responsible for the fulfilment of the obligations imposed by the corresponding Convention or by the person designated by such Authority. The same provision provides for the intervention of the Attorney General's office (Ministerio fiscal) in the procedures. The procedure is treated with priority (de carácter preferente) and should be concluded within a period of 6 weeks from the date on which the return of the child has been judicially requested.

- Art. 1903 LEJ⁹ allows the court to adopt provisional custody measures, as well as any other measure aimed at protecting the abducted child.
- Once the procedure is initiated, the judge issues an order, within twenty-four hours, requiring the person who has abducted or retains the child to appear in court within a period of three days, and state:
 - a) if s/he voluntarily agrees to return the child to the person, institution or agency that has legal custody; or,
 - b) if s/he opposes restitution on the basis of one of the grounds provided for by the Hague Convention on Child Abduction (art. 1904 LEJ).¹⁰
- If the abductor does not appear in court, the judge will, within 5 days, conduct an ex parte procedure and notify the interested persons and the Attorney General's office. He may also adopt any necessary provisional measures. At the hearing, the applicant and the Attorney General's office shall be heard (and if pertinent, the abducted child shall be heard separately). The judge then issues a decision within 2 days stating whether or not the child should be returned, taking into account the interest of the child and the Convention (art. 1905 LEJ).¹¹
- Articles 1907 – 1909 LEJ¹² deal with cases of the abductor opposing the restitution of the child on the basis of the provisions of the Convention, establishing a procedure in which

⁸ Art. 1.902 LEJ: «Será competente el Juez de Primera Instancia en cuya demarcación judicial se halle el menor que ha sido objeto de un traslado o retención ilícitos.

Podrá promover el procedimiento la persona, institución u organismo que tenga atribuido el derecho de custodia del menor, la autoridad central española encargada del cumplimiento de las obligaciones impuestas por el correspondiente convenio y, en representación de ésta, la persona que designe dicha autoridad.

Las actuaciones se practicarán con intervención del Ministerio Fiscal y los interesados podrán actuar bajo la dirección de Abogado.

La tramitación del procedimiento tendrá carácter preferente y deberá realizarse en el plazo de seis semanas desde la fecha en que se hubiere solicitado ante el Juez la restitución del menor».

⁹ Art. 1.903 LEJ: «A petición de quien promueva el procedimiento o del Ministerio Fiscal, el Juez podrá adoptar la medida provisional de custodia del menor prevista en la Sección siguiente de esta Ley y cualquier otra medida de aseguramiento que estime pertinente».

¹⁰ Art. 1.904 LEJ: «Promovido el expediente mediante la solicitud a la que se acompañará la documentación requerida por el correspondiente convenio internacional, el Juez dictará, en el plazo de veinticuatro horas, resolución en la que se requerirá a la persona que ha sustraído o retiene al menor, con los apercibimientos legales, para que en la fecha que se determine, que no podrá exceder de los tres días siguientes, comparezca en el juzgado con el menor y manifieste:

a) Si accede voluntariamente a la restitución del menor a la persona, institución y organismo que es titular del derecho de custodia; o, en otro caso,

b) Si se opone a la restitución por existir alguna de las causas establecidas en el correspondiente convenio cuyo texto se acompañará al requerimiento».

¹¹ Art. 1.905 LEJ: «Si no compareciese el requerido, el Juez dispondrá a continuación del procedimiento de su rebeldía citando a los interesados y al Ministerio Fiscal a una comparecencia que tendrá lugar en plazo no superior a los cinco días siguientes y decretará las medidas provisionales que juzgue pertinentes en relación con el menor.

En la comparecencia se oír al solicitante y al Ministerio Fiscal y en su caso y separadamente, al menor sobre su restitución. El Juez resolverá por auto dentro de los dos días siguientes a contar desde la fecha de la comparecencia, si procede o no la restitución, teniendo en cuenta el interés del menor y los términos del correspondiente convenio».

¹² Art. 1.907 LEJ: «Si en la primera comparecencia el requerido formulase oposición a la restitución del menor, al amparo de las causas establecidas en el correspondiente convenio, no será de aplicación lo dispuesto en el artículo 1.817 de esta Ley, ventilándose la oposición ante el mismo Juez por los trámites del juicio verbal. A este fin: a) En el mismo acto de comparecencia serán citados todos los interesados y el

the interested parties and the Attorney General's office are called to appear and, where appropriate, evidence is presented. If pertinent, the abducted child shall be heard (separately). Subsequently, a decision must be issued within 3 days, taking into account the interest of the child.

4.6.2.2. Spanish CC¹³

Art. 158.3 Spanish CC¹⁴ provides that, at the request of the child, of a member of his family or of the Attorney General's office, the judge shall order the necessary measures to prevent abductions by one of the parents or by third parties. Within this framework, the court can order:

- (a) a prohibition to leave the Spanish territory without prior judicial authorization,
- (b) a prohibition to issue a Passport to the minor, or the withdrawal of an issued passport,
- (c) that any change of address of the minor be subject to prior judicial authorization.

4.6.3. Characterisation of parental child abduction: civil and criminal aspects

Parental abduction occurs when the child is illicitly removed from his place of residence by one of the parents.¹⁵ When both parents exercise joint parental authority over a child, neither of the parents (even if s/he has been granted physical custody of the child) can remove the child to another country without the consent of the other parent.¹⁶ Where such

Ministerio Fiscal, para que expongan lo que estimen procedente y, en su caso, se practiquen las pruebas, en ulterior comparecencia, que se celebrará de conformidad con lo dispuesto en el artículo 730 y concordantes de esta Ley dentro del plazo improrrogable de los cinco días a contar desde la primera.

b) Asimismo, tras la primera comparecencia el Juez oír, en su caso, separadamente al menor sobre su restitución y podrá recabar los informes que estime pertinentes.

Art. 1.908 LEJ: «Celebrada la comparecencia y, en su caso, practicadas las pruebas pertinentes dentro de los seis días posteriores, el Juez dictará auto dentro de los tres días siguientes, resolviendo, en interés del menor y en los términos del convenio, si procede o no su restitución. Contra dicho auto sólo cabrá recurso de apelación en un solo efecto, que deberá resolverse en el improrrogable plazo de veinte días».

Artículo 1.909 LEJ: «Si el Juez resolviese la restitución del menor, en el auto se establecerá que la persona que trasladó o retuvo al menor abone las costas del procedimiento así como los gastos en que haya incurrido el solicitante, incluidos los del viaje y los que ocasione la restitución del menor al Estado de su residencia habitual con anterioridad a la sustracción, que se harán efectivos por los trámites previstos en el artículo 928 y concordantes de esta Ley. En los demás supuestos, se declararán de oficio las costas del procedimiento.»

¹³ Código Civil español, available at http://noticias.juridicas.com/base_datos/Privado/cc.l1t7.html#a158 (08.01.13).

¹⁴ Art. 158 SCC: «El Juez, de oficio o a instancia del propio hijo, de cualquier pariente o del Ministerio Fiscal, dictará [...] 3.º Las medidas necesarias para evitar la sustracción de los hijos menores por alguno de los progenitores o por terceras personas y, en particular, las siguientes:

a) Prohibición de salida del territorio nacional, salvo autorización judicial previa.

b) Prohibición de expedición del pasaporte al menor o retirada del mismo si ya se hubiere expedido.

c) Sometimiento a autorización judicial previa de cualquier cambio de domicilio del menor».

¹⁵ A. Caravaca & J. González, *Derecho internacional privado*, Vol. II, 13th. Ed., Granada 2012, p. 433.

¹⁶ SCC Art. 156: « La patria potestad se ejercerá conjuntamente por ambos progenitores o por uno solo con el consentimiento expreso o tácito del otro. Serán válidos los actos que realice uno de ellos conforme al uso social y a las circunstancias o en situaciones de urgente necesidad.

En caso de desacuerdo, cualquiera de los dos podrán acudir al Juez, quien, después de oír a ambos y al hijo si tuviera suficiente juicio y, en todo caso, si fuera mayor de doce años, atribuirá sin ulterior recurso la facultad de decidir al padre o a la madre. Si los desacuerdos fueran reiterados o concurren cualquier otra causa que entorpezca gravemente el ejercicio de la patria potestad, podrá atribuir la total o parcialmente a uno de los padres o distribuir entre ellos sus funciones. Esta medida tendrá vigencia durante el plazo que se fije, que no podrá nunca exceder de dos años.

En los supuestos de los párrafos anteriores, respecto de terceros de buena fe, se presumirá que cada uno de los progenitores actúa en el ejercicio ordinario de la patria potestad con el consentimiento del otro.

En defecto o por ausencia, incapacidad o imposibilidad de uno de los padres, la patria potestad será ejercida exclusivamente por el otro.

Si los padres viven separados, la patria potestad se ejercerá por aquel con quien el hijo conviva. Sin embargo, el Juez, a solicitud fundada del otro progenitor, podrá, en interés del hijo, atribuir al solicitante la

consent has not been given, only the judge can allow the relocation.¹⁷ In such cases, the judge will prescribe the conditions necessary to preserve the exercise of parental authority by the other parent in matters such as visitation rights, child support, education, health etc.¹⁸ In a decision of 2012,¹⁹ the Spanish Supreme Court stressed that both parents (i.e.; the parent having custody of the child, and the parent who does not have custody), must actively participate in the decision-making process in the interest of the child, because this is part of their responsibilities as common holders of parental authority.

In a decision of 2011,²⁰ the Provincial Court of La Coruña stated that unless one parent is legally authorized to decide unilaterally on the place of residence of the child, custody of a child should be considered as belonging jointly to both parents. The court (referring to EU Regulation 2201/2003), defined as abduction the taking of a child from one member State to another without the consent of the other parent.

Another case of illegal abduction occurs when only one parent has custody and the non-custodial parent takes advantage of his right of access to take the child to another country.²¹

When a parent who has obtained custody on the condition that the child not leave Spain without the permission of the court or the consent of the other parent, takes the child unilaterally to another country, such taking constitutes illegal abduction.²²

An interesting case, decided in 2013 by the Provincial Court of Madrid,²³ shows the correlation between civil and criminal actions related to child abduction. In that case, the

patria potestad para que la ejerza conjuntamente con el otro progenitor o distribuir entre el padre y la madre las funciones inherentes a su ejercicio».

¹⁷ J. Miranda, Spain, *International Child Protection, The Judges' Newsletter, Special Edition No 1, Publication of the Hague Conference on Private International Law, 2010*, p. 46; A. Martínez, *La determinación del lugar de residencia del menor como conflicto en el ejercicio conjunto de la patria potestad por progenitores no convivientes*. (Westlaw legal database for Spain, Section of bibliography) 2012\3483: "The parent having the custody of the child who wishes to move to another place due to work, family or other reasons, can request an authorization from the court when the other [parent] opposes [...] the judge will decide to which one of the parents he will attribute the power of decision in the concrete situation, after hearing the position of both of them and the opinion of the minor, if he/she is older than 12 year old or even less, but has sufficient maturity, of course with the intervention of the General Attorney" (« El progenitor custodio que proyecta trasladarse a otro lugar, por razones laborales, de arraigo familiar o de otra índole, puede plantear judicialmente que se le autorice para ello, al oponerse el otro, siendo, a nuestro juicio, cauce procesal adecuado para ello el previsto en el art. 156 CC. Así, en un procedimiento de jurisdicción voluntaria, el Juez decidirá a cuál de los progenitores atribuye la decisión en el caso concreto, oídas las posiciones de ambos y la opinión del menor, si tuviera más de doce años o menos, pero madurez suficiente, por supuesto con intervención del Ministerio Fiscal»).

¹⁸ J. Miranda, *op.cit.*

¹⁹ Tribunal Supremo Sentencia de 26 octubre 2012 (RJ 2012, 9730), HC/E/ES 1199.

²⁰ Audiencia Provincial de La Coruña (Sección 5ª) Sentencia num. 80/2011 de 25 febrero JUR\2011\169933: "When a minor is illicitly transferred from one to another Member State, the Regulation provides that the courts of the Member State of origin – the State where the minor resided before the abduction or the transfer – shall continue being competent in order to decide on the custody, despite the abduction. It is important to underline that according to EU Regulation 2201/2003 the custody shall be deemed to be exercised jointly whenever one of the parents having the parental authority cannot decide the place of residence of the minor without the consent of the other. As a consequence of this, the transfer of a minor from one member State to another Member State without the consent of the pertinent person is an abduction of minor in the terms of the regulation" («Cuando un menor sea trasladado ilícitamente de un estado miembro a otro estado miembro, el Reglamento establece que los órganos judiciales del Estado miembro de origen -Estado en el que residía el menor inmediatamente antes de la sustracción o traslado- sigan siendo competentes para decidir sobre la custodia a pesar de la sustracción. Es importante señalar que de conformidad con el Reglamento 2201/2003 [EU Regulation 2201/2003] se debe considerar que la custodia es ejercida de manera conjunta cuando uno de los titulares de la responsabilidad parental no puede decidir sin el consentimiento del otro titular, sobre el lugar de residencia del menor. Como consecuencia de ello, el traslado de un menor de un Estado miembro a otro sin el consentimiento de la persona pertinente es una sustracción de menores de conformidad con el Reglamento»).

²¹ A. Caravaca & J. González, *Derecho internacional privado*, *op. cit.*, p. 435.

²² A. Caravaca & J. González, *Derecho internacional privado*, *op. cit.*, p. 435.

²³ Audiencia Provincial de Madrid (Sección 1ª) Auto num. 645/2012 de 13 septiembre ARP\2012\961. In the same sense Audiencia Provincial de Madrid (Sección 17ª) Auto num. 819/2010 de 21 julio JUR\2010\336307.

Court was called upon to decide the case in the context of criminal law. The case concerned a divorced woman having custody of her child, who moved her domicile (and the domicile of the child) abroad without obtaining the agreement of the father. As a consequence, the father was prevented from exercising his rights of access, as they were fixed by the Court. The Court emphasized that, under the International instruments ratified by Spain, it would have been possible, in principle, to punish the unauthorized removal of a child by the custodial parent thereby depriving the noncustodial parent of his or her rights of access. However, the court said, Spain did not adopt such approach, preferring a more restrictive position. Indeed, art. 225 bis of Spain's Criminal Code defines unlawful parental child abduction as follows:

"Article 225 bis

1. A parent who, without a justified cause, abducts his child who is a minor, shall be punished with a sentence of imprisonment of two to four years and special barring from exercise of parental rights for a term from four to ten years.
2. For the purposes of this Article, abduction is deemed to be:
 - Transporting a child from his place of residence without consent by the custodial parent or the persons or institutions to whom his safekeeping or custody is entrusted;
 - Detention of the minor in serious breach of the duty established by a judicial or administrative order.
3. When the minor is transported out of Spain or any condition is demanded for his return, the punishment stated in Section 1 shall be imposed in its upper half.
 - When the abductor has notified the other parent, or person legally charged with his care, of the place where he is staying, within twenty- four hours of the abduction, with the commitment to immediately return the child that is effectively carried out, or when the absence does not exceed the term of twenty-four hours, he shall be exempt of punishment. Should the child be returned, without the notification stated in the preceding Section, within fifteen days following the abduction, a sentence of imprisonment of six months to two years shall be imposed. These terms shall be calculated from the date of the abduction being reported.
 - The penalties stated in this Article shall also be imposed on the ascendants of the minor and the relatives of the parent up to the second degree of consanguinity or affinity who act as described above".²⁴

In this sense, an abduction presupposes one of the following situations: one of the parents (or, following a judicial or administrative decision, a third person or an institution) has custody of a child, and the other parent removes the child from his/her place of residence concealing the place to which the child has been transferred; or, taking advantage of the opportunity to have the right of access, the non-custodial parent does not return the child, thereby revealing "his or her intention to make final what was supposed to be merely temporary"²⁵. In the specific case, the court did not find the woman criminally liable, because she was entrusted with the guardianship of the child, and a violation of the right of access is not punishable under this provision. Therefore, the court said, if the father wishes to pursue the acts of the mother he should do so in a civil, rather than a criminal, procedure:

"This situation does not exist in the present case, because the claimant (denunciante) does not have guardianship and custody and, due to the acts of the other parent, he is only deprived of the normal exercise of his

²⁴ Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, art. 225 bis (English translation by the Spanish Ministry of Justice available at <http://www.sanchezcervera-abogados.com/en/2012/06/25/the-ministry-of-justice-publishes-a-translation-into-english-of-the-spanish-criminal-code/>).

²⁵ Audiencia Provincial de Madrid (Sección 1ª) Auto num. 645/2012 de 13 septiembre, op. cit. Sec. 1 in fine.

rights of access. Faced with this situation, the claimant lacks criminal protection and in order to settle the conflict in which he finds himself he should apply to the mechanisms provided by civil law".²⁶

A controversial question concerns the dies a quo for the running of the statute of limitations (prescripción) in cases of long-term abductions. The question concerns the possibility for the parent deprived of contact with the child to claim damages against the other parent (see discussion below). In 2009, the Supreme Court²⁷ dealt with such a question and decided that, in such cases, the abduction gives rise to continuous damage (daño continuado); damages accrue from the date of the abduction to the date of expiration of the rights and duties related to guardianship and custody over the child or his/her restitution (if earlier). In this case, the child was born on the 13.8.84 and attained legal majority on 23.8.2002. An action for damages can be brought up to one year after the child attains legal majority. The damage is not only the kidnapping itself, but also the fact that the non-custodial parent was further prevented from having a relationship with his son, namely by means of visit arrangements. Thus, the statute of limitations cannot begin to run on the day of the abduction because damages continue to accrue until the child reaches legal majority. Therefore, the total amount of damages is unknown on the date of the abduction.

In another field, a member of the Spanish Central Authority described cases where one or both parents attempted to benefit from an abusive application of the Hague Convention on Child Abduction, for example, in order to benefit from residence permits in Spain. In one of these cases (concerning Spain and Colombia), a claimant-mother requested a humanitarian visa to travel to Spain. Once in Spain, she manifested before a court her intention to stay. The judge informed the Ministry of Justice in order to take the pertinent measures²⁸. In another case, the father-claimant requested the return of his minor child to Argentina from where he was abducted. It was demonstrated that the reason for the trip to Spain was the need to submit the child to a medical intervention, to which the father had consented. Once in Spain, both parties appeared before a court and reached an agreement granting custody to the mother and a right of access to the father, who argued for his right to reside in Spain²⁹.

4.6.4. Regional instruments regulating mediation

Spain is a State divided in Autonomous Communities (Comunidades Autónomas). On the basis of articles 148.1 and 149 of the Spanish Constitution³⁰, some Autonomous communities are empowered to regulate areas of civil and family law. Whenever there are regional norms regulating a field of law, the State's general civil law applies only as an alternative³¹.

²⁶ Audiencia Provincial de Madrid (Sección 1ª) Auto num. 645/2012, op. cit.: « Esta situación de hecho no concurre en el presente caso por cuanto el denunciante no tiene la guarda y custodia y, merced a la conducta del otro progenitor, sólo se ve privado del normal ejercicio de su derecho de visitas. Frente a tal situación el ahora denunciante carece de protección penal y para solventar el conflicto a que se enfrenta deberá acudir a los mecanismos que arbitra la jurisdicción civil », in doctrine: María José Pizarro Maqueda, No incurre en sustracción de menores el progenitor custodio que traslada su domicilio al extranjero sin conocimiento del otro. [Revista Aranzadi Doctrinal num. 8/2012](#), BIB 2012\3420.

²⁷ Sentencia del Tribunal Supremo de 30.6.2009, available at http://www.icam.es/docs/ficheros/200910050004_6_0.pdf.

²⁸ Case H 28 (1649), in C. Revuelta, Aplicación Práctica Del Convenio de La Haya Y el Reglamento 2201/2003 (EU Regulation 2201/2003). El papel de la Autoridad Central, available at http://www5.poderjudicial.es/CVsm/Ponencia_6_ES.pdf.

²⁹ Caso H 28 (1627), in C. Revuelta, op. cit.

³⁰ Constitución Española, 1978 available at http://noticias.juridicas.com/base_datos/Admin/constitucion.t8.html#c3.

³¹ For example in the Foral Code of the Autonomous Community of Aragon (Código del Derecho foral de Aragón), art. 1.2 states: "The general Civil Law of the State shall apply with subsidiarily only in the absence

In Spain, family mediation is regulated by almost all the Autonomous Communities, for example:

- Castilla-La Mancha

Law 4/2005³² created the Social Service specialized in family mediation.

Art. 5 to this law³³ provides for "international family mediation". Article 5, paragraph 2 states that the initiation of a procedure of international family mediation shall not prevent the adoption and application of judicial measures aimed at bringing an abducted child back, pursuant to the terms of the Hague Convention of 1980 and the other conventions ratified by Spain.

- Cataluña

Law 25/2010, Second Book of the Civil Code of Cataluña,³⁴ concerning persons and family status, provides, in article 236-13, for family mediation in cases of reiterated disputes that may seriously complicate the common exercise of parental authority.

In other regions, specific laws on family mediation do not mention specifically international abduction, but could be applied to such cases.

It is not easy to find references to specific cases that have been resolved through family mediation but, according to one judge, this practice has proven to be effective to resolve some of these disputes.³⁵ The judge illustrates this with a case, in which the spouses married in Cyprus on 2001, and became USA residents in 2003. The husband was born in Cyprus and held USA citizenship and the wife was Spanish. The couple had twins and, eventually, the mother abducted them to Spain. Until that moment, the family had had a normal life and no separation or divorce proceedings were pending. In Spain, the mother requested a court in Barcelona to adopt interim measures without hearing the father. In the meantime, the father filed suit in the competent court in the USA (Alabama) requesting the restitution of the twins. The father then filed a request for restitution with the Central

of Aragonian norms" ("El Derecho civil general del Estado se aplicará como supletorio sólo en defecto de normas aragonesas y de acuerdo con los principios que las informan") Decreto Legislativo 1/2011, de 22 de marzo. LARG 2011\118 Intervención judicial, available at http://noticias.juridicas.com/base_datos/CCAA/ar-dleg1-2011.html.

³² Servicio Social Especializado de Mediación Familiar de Castilla-La Mancha, Ley 4/2005, de 24 de mayo. LCLM 2005\161.

³³ Ley 4/2005, Art 5. Mediación familiar internacional. « 1. La mediación familiar internacional, entendiéndose por tal aquella que presenta un elemento personal de extranjería, se rige por las prescripciones de esta Ley.

2. La iniciación de un procedimiento de mediación familiar internacional no impedirá la adopción y aplicación de las medidas judiciales oportunas tendentes al retorno del menor indebidamente desplazado o retenido, en los términos previstos por el Convenio de La Haya de 25 de octubre de 1980 sobre los aspectos civiles de la sustracción internacional de menores, así como en los restantes convenios internacionales ratificados por España y en las normas estatales sobre esta materia».

³⁴ Ley 25/2010, de 29 de julio, del libro segundo del Código civil de Cataluña, relativo a la persona y la familia - (BOE núm. 203, de 21-08-2010, pp-. 73429-73525; publicada en el DOGC núm. 5686, de 5-08-2010), available at <http://civil.udg.es/normacivil/cat/ccc/ES/L25-2010.htm#T03C01>, Artículo 236-13. Desacuerdos.

«1. En caso de desacuerdo ocasional en el ejercicio de la potestad parental, la autoridad judicial, a instancia de cualquiera de los progenitores, debe atribuir la facultad de decidir a uno de ellos.

2. Si los desacuerdos son reiterados o se produce cualquier causa que dificulte gravemente el ejercicio conjunto de la potestad parental, la autoridad judicial puede atribuir total o parcialmente el ejercicio de la potestad a los progenitores separadamente o distribuir entre ellos sus funciones de modo temporal, por un plazo máximo de dos años.

3. En los procedimientos que se substancien por razón de desacuerdos en el ejercicio de la potestad parental, los progenitores pueden someter las discrepancias a mediación. Asimismo, la autoridad judicial puede remitirlos a una sesión informativa con la misma finalidad ».

³⁵ I. García, Mediación en sustracción de menores, available at http://www5.poderjudicial.es/CVsm/Ponencia_3_ES.pdf (09.01.14).

Authority in the USA on the basis of the Hague Convention on Child Abduction. After negotiations, two mediators were appointed (one attorney-mediator and one psychologist-mediator). Initially, it was proposed that the sessions be held by video-conference, but finally the father came to Spain. During the meetings, the mediators told the parties that their role was not to judge the case, but to try to assist the parties in reaching an amicable solution. After several meetings, the parties reached an agreement granting custody to the mother and a right of access to the father. The agreement was then jointly brought for confirmation before the court.

The same judge also mentioned another case that was pending before her court, in which a Spanish mother abducted her children from Switzerland to Spain, after divorce proceedings were commenced in Switzerland. The parties agreed to mediation and, at the date of her report, the judge was waiting for the reaction of the Attorney General's office.

4.6.5. Existing criminal sanctions

Article 225 bis of the Spanish criminal Code punishes the abduction of children by a parent who, without just cause, abducts his/her minor child, by imprisonment for 2 to 4 years, and by a special prohibition on the exercise of parental rights for a term from 4 to 10 years.³⁶

Some authors³⁷ submit that in many cases, the application of such punitive measures to the abducting parent may have a negative effect on the child, namely on his personality and development. Such negative impact would be even stronger if the abducting parent is imprisoned in the State where the child was abducted, and the child is sent back to his state of residence. Other authors³⁸ state that a criminal conviction of the abducting parent in Spain may be useless because it will not be executed abroad. Furthermore, since in many cases the abducting parent is a national of the foreign state to which the child is abducted, the possibility of obtaining his/her extradition to Spain are slim in light of the fact that some states do not extradite their own nationals.

4.6.6. Compensation for the parent left behind

An interesting question is whether and in which cases an abducting parent can be held responsible and therefore obliged to indemnify the other parent.

On 30.6.09,³⁹ the Spanish Supreme Court issued a decision recognizing the possibility of awarding damages to a parent who was deliberately prevented by the other parent from exercising the right of guardianship and custody. In that case, the mother took the child from Spain to the USA and did not return. The father filed a claim in Spain and was granted guardianship and custody of the child because there were suspicions that the child's cohabitation with the mother (who was member of a religious or sectarian movement) would affect the child's personality. The court of appeal stated that the mother unilaterally prevented the father from exercising his rights and duties over the child, the father having been excluded from all decisions concerning the education of his son. Furthermore, the court stressed, the mother ignored the decision attributing guardianship to the father. The

³⁶ Supra, at 4.3.1.

³⁷ C. Beilfuss & M. Michel, *Sustracción internacional de menores y responsabilidad civil (comentario a la sentencia del Tribunal Supremo de 30.6.2009)*, Revista Jurídica de Catalunya num. 3/2010 parte Estudis, Barcelona, 2010 p. 187 (823).

³⁸ A. Caravaca & J. González, *Sustracción internacional de menores: una visión general*, p. 152, available at <http://ifc.dpz.es/recursos/publicaciones/31/41/10calvocarrascosa.pdf> (02.01.14).

³⁹ Sentencia del Tribunal Supremo de 30.6.2009, op. cit.

father introduced a claim for civil liability under art. 1902 SCC⁴⁰ against the mother, claiming reparation for the damages suffered as a consequence of the abduction.

The court examined the elements that must be present for such a claim to succeed, namely:

- a. An action or omission committed voluntarily or with negligence. This element was present, because the mother abducted the child preventing him from having a relationship with his father, in violation of art. 160 SCC⁴¹. Furthermore, the mother did not comply with the decisions of the Spanish court (decisions of which she was aware, because she even filed appeals in Spain). Therefore, the court stated that the mother deliberately committed the acts that deprived the father from exercising his legal rights and duties with respect to the child.
- b. Damage caused to the claimant. Such damage is not only the impossibility of exercising parental rights and duties, but also the father's impossibility of having and developing a personal relationship with his child. The Court concluded that these types of damage are independent from the possibility of charging the mother for criminal liability for non-compliance with the courts' decisions.
- c. The element of causation. The court stated that there is no doubt that the mother caused the damage by abducting the child.

Therefore, the court stated, the mother is liable for the moral damage caused to the father by the abduction.

The last question dealt with by the court was the quantum of the damages to be awarded to the father. The Court stated that it is very difficult to quantify moral damages in such cases, especially because, in the present case, the father had not alleged any material damage. For that reason, the court ordered the mother to pay the father the amount of 60.000 €, taking into account that the damage is irreversible.⁴²

An interesting doctrinal approach⁴³ proposes that a bad application of the international instruments regulating child abduction that bind the State may cause the responsibility of the latter. Such responsibility could be based on the absence of action or on deficient action by the State's authorities, whenever the return of an abducted child is requested. A State's liability can also be the consequence of a lack of adequate legal means of guaranteeing the right of one parent to have a relationship with his child.

In this context, it has also been suggested that the lack of such means is a violation of the European Convention of Human Rights.⁴⁴

⁴⁰ SCC art. 1.902: «The person who, as a result of an action or omission, causes damage to another by his fault or negligence shall be obliged to repair the damaged caused».

⁴¹ SCC, art. 160: «The parents, even if they do not exercise parental authority, are entitled to a relationship with their underage children, except with those adopted by another, in accordance with the provisions of the judicial resolution.

Personal relationships between the child and his grandparents and other relatives and close friends may not be prevented without just cause.

In the event of opposition, the Judge, at the request of the minor, his grandparents, relatives or close friends, shall decide, in accordance with the circumstances of the specific case. He must especially ensure that the measures which may be ordered to favour relations between grandparents and grandchildren do not enable the infringement of judicial resolutions restricting or suspending relations between the minors and one of the parents».

⁴² Sentencia del Tribunal Supremo de 30.6.2009, op. cit.: «En este caso, el daño moral resulta absolutamente indeterminado al carecer de parámetros objetivos, y más teniendo en cuenta que el padre no ha reclamado los daños materiales que le puedan haber ocasionado los distintos procedimientos iniciados durante los años siguientes a la desaparición del hijo menor. Por ello se considera adecuada la cantidad de 60.000€, teniendo en cuenta, además, que el daño es irreversible».

⁴³ C. Beilfuss & M. Michel, op. cit., p. 193 (831).

⁴⁴ C. Beilfuss & M. Michel, op. cit., p. 193 (831).

4.6.7. Judicial, administrative and other authorities competent for child abduction cases

The Spanish Central Authority for the purpose of the Hague Convention on child abduction is the Ministry of Justice, through the General Direction of International Legal Cooperation (Dirección General de Cooperación Jurídica Internacional)⁴⁵. Under this organ there are two vice-directions: the Vice-direction for Legal Affairs in the EU and International Organizations, and the Vice-direction for International Legal Cooperation (the latter is in charge of the application of EU Regulation 2201/2003).⁴⁶

When a decision to return an abducted child is issued by a Spanish court, the Central Authority may request execution of the decision through the General Attorney's office (the decisions are not self-executing) and may act as a party in that procedure.⁴⁷

At the national level, art. 158 SCC authorizes the Spanish courts (upon request of the Attorney General's office or even ex officio) to adopt:

- Suitable measures to ensure the provision of support, and to provide for the future needs of the child by his parents, in the event of breach of such duty;
- Adequate provisions to prevent harmful disturbance to the children in cases of change of custody;
- Necessary measures to prevent the abduction of underage children by one of the parents or by third parties and, in particular:
 - a) Prohibition to leave the national territory, unless there is a judicial authorization;
 - b) Prohibition to issue a passport to the minor; or removal of a passport, if one has been issued;
 - c) Submission of any change of domicile of the minor to judicial authorization;
- In general, any other provision deemed pertinent in order to remove the minor from danger or to prevent him from suffering damages.

Spain does not provide for a system of "concentrated competence" in favour of one single court for international abduction matters. Indeed, art. 1902 LEJ states that the competence for these cases lies with the court of first instance of the judicial district where the abducted child resides. This being the case, there are several hundred courts that could be seized with cases of abduction. The doctrine indicates that such situation hinders the possibility of having one single instance with long-term experience in these types of cases.⁴⁸ Thus, the Central Authority would prefer to concentrate the competence in a short number of courts.⁴⁹

At the non-judicial level, the Attorney General's office is the authority responsible for guaranteeing the enforcement of rules in general and in particular in the field of the rights of children.⁵⁰

The Organic Statute of the Attorney General's office⁵¹ provides, in art. 3, para 3, para 6 and para 7 that the tasks of this body include, inter alia:

⁴⁵ A. Caravaca & J. González, *Derecho internacional privado*, op. cit., p. 436.

⁴⁶ B. Fernández, *Protección jurisdiccional de los hijos en los casos de ruptura de los matrimonios mixtos. Especial consideración de la regulación adoptada en el Espacio Europeo de Libertad, Seguridad y Justicia*, *Revista de Estudios Europeos*, n.º 55 Jul./Dic. 2010, 124. In the framework of the Ministry of social affairs, there exist a General Director of Children and Family, entrusted, inter alia, with the task of the technical cooperation with the other public administrations in these matters: Real Decreto 2309/1994, de 2 de diciembre. RCL 1994\3353, art. 3. Dirección General de Protección Jurídica del Menor. Modifica su denominación y determina sus competencias.

⁴⁷ C. Revuelta, op. cit.

⁴⁸ C. Revuelta, op. cit.

⁴⁹ C. Revuelta, op. cit.

⁵⁰ C. Beilfuss & M. Michel, op. cit., p. 193 (829).

- The duty to oversee the respect of fundamental rights and public liberties,
- The task of acting whenever it is necessary, and to intervene in civil proceedings – as the law may provide – whenever the social interest is compromised or when minors may be affected;
- the task of participating, defending the legality and the public or social interest, in procedures related to civil status.

Similar provisions exist at the regional level. The basic competence belongs to the Attorney General and, at the regional level, it is exercised through Chief Regional Attorneys⁵².

The Regional Code of the Autonomous Community of Aragon, for instance, provides, in art 10,⁵³ that the court (ex officio or at the request, inter alia, of the Attorney General's office), shall dictate the necessary measures in order to prevent the abduction of a child by one of the parents or third persons and, in general, any measure aimed at protecting the child from danger. Similar provisions appear in Art. 79 of the same Code.⁵⁴

⁵¹ Ley 50/1981, de 30 de diciembre. RCL 1982\66, disponible sous http://noticias.juridicas.com/base_datos/Admin/l50-1981.html (10.01.14), Art. 3: «Para el cumplimiento de las misiones establecidas en el artículo 1, corresponde al Ministerio Fiscal: [...] 3. Velar por el respeto de las instituciones constitucionales y de los derechos fundamentales y libertades públicas con cuantas actuaciones exija su defensa [...] 6. Tomar parte, en defensa de la legalidad y del interés público o social, en los procesos relativos al estado civil y en los demás que establezca la ley [...] 7. Intervenir en los procesos civiles que determine la ley cuando esté comprometido el interés social o cuando puedan afectar a personas menores, incapaces o desvalidas en tanto se provee de los mecanismos ordinarios de representación».

⁵² The Prosecution Service. Organic Statute ACT 24/2007, of October 9th, to amend the Act 50/1981, of December 30th, on the Organic Statute of the Prosecution Service (translation by the Ministry of justice), art. 11: "One. When regional governments ask the Prosecution service to institute action in defence of the public interest within their scope of competence, they will address their request to the Chief Regional Prosecutor, notifying the Ministry of Justice thereof. The regional Prosecutor will in turn advise the general Prosecutor who, after consulting the board of high Prosecutors, will resolve accordingly, honouring the principle of legality at all times. Irrespective of the decision adopted, notice thereof will be served upon the body lodging the request", available at http://www.fiscal.es/Documentos/Normativa-b%C3%A1sica-del-Ministerio-Fiscal.html?cid=1242052721188&pagename=PFiscal%2FPage%2FFGE_pintarDocumentos (26.02.14).

⁵³ Código del Derecho Foral de Aragón, op. cit., Art 10: « En cualquier procedimiento, el Juez, de oficio o a instancia del propio menor, de cualquier pariente o persona interesada, o del Ministerio Fiscal, dictará:

- a) Las medidas convenientes para asegurar la prestación de alimentos y proveer a las futuras necesidades del menor, en caso de incumplimiento de este deber por sus guardadores.
- b) Las disposiciones apropiadas a fin de evitar al menor perturbaciones dañosas en los casos de cambio de titular de la potestad de guarda.
- c) Las medidas necesarias para evitar la sustracción del menor por alguno de los progenitores o por terceras personas.
- d) En general, las demás disposiciones que considere oportunas, a fin de apartar al menor de un peligro o de evitarle perjuicios».

⁵⁴ Código del Derecho Foral de Aragón, Art. 79: « Medidas judiciales: 1. A falta de pacto entre los padres, el Juez determinará las medidas que deberán regir las relaciones familiares tras la ruptura de su convivencia, teniendo en cuenta los criterios que se establecen en los artículos siguientes.

2. El Juez, de oficio o a instancia de los hijos menores de edad, de cualquier pariente o persona interesada o del Ministerio Fiscal, dictará las medidas necesarias a fin de:

- a) Garantizar la continuidad y la efectividad del mantenimiento de los vínculos de los hijos menores con cada uno de sus progenitores, así como de la relación con sus hermanos, abuelos y otros parientes y personas allegadas.
- b) Evitar la sustracción de los hijos menores por alguno de los progenitores o por terceras personas.
- c) Evitar a los hijos perturbaciones dañosas en los casos de cambio de titular de la potestad de guarda y custodia.

3. El Juez podrá disponer las medidas cautelares necesarias para asegurar el cumplimiento de las medidas adoptadas.

4. El incumplimiento grave o reiterado de las medidas aprobadas judicialmente podrá dar lugar a su modificación o a la exigencia de su cumplimiento de acuerdo con lo previsto en las normas de ejecución judicial».

4.6.8. Sensitive issues featured in national case law

According to the statements of Spanish courts, the first aim of the Hague Convention on Child Abduction as applied in Spain is to return the child to his country of residence.⁵⁵

In this respect, it has been observed that the Hague Convention on Child Abduction is not a “Custody Convention” but, rather, a “Restitution Convention”. The decision about restitution shall not concern custody and guardianship. The task of the court is not to analyse the situation in which the children live and to decide with which of the parents they should live, but to determine whether the removal was illicit. In the event the removal was illicit, then the court analyses the existence of any exceptions provided for by the Convention.⁵⁶ Such exceptions are to be evaluated restrictively and can only operate when it is proven that the removal of the children can place them at serious risk.⁵⁷

The mere allegation of the existence of a situation of risk or potential prejudice to the child if returned is not sufficient to prevent the return of the child.⁵⁸ It is necessary to demonstrate concretely what the risk factors are. This is all the more true if there is no sufficient proof (prueba eficaz) to support the allegation.⁵⁹

When the parents exercise joint parental authority over a child, a single parent (even if s/he has been awarded custody) cannot remove the child to another country without the consent of the other parent (art. 156 SCC). In case of absence of consent, only the judge can allow the relocation.⁶⁰

When parental authority is attributed to only one of the parents, s/he can change the place of residence provided arrangements for protecting the other parent’s rights of access are taken. Art. 160 SCC⁶¹ provides that the parents, even in case of absence of parental authority, have the right to enter into relation with their minor children.

⁵⁵ Case n° 2: Audiencia Provincial de Málaga (Sección 6ª) Sentencia núm. 463/2007 de 11 septiembre. AC 2007\2085.

⁵⁶ Audiencia Provincial de Barcelona (Sección 18ª) Auto núm. 54/2012 de 13 marzo. JUR 2012\195157; Audiencia Provincial de Málaga (Sección 6ª) Sentencia núm. 463/2007 de 11 septiembre, op. cit. Rules discussed: Art. 1, 3, 5, 7, 12 and 13 of the Hague Convention on Child Abduction.

⁵⁷ «El Convenio de la Haya sobre sustracción de menores no es un Convenio de custodia, sino un Convenio de restitución y en este sentido cabe precisar que la resolución que ordena la restitución en ningún caso se esta pronunciando sobre la guarda y custodia, sino que lo que acuerda es la devolución del menor al país donde residía habitualmente para que sean las autoridades competentes de aquel país las que en su caso resuelvan sobre la custodia [...] No se trata por tanto de valorar la situación actual en la que se encuentran los menores para decidir con cual de los progenitores deben convivir, que es al parecer lo que se sostiene por el Ministerio Fiscal, sino de determinar en primer lugar si el traslado es o no ilícito y caso de serlo si concurre alguna de las excepciones contempladas en el propio convenio para denegar la restitución. La decisión por tanto se limita a acordar si procede o no la restitución del menor o menores dentro del ámbito permitido en el propio convenio. Dicha causa, como también ha señalado este Tribunal, debe ser valorada de forma restrictiva de manera que solo puede operar en aquellos supuestos en que se pruebe de forma cumplida que el traslado de los menores al país y al lugar, que hasta el momento del traslado ha constituido su hábitat natural, puede colocarlos en situación de grave riesgo».

⁵⁸ Audiencia Provincial de Barcelona (Sección 18ª), Auto núm. 88/2012 de 23 abril. AC 2012\958. Rules discussed: Art. 3, 12, 13 and 14 of the Hague Convention of 1980.

⁵⁹ Audiencia Provincial de Barcelona (Sección 18ª), Auto núm. 88/2012 de 23 abril, op. cit., “It is not enough to merely mention that there exists a situation of risk, if the mention is not accompanied by a concrete description of the fact or facts in which [the party] bases the denunciation of such situation, and even more, if there is no sufficient proof so support the allegation” («No basta la mera mención a la existencia de una situación de riesgo o perjuicio si no va acompañada tanto de la exposición concreta del hecho o hechos en que se basa para denunciar esta situación y más aún, si no se acompaña de prueba eficaz que corrobore la alegación»).

⁶⁰ J. Miranda, Spain, International Child Protection, op. cit.

⁶¹ Art 160 SCC: « Los progenitores, aunque no ejerzan la patria potestad, tienen el derecho de relacionarse con sus hijos menores, excepto con los adoptados por otro o conforme a lo dispuesto en resolución judicial ».

4.6.9. Justifications for refusing to return a child relocated to Spain

Even though restitution of the illicitly removed child is the primary aim of the Hague Convention on Child Abduction and of EU Regulation 2201/2003, in some cases the Spanish courts do take into account other factors not to return the child. The principal factor is the risk that the return of the child to his country of residence would expose him to a physical or psychological danger or place him in an unbearable situation.⁶² In this sense, the case law has privileged the principle of the best interest of the child. In a 2007 case,⁶³ the Provincial court of Málaga stated that art. 11.4 of EU Regulation 2201/2003 imposes the obligation to return the abducted child, including when s/he may be exposed to some risks, when it is demonstrated that the foreign State has adopted/will adopt the measures necessary to guarantee the protection of the child after the restitution.

The Court stated that in that case it had not been demonstrated that the foreign State (UK) had taken or was ready to take such measures of protection and, therefore, the Spanish court was entitled to refuse the restitution. In order to strengthen this position, the court referred to other international instruments, such as the UN Convention on the Rights of the Child, and the European Charter of Fundamental Rights of the Child.⁶⁴

In a 2007 case, the provincial court of Madrid refused to deliver a child because she was already attending school in her new country, the separation from the mother - who was the primary caretaker of the child since birth - would "put the child at risk" and cause to her, possibly, a "conflict of identity".⁶⁵

The jurisprudence stresses the "large margin of appreciation" (*amplio arbitrio*) accorded to the court of the State where the abducted child has been brought to analyse whether the conditions established in the international instruments for refusing the return of a child exist in the specific case. Among the elements to be taken into consideration are the possibility of having regard to the fundamental principles in force in the requested State in areas such as human rights and fundamental freedoms. It is also stressed the rule pursuant to which the courts of the requested state may refuse restitution if a physical or psychological danger could place the child in an unbearable situation.⁶⁶

Such unbearable situation was deemed to exist when the parent that requested the restitution had a history of maltreatments of the child or when the child had strong fears of the parent, or when the parent had a history of drug consumption, alcoholism, depression, and/or frequent criminal convictions.⁶⁷

⁶² Audiencia Provincial de Barcelona (Sección 18ª), Auto núm. 54/2012 de 13 marzo. JUR 2012\195157; Audiencia Provincial de Málaga (Sección 6ª) Sentencia núm. 463/2007 de 11 septiembre. AC 2007\2085.

⁶³ Audiencia Provincial de Málaga (Sección 6ª), Sentencia núm. 463/2007 de 11 septiembre, op. cit.

⁶⁴ Audiencia Provincial de Málaga (Sección 6ª), Sentencia núm. 463/2007, op. cit.: "[...] it was not proved that the applicant State adopted or is in a position to adopt adequate measures in order to assure the psychical protection of the minor after her restitution, and this allows this Court, facing the lack of proof, to deny the restitution requested by the Public Ministry (Abogado del Estado), especially when, according to Organic Law 1/1996 of 15 January for the legal protection of minors and art. 12 of the UN Convention on the Rights of the Child [...] the interest of the minor must absolutely prevail, all this without forgetting the provisions of art. 24 of the Charter of Fundamental rights of the EU [...] that, even if it is not compulsory and has no direct legal efficacy, is a very important reference in our social and cultural space" («[...] no se ha acreditado en el Estado requeriente haya adoptado o esté en disposición de adoptar medidas adecuadas para garantizar la protección psíquica de la menor tras su restitución, lo cual faculta a esta Sala, ante esa falta de acreditación, a denegar la pretensión de restitución deducida por el Abogado del Estado, más cuando, conforme a la LO 1/1996 de 15 de enero de protección jurídica del menor y el artículo 12 de la Convención de Naciones Unidas de 1989, sobre los derechos del niño (RCL 1990, 2712), el interés del menor es el absolutamente prevalente, todo ello sin olvidar las previsiones del artículo 24 de la Carta de los derechos fundamentales de la Unión Europea (LCEur 2000, 3480) , que, aún no siendo vinculante, ni teniendo eficacia jurídica directa, es un referente importantísimo en nuestro espacio social y cultural»).

⁶⁵ Ibid. The decision is based on Art. 3, 12 and 13 of the Hague Convention on Child Abduction, Art. 11.4 of the Brussels IIbis Regulation.

⁶⁶ Ibid.

⁶⁷ Audiencia Provincial de Cádiz (Sección 5ª) Auto núm. 25/2011 de 22 febrero. JUR 2011\202945; other case law in A. Caravaca & J. González, *Derecho internacional privado*, op. cit., p. 441.

4.6.10. On-going projects of future legislation on child abduction

In Spain, the competence to decide matters concerning child abduction lies with the courts of first instance of the place where the child resides. Since in Spain there are some 900 such courts, there are proposals to concentrate jurisdiction in one or a few courts that will specialize in these matters. In this respect, an author has put forward that with the rules in force there are courts dealing with several cases per year, whilst others may have just one or two.⁶⁸ This creates a natural inequality in the knowledge and practice of the Hague convention by Spanish judges.⁶⁹

⁶⁸ C. Revuelta, *op. cit.*

⁶⁹ The report was last updated on December 2014.

4.7. France

4.7.1. Statistical Assessment

4.7.1.1. Key statistics overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	41,135 (13.8%)	50949 (18.8%)	43948 (16.4%)	40786 (16.6%)
International divorces	n/a	n/a	n/a	n/a
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	42	42	76	121
Outgoing return requests made under the Hague Convention	n/a	58	68	106

* Marriage figures based on centrally-collected Eurostat data, save for 2012, which was provided by relevant national statistical authority. Percentages indicate international marriages/divorces as a proportion of all marriages/divorces.

4.7.1.2. Available national data

The French National Institute for Statistics (INSEE) has published statistics on the number of international marriages per year as well as the number of annual birth in France where at least one of the parents is of foreign nationality regardless of whether the parents are married or not. These statistics show that the number of international marriages has been overall stable since 2009.

Mariages selon la nationalité des époux

Nationalité des époux	2009	2010	2011	2012
Les deux époux français	211'070	213'511	198'493	205'144
Un époux français, un époux étranger	32'396	30'765	31'037	32'731
Les deux époux étrangers	8'012	7'378	7'296	8'055
Ensemble des mariages	251'478	251'654	236'826	245'930

Champ : France hors Mayotte

Source : Insee, statistiques de l'état civil

Mariages selon le lieu de naissance des époux

Lieu de naissance des époux	2009	2010	2011	2012
Les deux époux nés en France	194'036	197'965	186'473	193'679
Un époux né en France, un époux né à l'étranger	41'248	38'854	37'188	38'443
Les deux nés à l'étranger	16'194	14'835	13'165	13'808
Ensemble des mariages	251'478	251'654	236'826	245'930

Champ : France hors Mayotte

Source : Insee, statistiques de l'état civil

Naissances selon la nationalité des parents

Nationalité des parents	2009	2010	2011	2012
Les deux parents français	658'821	667'707	659'834	651'577
Un parent français, un parent étranger	108'392	110'768	105'767	108'905
Père de nationalité de l'UE 27, mère française	8'226	8'865	8'282	8'239
Père de nationalité hors UE 27, mère française	48'743	47'872	44'618	45'630
Père français, mère de nationalité de l'UE 27	7'910	7'937	7'819	7'710
Père français, mère de nationalité hors UE 27	43'513	46'094	45'048	47'326
Les deux parents étrangers	57'428	54'324	57'793	60'565
Deux parents de nationalités de l'UE 27	6'821	6'971	7'877	8'540
Deux parents de nationalités hors UE 27	48'273	44'966	47'450	49'293
Père de nationalité de l'UE 27, mère de nationalité hors UE 27	1'148	1'244	1'393	1'553
Père de nationalité hors UE 27, mère de nationalité de l'UE 27	1'186	1'143	1'073	1'179
Ensemble des naissances	824'641	832'799	823'394	821'047

Champ : France hors Mayotte

Source : Insee, statistiques de l'état civil

Naissances selon le lieu de naissance des parents

Lieu de naissance des parents	2009	2010	2011	2012
les deux parents nés en France	601'168	606'250	604'077	598'473
un parent né en France, un parent né à l'étranger	130'822	134'891	119'114	119'957
père né dans l'UE à 27, mère née en France	9'579	9'610	9'941	9'606
père né hors UE à 27, mère née en France	62'643	64'917	55'229	55'519
père né en France, mère née dans l'UE à 27	10'679	10'499	10'076	9'738
père né en France, mère née hors UE à 27	47'921	49'865	43'868	45'094
les deux parents nés à l'étranger	92'651	91'658	100'203	102'617
les deux parents nés dans l'UE à 27	6'458	6'707	7'782	8'407
les deux parents nés hors UE à 27	82'944	81'713	89'195	91'080
père né dans l'UE à 27, mère née hors UE à 27	1'285	1'273	1'463	1'435
père né hors UE à 27, mère née dans l'UE à 27	1'964	1'965	1'763	1'695
Ensemble des naissances	824'641	832'799	823'394	821'047

Champ : France hors Mayotte

Source : Insee, statistiques de l'état civil

France signed the Hague Convention on Child Abduction on the date of its conclusion, namely 25 October 1980. The Convention was ratified on 16 September 1982 after Parliament adopted Act No. 82-486 dated 10 June 1982 authorising approval of the Convention. According to the Government's Decree No. 83-1021 of 29 November 1983, the Convention was subsequently published in the Journal Officiel and entered into force on 1 December 1983. From the date of entry into force, the provisions of the Convention are applicable within the French legal system.

Nevertheless, some aspects of the Convention required specific implementation rules in national law, especially with regard to jurisdictional matters. Hence, the French Civil Procedure Code (hereinafter: CPC) indicates that the judge for family affairs of the territorially competent Tribunal de grande instance will decide upon legal proceedings based on international instruments governing child international wrongful removal.¹ The Code of the Judiciary Organization (hereinafter: COJ) provides that only one Tribunal de grande instance at each Appeals Court will have jurisdiction to decide upon these cases. The tribunals that have such specialized competence are listed in a schedule attached to the COJ.² Pursuant to the general rules on territorial competence, the legal proceedings shall be brought before the competent tribunal of the place of domicile of the defendant, or in the absence of a domicile in France, of the place of residence of the defendant³. Should the defendant have no such known place of domicile or residence in France, the applicant must bring the case to the tribunal of his or her place of domicile or residence, or to the place of his or her choice in case the applicant resides abroad.⁴

When seized of a request from a foreign Central Authority regarding the abduction of a child to France, the French Central Authority must verify that the conditions laid down in the Convention have been met. If the conditions are met, the Central Authority must inform the Public Prosecutor (Ministère Public) of the territorially competent tribunal. If no amicable settlement is reached, the Public Prosecutor will seize the tribunal, pursuant to Article 423 CPC, with a view to obtaining a decision for the return of the child who has been wrongfully removed to or held in France. The fact that the initiative is taken by the Public Prosecutor has the advantage of making the proceedings free of charge for the parent who is victim of the abduction. The CPC provides that legal proceedings based on international instruments governing child international wrongful removal are introduced, managed and decided upon in the form applicable to urgent matters (*comme en référé*)⁵. The tribunal's decision is, however, not *exécutoire de droit par provision*, which means that the enforcement of the tribunal's decision will be stayed if an appeal is instigated, unless the judge decides to allow provisional enforcement.⁶ In 2012, the Government adopted regulatory measures⁷ in view of facilitating the enforcement of judicial decisions ordering the return of a child. Hence, pursuant to Article 1210-6 CPC. If voluntary enforcement of the tribunal's decision to return the child is impossible, the Public Prosecutor of the place where the child is present may order enforcement of the tribunal's decision. Moreover, in order to determine the most adequate means of enforcing the tribunal's decision, the Public Prosecutor in charge of the enforcement may request the assistance of any person qualified to promote voluntary enforcement of the decision and to determine the means of the return of the child, to verify the material, family and social situation of the child, or to proceed with a medical, psychiatric or psychological analysis of the child.⁸

¹ Art. 1210-4 CPC.

² Art. L211-12 COJ and Art. D211-9 COJ referring to Table VII attached to the COJ.

³ Art. 42 and 43 CPC.

⁴ Article 42 CPC.

⁵ Art. 1210-5 CPC.

⁶ Cass. Civ. 1^{ere}, 20 January 2010, nr. 08-19267, Bull., 2010, I, nr. 12.

⁷ Decree No. 2012-98, 27 January 2012, J.O. 28 January 2012.

⁸ Art. 1210-8 CPC.

4.7.2. Characterisation of parental child abduction in France

In the meaning of the Convention, unlawful parental child abduction is the wrongful removal or retention of a child under the age of 16 who was habitually resident in a Contracting State. Wrongful removal refers to the situation in which a parent wrongfully removes the child abroad (i.e., without permission), while wrongful retention designates the situation where a parent takes advantage of a lawful temporary stay of the child abroad not to return the child as originally planned.

In order to determine when the removal or retention is wrongful, the Convention relies on the breach of existing custody rights under the law of the State in which the child was habitually resident (1), and on the verification that those rights were actually exercised (2).

1.) Custody rights

First, for child abduction to be unlawful, it is necessary to verify that there has been a breach of existing rights (a) under the law of the State in which the child was habitually resident (b).

a.) a breach of existing rights

The Convention defines custody rights as the “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence” (Article 5 (a)). The concept covered by this provision corresponds to that of parental authority under French law (*autorité parentale*). As a result, it cannot validly be decided that a child’s removal or retention by one of the parents was wrongful without verifying whether, under the national law of the place of habitual residence of the child before removal or retention, that parent held custody rights in the sense of the Convention.⁹

Such parental authority may arise by operation of law or as a result of a judicial or administrative decision, or an agreement. As to the law, the French Civil Code provides that parents exercise parental authority jointly once parentage has been established in their respect less than one year after the child’s birth.¹⁰ Therefore, in principle, by operation of the law, neither parent can unilaterally alter the child’s place of residence without violating the custody rights of the other parent according to French law. However, custody rights should be distinguished from the place of residence of the child; a child’s residence may be with one of the parents while both parents exercise joint parental authority over that child. In 2005, the French Supreme Court, the *Cour de Cassation*, decided that both parents exercised joint parental authority as the mother did not have an exclusive custody right, despite the fact that the child’s place of residence was with the mother according to an agreement between the parents. As a result, the mother could not unilaterally modify the place of residence of the child.¹¹

On the contrary, it is possible that only one parent is vested with parental authority, while the other parent only has solely a right of contact with the child, therefore custody rights are not vested with the parents jointly. As a result, the unilateral decision of the parent holding sole parental authority to remove the child from the place of habitual residence is not wrongful.

⁹ Cass. Civ. 1ere, 29 February 2012, nr. 11-15-613, available at: www.legifrance.gouv.fr.

¹⁰ Art. 372 French Civil Code.

¹¹ Cass. Civ. 1ere, 14 December 2005, INCADAT, HC/E/FR 889.

Furthermore, except if decided otherwise by the parties concerned or by a court's decision, divorce or separation has no influence on the rules relating to the exercise of parental authority.¹²

When custody rights stem from an agreement, the judge may have to interpret the convention so as to verify that it indeed covers the right in particular to decide on the child's place of habitual residence. In a particular case, the Cour de Cassation decided that the removal of a child by his mother to France constituted a violation of the custody rights provided in the agreement between parents since that agreement contained a prohibition to reside with the child outside of Quebec.¹³

Finally, when French Courts verify the custody rights under the law of the place of the habitual residence of the child, they are required to proceed with an *in concreto* examination. Indeed, in a case where the father had recognised the child more than one year after the birth, the Cour de Cassation overturned a decision of the Paris Court of Appeal due to the fact that it had not verified that, according to the law of the State of the habitual residence of the child before removal, custody rights are exercised jointly also in cases where the father recognises the child after some time¹⁴.

b.) the habitual residence of the child

Before determining whether there has been a removal or a retention elsewhere, the child's habitual residence must be determined. The interpretation of "habitual residence" is functional to the application of the Hague Convention, thus French Courts cannot rely on the French national legal concept of "domicile". As in all other Hague Conventions, the notion of "habitual residence" demands the ascertainment of facts and is not based on the existence of particular national administrative documents. The right to determine the child's place of residence stems from parental authority. In order to localise the habitual residence of the child immediately before removal or retention, courts and tribunals in France find inspiration in the indications provided by the Court of Justice of the European Union with respect to the concept of habitual residence according to the EU Regulation 2201/2003.¹⁵ In particular, courts and tribunals take in account the place where the children attend school and medical appointments. For example, the Agen Court of Appeals determined that two children of 9 and 10 years old resided in Singapore since they were registered at school and were followed by paediatricians in Singapore.¹⁶ In a matter where the child's parents were living both in France and in the United States of America, the Cour de Cassation decided that the 5-year-old child had his habitual residence in the USA since he was registered at school in New York.¹⁷ With respect to new-born babies, however, courts have the tendency to establish the habitual residence of the child with reference to the habitual residence of the mother.¹⁸ In a case where the child was born while the mother was on a temporary stay in France, both parents and the eldest child habitually residing in the USA, the Cour de Cassation decided that the place of habitual residence of the child was in the USA. As a result, it was decided that, by refusing to return the child to the USA, the mother had wrongfully retained the child.¹⁹

¹² Art. 373-2 French Civil Code.

¹³ Cass. Civ., 1ere, 22 April 1997, nr. 95-11999, Bull. civ. 1, nr. 123, p. 82.

¹⁴ Cass. Civ. 1ere, 29 February 2012, INCADAT HC/E/FR 1157

¹⁵ P. Murat, *Droit de la famille*, Dalloz, 2013, p. 1742, para. 535-22; see in particular: CJEC 2 April 2009, C-523 /07, A, paras. 40-44, AJ fam., 2009, 294; CJEU 22 December 2010, C-497/10, Rec. CJUE, p. I-14309.

¹⁶ Agen Court of Appeals, 20 December 2012, available at: www.incadat.com (last consultation on 20 March 2014); similarly Cass. 1ere, civ., 25 September 2005, 12-22651, available at: www.incadat.com (last consultation on 20 March 2014). The case is also interesting because the residence of the children was qualified as "habitual", even though the circumstances taken into account referred only to the previous year.

¹⁷ Cass. Civ., 1ere, 17 June 2009, INCADAT HC/E/FR 1032.

¹⁸ See in particular: Rennes Court of Appeals, 14 May 2013, INCADAT HC/E/FR 1208.

¹⁹ Cass. Civ., 1ere, 26 October 2011, INCADAT HC/E/FR 1130.

2.) Effective exercise of custody rights

Under the Convention, no removal or retention is deemed wrongful if the parent holding the custody rights did not actually exercise them (Art. 3(1)(b) of the Convention). The threshold as to the effectiveness of the exercise of the custody rights depends on the law of the State of the habitual residence of the child. The effective character of the exercise of custody rights generally stems from the chronology of the facts, which explains why this is very rarely discussed in the case law.²⁰ French courts do not seem to require cohabitation for the custody rights to be exercised effectively. Indeed, the Paris Court of Appeals decided that the mother effectively exercised her custody rights with respect to her children even if they were in a boarding school.²¹

4.7.3. Judicial and non-judicial tools available to the parties, including mediation

According to the Convention, Central Authorities must, directly or through any intermediary, take all appropriate action to ensure the safe and voluntary return of the child, or to facilitate an amicable solution.²² Similarly, Article 10 of the Convention invites the Central Authorities to take every possible measure to organise voluntary return of the child. In France, the Central Authority is embodied by the Bureau d'entraide civile et commerciale, where 5 persons are in charge of the international child abduction cases²³. In doing so, they do not follow a specific protocol on how to deal with outgoing or incoming requests concerning international child abduction under the Hague Convention on Child Abduction. In general terms, the French Central Authority intervenes whether the author of the international child abduction has a qualified relationship with the abducted child (parent or grandparent) or not.

In this context, the French Central Authority invites the parents involved in a matter of international child abduction to participate in a mediation process with a view to achieve an amicable settlement of the dispute. The mediation is organised by the Service de l'Aide à la Médiation Internationale pour les Familles (AMIF).²⁴ Although part of the French Central Authority, the AMIF functions autonomously from the Central Authority; the only information that is communicated from the AMIF to the Central Authority relates to the opening and closing of the mediation process. The AMIF comprises one judge, two social workers and one secretary. The process can be initiated at the request of the parents or with their consent, and is confidential. It may be instigated before the commencement of judicial proceedings, whilst those proceedings are pending or after the commencement of proceedings. Holding an impartial and neutral position, the AMIF seeks to help the parents find an equitable solution that focuses on the needs of the child. In this sense, mediation is firstly and foremost aimed at reconciling the parents' positions by means of negotiation – whether directly face-to-face, by telephone or e-mail – with each of the parents one after the other. It also seeks to organise a meeting in person so as to promote direct dialogue. Finally, the parents may also choose to participate in a mediation process outside of the Central Authority. Accordingly, the Central Authority maintains a list of external family mediators in France who are especially qualified to intervene in international family

²⁰ See in particular: Poitiers Court of Appeals, 16 April 2009, INCADAT HC/E/FR 1031.

²¹ Paris Court of Appeals 2 April 2013, INCADAT HC/E/FR 1209.

²² Art. 7(c) of the Convention.

²³ The team is assisted by two social workers who are specialised in international family mediation cases.

²⁴ Information regarding the AMIF is available through the website of the French Central Authority: <http://www.justice.gouv.fr/justice-civile-11861/enlevement-parental-12063/la-mediation-21106.html>. ____A brochure describes the conditions of its intervention in view of finding an amicable solution to the parties' dispute: http://www.justice.gouv.fr/art_pix/Plaqueette_amif_presentation.pdf

disputes due to their knowledge of foreign languages and cultures.²⁵ Mediation is free of charge when led by the AMIF; parties need to pay for mediation processes led by external mediators.

The Office of the Public Prosecutor may also play an important role in finding an amicable solution. Hence, being often the first to be informed of the displacement of a child by one of the parents, the Office of the Public Prosecutor, who is also in charge of instigating criminal proceedings against the abducting parent, has a convincing array of measures at his or her disposal to use against the abducting parent. In this context, it was reported that the Public Prosecutor offered to drop criminal charges against the abducting parent in exchange for a voluntary return of the child to his or her place of habitual residence before displacement.²⁶

Mediation often takes place while judicial proceedings are pending. Judges for family matters are indeed generally very favourable to attempts to reach an amicable solution by means of mediation. In this context, Article 373-2-10 French Civil Code provides that the judge may try to reconcile the parties or, if possible, invite them to participate in mediation. In the latter case, the judge will designate, with the parties' consent, a qualified mediator who also has experience with the nature of the dispute. If an amicable settlement of the dispute is reached, the parties may request the judge to homologate (i.e., officially approve) it.

When no amicable settlement can be found, the judge may order that the abductor parent must return the child to the left behind parent, under a penalty (*astreinte*), in which case the abducting parent is condemned to pay a fixed amount of money for each day of delay in the enforcement of the court's decision.²⁷ In general, tribunals only order such penalties if there are indications that the guilty parent will not return the child in compliance with the court order. Such a penalty system has no compensatory purpose.

4.7.4. Existing criminal sanctions

The French Criminal Code punishes infringements of parental authority.

As to the wrongful retention of a minor child, Article 227-5 French Criminal Code provides that the unlawful refusal to produce a minor child to the person who has the right to require the production of the child is punished by one year's imprisonment and a fine of €15,000. Similarly, the abduction of a child out of the care of persons who exercise parental authority over him or her, or from persons to whom he or she is entrusted, or with whom the child habitually resides, when committed by any ascendant, is also punished by one year's imprisonment and a fine of €15,000.²⁸

However, in case the minor is retained for more than five days, when the persons who have the right to claim him or her do not know where he or she is, or in case the minor is unlawfully retained outside the territory of the French Republic, the offences are punished more severely, i.e., by three years' imprisonment and a fine of €45,000²⁹. The same aggravated penalties apply if the person guilty of the offences set out earlier is discharged of parental authority.³⁰

²⁵ The list of international family mediators is available at: <http://www.justice.gouv.fr/justice-civile-11861/enlevement-parental-12063/listes-des-mediateurs-familiaux-internationaux-au-18-octobre-2013-26139.html>.

²⁶ H. Fulchiron (ed.), *Les enlèvements d'enfants à travers les frontières*, Actes du colloque organisé par le centre de droit de la famille, Lyon, 20 et 21 novembre 2003, Bruylant, 2004, p. 166.

²⁷ Paris Court of Appeals 27 November 2012, INCADAT HC/E/FR 1196.

²⁸ Art. 227-7 of the French Criminal Code. Pursuant to art. 227-11 of the French Criminal Code, the attempt to commit this offence is punished by the same penalties.

²⁹ Art. 227-9 French Criminal Code.

³⁰ Art. 227-10 French Criminal Code.

Finally, Article 227-6 French Criminal Code provides that the omission by a person whose children habitually reside with him or her when moving elsewhere to notify his change of address within one month from the date of such change to those persons entitled to exercise the right of contact or residence rights over such children pursuant to a judgment or a judicially approved agreement is punishable with a sentence of six months imprisonment and a fine of €7,500.

4.7.5. Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages

Upon ratification of the Convention, France declared that it would cover the expenses mentioned in Article 26 (2) of the Convention only if, and to the extent that, the requesting parent is entitled to legal aid and advice in France. As a result, the left behind parent will have to assume the costs resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Pursuant to Article 26 (4) of the Convention, “the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child (...) to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child”. Based on this paragraph, the left-behind parent thus has the possibility to claim the reimbursement of certain expenses incurred as a result of the abduction before the tribunal. French courts often accept to condemn the abducting parent to the payment of the expenses incurred by the other parent in light of an order to return of the child, sometimes even condemning the abducting parent to the payment of a lump sum.³¹ In doing so, courts often refer to Article 700 CPC, which provides that the judge shall order the party obliged to pay for legal costs or in default judgments, the losing party, to pay to the other party an amount determined by the court on the basis of the expenses incurred, including but not limited to the legal costs. The judge will take into consideration the rules of equity and the financial condition of the party ordered to pay. The judge may also freely decide that no such compensation shall be ordered.

Besides the compensation for the expenses resulting from a parental abduction, the left-behind parent may also initiate proceedings to obtain damages for the harm he or she has suffered, and which is not covered by Article 26 Convention or Article 700 CPC. This would, for instance, be the case for damages for the moral tort of having been wrongfully separated from the child or, in the case of the child, from the left-behind parent. In such a hypothesis, although to our knowledge there has been no case in this respect, the tribunal would have to come to the conclusion, pursuant to Article 1382 French Civil Code that a wrongful act, i.e., the abduction, was tortious vis-à-vis the left-behind parent or the child, and that such a tort can be rectified. In this respect, the courts would need to verify that there is a causal link between the wrongful act and the damage (lien de causalité). Finally, the tort must be certain in its principle, i.e. not hypothetical, and represent the violation of a legitimate interest; be direct and personal to the claimant.

Where applicable, the criminal judge will decide on the amount of damages due in addition to the criminal charges.

³¹ Poitiers Court of Appeals 16 April 2009, INCADAT HC/E/FR 1031, confirmed by Cass. Civ. 1ere, 8 July 2010, INCADAT HC/E/FR 1073; Paris Court of Appeals 27 November 2012, INCADAT HC/E/FR 1196; Dijon Court of Appeals 17 June 2010, INCADAT HC/E/FR 1133; Agen Court of Appeals 1 December 2011, INCADAT HC/E/FR 1172, Cass., civ. 1ere, 13 February 2013, INCADAT HC/E/FR 1203; Cass. Civ. 1ere, 25 September 2013, 12-25864, available at: www.legifrance.gouv.fr; contra: Poitiers Court of Appeals 6 May 2009, INCADAT HC/E/FR 1134.

4.7.6. Enforcement methods

The Central Authority in France is the main authority for the application of the State's obligations under the Convention.

The Ministry of Foreign Affairs oftentimes becomes involved in international child abduction cases, especially when the Central Authority requests the return of a French national to France. Through its specific intervention team, as well as its local representations, the Ministry of Foreign Affairs may contribute in the process of localising the child abroad and thus be able to assist parents who are the victim of the international child abduction by taking the necessary steps to secure their legal position and/or to obtain an amicable settlement of the dispute.

Moreover, national courts also are responsible for enforcing the provisions of the Convention. As previously mentioned, international child abduction cases are dealt with by a limited number of courts in France. This specific *ratione loci* jurisdiction rule aims to develop a specialised competence and thus contribute to the process of harmonization of the case law regarding the application of the Convention as much as possible.

Finally, the Public Prosecutor plays an important role in the enforcement of the rules laid down by the Convention. If the French Central Authority is seized of a request to return an abducted child from France to his or her place of habitual residence, the Public Prosecutor will first attempt to reach an amicable solution with the abducting parent. If such an amicable solution cannot be reached, the Public Prosecutor will seize the tribunal that is territorially competent to decide upon the return petition. If the tribunal orders the return of the child, the Public Prosecutor is in charge of the enforcement of the judgment; the Public Prosecutor will again first attempt to obtain the voluntary return of the child that has been abducted. Accordingly, the Public Prosecutor may hear the abducting parent, as well as request the assistance of any qualified person to promote a voluntary enforcement of the judgment. If this is not possible, the Public Prosecutor may order the intervention of the police to enforce the judgment of the tribunal. Finally, the Public Prosecutor is also responsible for instigating the criminal prosecution against the abducting parent.

4.7.7. Sensitive issues featured in national case law

One of the issues discussed a great deal in national case law regarding international child abduction concerns the application and interpretation of the exceptions to the immediate return mechanism. In particular Article 13(1)(b) of the Convention has received a great deal of attention, i.e., the existence of a grave risk of harm in case the child is returned to his/her place of habitual residence. Examination of the case law shows that the interpretation of this provision has evolved over time. While in the 1990s the notion of "grave risk of harm" for the child was interpreted in an expansive manner, the national courts' main position after the turn of the new Millennium is to interpret the concept of "grave risk of harm" restrictively.

In the 1990s, the Cour de Cassation clearly adopted the view according to which physical or psychological harm, or the otherwise intolerable situation in which the child may be placed in case of return, not only resulted from the living conditions the child would retrieve once returned to his or her place of habitual residence, but also from the mere change from his or her current living conditions. As a result, in the 1990s the Cour de Cassation regularly refused to return children who had been living with the abducting parent for some time and/or who had been abducted at a very young age, since their return would place them in an intolerable situation.³² Following criticism in legal literature,³³ the Cour de Cassation

³² Cass. Civ., 1ere, 12 July 1994, INCADAT HC/E/FR 103; Cass. Civ., 1ere, 21 November 1995, HC/E/FR 514; Cass. Civ., 1ere, 22 June 1999, INCADAT HC/E/FR 498.

adopted an interpretation closer to the text of the Convention from 2000 onwards. Without expressly clarifying that the integration of the child in his or her current residence should not be taken into account when deciding upon the application of Article 13(1)(b) of the Convention, national courts in recent years have clearly focused their attention on elements of the child's living conditions in the State to which he or she would be returned. In this sense, the Cour de Cassation refused to consider the young age of the child based on the fact that the conditions for his or her return were met.³⁴ It also refused to consider the possible danger resulting from the separation of a child of a young age from the abducting parent, since the abducting parent was at the origin of the separation of the child with the other parent.³⁵ Moreover, in a case where the mother had unilaterally taken her child from the USA to France, the Cour de Cassation refused to take into account the specific difficulty for the mother who is expecting a second child to visit her first child once returned to the place of his habitual residence, the USA, as an additional justification for refusing the return of that child to the USA.³⁶ In its reasoning the Court expressly acknowledged several times that Article 3(1) of the UN Convention on the Rights of the Child was directly applicable within the French legal order and that the non-application of the exception of Article 13(1)(b) of the Convention in these cases was decided in light of the best interests of the child³⁷.

In particular, courts have refused to consider that violence or psychological instability of the parent victim of the abduction could constitute a sufficient reason to refuse the return of the child, whenever there is no evidence (i) of the reality of such violence;³⁸ (ii) that such violence could be directed to the child;³⁹ (iii) that such violence could be repeated once the child is back.⁴⁰

In addition, the mere fact that the living conditions for the child would be better were he or she not to return was considered not to be a valid reason to refuse the return based on article 13(1)(b) of the Convention⁴¹. In this sense, the Cour de Cassation also considered that it had been demonstrated that the child would not be placed in an intolerable situation where it had been established that the child was well integrated in both countries.⁴² The Court also clarified that "some effort to integrate" into the environment of country where the child would be returned to was not sufficient to reject the return application based on Article 13(1)(b) of the Convention.⁴³ The Court of Appeal in Aix en Provence considered that the return of the children to one of the parents in Israel did not constitute a grave risk

³³ S. Godechot-Patris, Y. Lequette, *Rép. droit international*, Dalloz, June 2013, para. 260.

³⁴ Cass. Civ. 1ere, 25 January 2005, INCADAT HC/E/FR 708; see contra, a case involving France and Mexico: Rouen Court of Appeals 9 March 2006, INCADAT HC/E/FR 897.

³⁵ Cass. Civ., 1ere, 26 October 2011, INCADATHC/E/FR 1130; see also: Rouen Court of Appeals 30 October 2008, INCADAT HC/E/FR 1002; however, contra: Rouen Court of Appeals 9 March 2006, INCADAT HC/E/FR 897.

³⁶ Cass. Civ. 1ere, 13 February 2013, INCADAT HC/E/FR 1203.

³⁷ Cass. Civ. 1ere, 25 February 2009, INCADAT HC/E/FR 1013; Cass. Civ. 1ere, 14 June 2005, INCADAT HC/E/FR 844; Cass. Civ. 1ere, 10 July 2013, INCADAT HC/E/FR 1219.

³⁸ Cass. Civ. 1ere, 25 January 2005, INCADAT HC/E/FR 708; Cass. Civ. 1ere, 13 July 2005, INCADAT INCADAT HC/E/FR 845; Cass. Civ. 1ere, 14 June 2005, INCADAT HC/E/FR 844; Reims Court of Appeals 2 October 2008, INCADAT HC/E/FR 959, confirmed by: Cass. Civ. 1ere, 20 October 2010, INCADAT HC/E/FR 1069; Cass. Civ. 1ere, 26 September 2012, INCADAT HC/E/FR 1217; Cass. Civ. 1ere, 10 July 2013, INCADAT HC/E/FR 1219; Cass. Civ. 1ere, 30 October 2008, INCADAT HC/E/FR 1002; Dijon Court of Appeals 17 June 2010, INCADAT HC/E/FR 1133; Paris Court of Appeals 5 July 2013, INCADAT HC/E/FR 1221; Agen Court of Appeals 20 December 2012, INCADAT HC/E/FR 1216; Paris Court of Appeals 31 May 2012, INCADAT HC/E/FR 1175; Versailles Court of Appeals 2 May 2012, INCADAT HC/E/FR 1214; Angers Court of Appeals 1 December 2011, INCADAT HC/E/FR 1172; Cass. 1ere civ, 25 September 2013, 12-22651, available at: www.legisfrance.gouv.fr.

³⁹ Cass. civ. 1ere, 12 April 2012, INCADAT HC/E/FR 1155; Appeals Court Versailles, 20 June 2006, INCADAT HC/E/FR 949.

⁴⁰ Paris Court of Appeals 7 February 2002, INCADAT HC/E/FR 849; Paris Court of Appeals 20 September 2002, INCADAT HC/E/FR 850. HC/E/FR

⁴¹ Bordeaux Court of Appeals 28 June 2011, INCADAT HC/E/FR 1128; Lyon Court of Appeals 19 September 2011, INCADAT HC/E/FR 1168; Paris Court of Appeals 2 April 2013, INCADAT HC/E/FR 1209.

⁴² Cass. Civ. 1ere, 17 June 2009, INCADAT HC/E/FR 1032.

⁴³ Cass. Civ. 1ere, 20 January 2010, INCADAT HC/E/FR 1036.

of harm or place them in an intolerable situation; the Court considered that although the political situation in Israel was tense, this was not sufficient to refuse the return of the children based on Article 13(1)(b) of the Convention.⁴⁴ Finally, in a matter concerning a child who was ill, it was decided that the disagreement between parents on the adequate treatment of the child did not constitute a great risk of harm or an intolerable situation for the child.⁴⁵

As a result, the exception based on Article 13(1)(b) of the Convention has only been accepted in approximately one quarter of the approximately 40 cases in which the application of the exception based on the existence of a grave risk of harm has been argued. This was the case when it was demonstrated by means of reports of social services inquiry or witnesses that the parent who is claiming the return of the child has been violent towards the other parent and the child, or is psychologically unstable⁴⁶. Article 13(1)(b) of the Convention was also accepted in matters where, in addition to allegations of violence and improper conduct of the parent claiming the return of the child, it was demonstrated that this parent has no affective bonds with the child, nor can ensure sufficient means of subsistence for the child.⁴⁷ Finally, the return of the child was rejected based on Article 13(1)(b) of the Convention in two matters where the grave allegations of violence and mistreatment towards the child, although not demonstrated, had not been countered by the expertise ordered by the Court.⁴⁸

As to the child's objection to his or her return, an examination of the case law shows that although very often argued, it is rarely taken into account by courts. Indeed, judges most frequently refuse to hear the child because of his/her age. If the parties report the child's objection to the court, it is often considered that the child might have been influenced by the abducting parent with whom he/she is staying at the time of the proceedings, and that accordingly the child's objection is not sufficient as such to reject the claim for return.⁴⁹

Finally, within the context of the European Union, i.e. whenever the system of the Hague Convention on Child Abduction needs to be coupled with that of the EU Regulation 2201/2003, Article 11(4) of the EU Regulation 2201/2003 has often been the ultimate obstacle to the return of the child in his/her place of habitual residence. In France, courts have often adopted a proactive approach in verifying that the State of habitual residence of the child would take the adequate measures for the protection of the child. In particular, courts have searched to obtain the assurance by the Central Authorities of the State of the child's habitual residence that the adequate measures for the protection of the child would be implemented upon the child's return to that country before rejecting the application of Article 13(1)(b) of the Convention.⁵⁰

⁴⁴ Aix en Provence Court of Appeals 8 October 2002, INCADAT HC/E/FR 509.

⁴⁵ Rouen Court of Appeals 20 January 2005, INCADAT HC/E/FR 1007.

⁴⁶ Paris Court of Appeals 5 July 2013, INCADAT HC/E/FR 1220; Paris Court of Appeals 5 October 2005, INCADAT HC/E/FR 1009.

⁴⁷ Douai Court of Appeals 24 May 2007, INCADAT HC/E/FR 715; Versailles Court of Appeals 6 December 2012, INCADAT HC/E/FR 1215.

⁴⁸ Aix-en-Provence Court of Appeals 30 November 2006, INCADAT HC/E/FR 717; see also: Paris Court of Appeals 30 May 2006, INCADAT HC/E/FR 1010.

⁴⁹ The child's objection was accepted as a valid reason for refusing the child's return in a case where it was combined with the existence of a grave risk of harm in a specific context, where the child had been removed by her biological parents from the host family where she had been placed temporarily by a court's decision (Cass. Civ. 1ere, 17 October 2007, INCADAT HC/E/FR 946.

⁵⁰ Reims Court of Appeals 2 October 2008, INCADAT HC/E/FR 959, confirmed by Cass. Civ. 20 October 2010, INCADAT HC/E/FR 1069; Paris Court of Appeals 15 February 2007, INCADAT HC/E/FR 979.

4.7.8. Existing critics and comments on the legal rules in force

Doctrine in France has expressed strong criticism on the ECHR's approach in recent cases regarding the application of the Convention, in particular the *Neulinger and Shuruk v. Switzerland*⁵¹, *X vs. Latvia*⁵² and *Karrer vs. Romania*⁵³ cases. Several authors consider that by requiring national judges to proceed with a detailed examination of the full situation of the family in view of deciding on the return of the child based on his/her best interest, the ECHR is dangerously hampering the efficiency of the system put in place by the Convention.⁵⁴ Indeed, in these authors' view, the ECHR's approach is encouraging parents to commit abduction and thereby imposing their new way of life onto the left-behind parent, the child and the judges. Indeed, it would suffice the abducting parent to object to the return of the child before court by raising article 13(1)(b), to force such court to examine the full situation of the family as the judge competent on the merits – i.e. the judge in the State of the child's habitual residence – and to decide where the child would be at best, thereby actually deciding on the parental authority over the child. As a result, by arguing the grave risk of harm that would result from the child's separation from the abducting parent upon return to the State of habitual residence before abduction, the abducting parent would easily obtain a decision of non-return of the child based on the latter's best interest.

It has further been noted that the ECHR's approach enables the appearance of a dynamic of forum shopping through wrongful removal, which is destroying the entire system of the Convention. Moreover, it has been highlighted the fact that through the "best interest of the child", the ECHR is actually requesting national courts to exclusively take into account the egoistic interest of the abducting parent. In this view, such dangerous approach will also result in the termination of the relationship of the child and the other parent, since courts will logically refuse to accept that the child visits the left-behind parent, since this parent may in turn retain the child wrongfully.⁵⁵ Furthermore, the ECHR's approach - requiring a full examination of the situation of the family – has been judged not compatible with the swiftness that characterises the mechanism put in place by the Convention.⁵⁶

Consequently, it is with a great relief that the doctrine welcomed the Cour de Cassation's decisions in recent cases, in which it maintained a restrictive interpretation of the exceptions to the immediate return. Several authors congratulated the Cour de Cassation on refusing to follow the *Neulinger* case law of the ECHR and on maintaining an approach that is close to the text of the Convention. Contrary to what seems to be the position of the ECHR, it is suggested that the concept of "best interest of the child" should be "a primary consideration" within the limited context of the dispute at stake, and should therefore differ from the best interests' analysis in the broader context of the dispute regarding the parental authority.⁵⁷ In this respect, the Cour de Cassation has continually taken the "best interest of the child" into consideration since 2005, when it confirmed the direct applicability of the UN Convention on the Rights of the Child, despite the fact that this did not prevent the Court from adopting a restrictive approach to the exceptions to the return mechanism of the Convention.⁵⁸

⁵¹ ECHR, *Neulinger and Shuruk vs. Switzerland*, 6.07.2010, INCADAT HC/E/1323.

⁵² ECHR, *X. vs. Latvia*, 26 November 2013, INCADAT HC/E/1234.

⁵³ ECHR, *Karrer vs. Romania*, 21 February 2012, INCADAT HC/E/1149.

⁵⁴ P. Murat, *Droit de la famille*, Dalloz, 2013, p. 1754, para. 535-48 ; A. Boiché, *La Cour strasbourgeoise a-t-elle décidé d'annihiler la convention de La Haye ?*, *AJ Famille*, 2012, p. 97.

⁵⁵ A. Boiché, *La Cour strasbourgeoise a-t-elle décidé d'annihiler la convention de La Haye ?*, *AJ Famille*, 2012, p. 97.

⁵⁶ P. Murat, *Droit de la famille*, Dalloz, 2013, p. 1752, para. 535-43.

⁵⁷ BOICHÉ, A. *Enlèvement international : la Cour de cassation refuse de suivre la jurisprudence Neulinger de la Cour européenne des droits de l'homme*, *AJ Famille* 2013, p. 185.

⁵⁸ *Ibidem*

Mrs. Gaudemet-Tallon nevertheless criticised the restrictive interpretation by the Cour de Cassation in situations where the child was new-born and where the return of the child would prevent it from maintaining daily contact with the mother.⁵⁹

Despite the ECHR's change of approach since *Neulinger v. Switzerland*, the French Cour de Cassation has maintained a restrictive interpretation of the exceptions to the return mechanism set up by the Convention. In this sense, it is clearly acknowledged that the immediate return of the child being abducted is seen as the main objective of the Convention. This does not prevent the Court to decide on the matter in light of the best interest of the child. Such interest is, however, examined and interpreted within the context of the dispute before the Court, i.e., that regarding the application of the Convention, and not that relating to the issue of parental authority, which – in the eyes of the Cour de Cassation – remains the competence of the judge of the merits.

4.7.9. Justifications for refusing to return a child relocated to France

For the past ten years approximately, highest national courts in France have always motivated the decisions on child abduction by reference to the best interest of the child involved. In the great majority of the cases, the best interests of the child was regarded as lying in the immediate return of the child to his or her place of habitual residence immediately before the abduction. Moreover, case law shows that the best interest of the child is never used as a justification on its own for refusing to order the return of the child. It is rather referred to as a result of the application of the exceptions to the return provided by the Convention. Courts only considered that it was in the best interest of the child not to return to his or her place of habitual residence in specific cases where the exceptions listed in Articles 12 and 13 of the Convention were applicable. Hence, it was considered that because the return of the child would place him or her in a situation of grave risk of harm, it was considered in his/her best interest not to be returned. In particular, the Court of Cassation considered that whenever it is demonstrated, through social inquiry reports or witnesses, that the parent claiming the return was violent towards the mother and the child or psychologically unstable so that the return of the child to that parent would place him/her in a situation of great risk of physical or psychological harm or an otherwise intolerable situation, the Court acknowledged that it was in the child's best interest not to be returned.⁶⁰ Similarly, as mentioned earlier in this report, when the allegations of violence or mistreatments regarding the parent claiming for the return of the child are grave, the mere fact that they have not been countered by the social inquiry ordered by the court may be sufficient to consider that it is the child's best interest not to be returned to that parent. The Court of Cassation also recognized that it is in the child's best interest not to be returned when, in addition to allegations of violence and improper conduct of the parent claiming the return of the child, it is demonstrated that this parent has no affective bonds with the child nor can demonstrate sufficient means of subsistence for the child. When analysing the best interest of the child in light of article 13 1 b) of the Convention, courts may also take into account the child's expressed objection to being returned. Although never considered on its own, when combined with a great risk of harm, the child's objection to his/her return might be taken into account to determine that child's best interest.

National courts have as well retained the best interest of the child as a justification for refusing to return the child when the return proceedings was introduced more than one year after the abduction took place (article 12 of the Convention). In this framework, the

⁵⁹ H. Gaudemet-Tallon, note, *Journal du droit international*, 2005, p. 144-145 ; see also: Cass. 25 January 2005, INCADAT HC/E/FR 708.

⁶⁰ Paris Court of Appeals 5 July 2013, INCADAT HC/E/FR 1220; Paris Court of Appeals 5 October 2005, INCADAT HC/E/FR 1009; Paris Court of Appeals 14 October 2010, INCADAT HC/E/FR 1132.

best interest of the child will be examined with respect to the child's integration in his/her new environment. Hence, whenever more than one year elapsed between the date of the abduction and the date of seizing of the tribunal, the Court of Cassation considers that it is the child's best interest to stay in his/her new environment when it is demonstrated that he/she is well integrated in this new environment. So as to verify the level of integration, courts take into consideration all kinds of indicators, whether objective or rather subjective: the child's registration and integration at school, his/her external activities, his/her knowledge of the language of the State of his/her new place of residence, but also the manifestation of his/her will not to move from his/her current environment or the fact that the child appeared balanced and blooming.⁶¹

Case law has shown some hesitation as to the identification of the child's best interest when removal or retention took place at a very young age. In a case involving France and Mexico, an Appeals Court decided that the child should not be returned to his father in Mexico since the removal of the child by his mother to France was not wrongful; in an obiter, the Court added that the separation of a child of 17 months from his mother to be returned to his father in Mexico, would place the child in an intolerable situation, since the mother had been taking care of the child since his birth and would not be in state to visit the child frequently because of the distance.⁶² Although the main trend is to return the child even if it is a new-born⁶³, this case shows that courts may consider that the best interest of a child of a very young age could logically be to stay with his/her mother.

4.7.10. On-going projects of future legislation on child abduction

Except with respect to the restrictive interpretation of the exception of great risk of harm by some national courts in specific circumstances where the child is very young and the access right difficult to put in place, it seems that the doctrine in France is satisfied with the national courts' approach to the mechanism of immediate return of the abducted child to his or her place of habitual residence, and the exceptions. To our knowledge, there are no calls for reform regarding the application of the Convention in the French legal order.⁶⁴

⁶¹ Cass. Civ. 1ere, 12 December 2006, INCADAT HC/E/FR 892; Paris Court of Appeals 19 October 2006, INCADAT HC/E/FR 1008; Paris Court of Appeals 8 August 2008, INCADAT HC/E/FR 1006; Paris Court of Appeals 11 December 2012, INCADAT HC/E/FR 1186.

⁶² Rouen Court of Appeals, 9 March 2006 INCADAT HC/E/FR 897.

⁶³ Cass. Civ. 25 January 2005, INCADAT HC/E/FR 708.

⁶⁴ This report was established on 20 March 2014 and last updated on 14 December 2014.

4.8. Italy

4.8.1. Introduction

Italy ratified the Hague Convention on Child Abduction through Law No. 64 of 15 January 1994. The Convention is in force in Italy since 1 May 1995.

Article 3 of Law No. 64 designates the Central Office for Juvenile Justice at the Ministry of Justice as the Italian Central Authority. The Central Authority enjoys the assistance of a State attorney (Avvocatura dello Stato), of the Juvenile Services of the Justice administration (Servizi minorili), as well as of any public administrative body, in particular the police departments.

Italy has recently modified its legislation on custody.¹ Under article 316² of the Italian civil code, both parents have parental responsibility, which, according to Council Regulation (EC) No 2201/2003, means all rights and duties relating to the person or the property of a child. It shall include rights of custody and rights of access. It allows parents to decide, by mutual agreement, the habitual residence of the child.³

In the event of divorce or separation or when children are born outside the marriage, the judge may decide if custody has to be given to both parents or exclusively to one of them (art. 337^{ter} et art. 337^{quater} Italian civil code). Joint-custody is the first option to be considered. The parent who exercises the custody exclusively has the parental responsibility. However, the parents take any major decisions jointly with regard to the children. The non-custodial parent has the duty and the right to look after the education of the child. The judge determines the modalities regulating the relationship between the non-custodial parent and the children (art. 337^{ter} Italian civil code).

¹ Decreto legislativo 28 dicembre 2013, n. 154 (<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2013-12-28:154>)

² [II DECRETO LEGISLATIVO 28 dicembre 2013, n. 154 \(in G.U. 08/01/2014, n.5\)](#) ha disposto (con l'art. 39, comma 1) la modifica dell'art. 316 c.c. :

Responsabilità genitoriale:

«Entrambi i genitori hanno la responsabilità genitoriale che è esercitata di comune accordo tenendo conto delle capacità, delle inclinazioni naturali e delle aspirazioni del figlio. I genitori di comune accordo stabiliscono la residenza abituale del minore. In caso di contrasto su questioni di particolare importanza ciascuno dei genitori può ricorrere senza formalità al giudice indicando i provvedimenti che ritiene più idonei.

Il giudice, sentiti i genitori e disposto l'ascolto del figlio minore che abbia compiuto gli anni dodici e anche di età inferiore ove capace di discernimento, suggerisce le determinazioni che ritiene più utili nell'interesse del figlio e dell'unità familiare. Se il contrasto permane il giudice attribuisce il potere di decisione a quello dei genitori che, nel singolo caso, ritiene il più idoneo a curare l'interesse del figlio. Il genitore che ha riconosciuto il figlio esercita la responsabilità genitoriale su di lui. Se il riconoscimento del figlio, nato fuori del matrimonio, è fatto dai genitori, l'esercizio della responsabilità genitoriale spetta ad entrambi.

Il genitore che non esercita la responsabilità genitoriale vigila sull'istruzione, sull'educazione e sulle condizioni di vita del figlio».

³ About the relationships existing between the Regulation and the Hague Convention see Alberto Salzano, Sui rapporti intercorrenti (e sulle reciproche implicazioni) tra il cd. Regolamento di Bruxelles II bis e la Convenzione de L'Aja del 25 ottobre 1980 sugli aspetti civili della sottrazione internazionale dei minori: per una maggiore effettiva loro tutela, in *Il Diritto di famiglia e delle persone*, fasc.1, 2012, pp. 102-110. See also Lea Querzola, La tutela processuale dei minori in prospettiva europea, in *Rivista trimestrale di diritto e procedura civile*, fasc. 2, 2010, pp. 449-479.

4.8.2. Statistical Assessment

4.8.2.1. Key statistics overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	20001 (7.0%)	30662 (12.3%)	15.0%	14.8%
International divorces	763 (2.0%)	1075 (2.4%)	6.0%	8.9%
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	41	46	53	n/a
Outgoing return requests made under the Hague Convention	n/a	53	127	n/a

* Marriage and divorce figures based on centrally-collected Eurostat data. Percentages indicate international marriages/divorces as a proportion of all marriages/divorces. 2007 figures not available; approximated 2008 figures used instead. 2012 figures for marriages and divorces are also approximated. Approximated figures obtained from 2011 article by G. Lanzieri of Eurostat, "A Comparison of Recent Trends of International Marriages and Divorces in European Countries".

4.8.2.2. Available national data

4.8.2.2.1. International Marriage

Year	Foreign wife	Foreign Husband	Both foreigners	Total
2005: 2005	18481	4822	5050	250979
2006: 2006	19029	4991	5143	245992
2007: 2007	17663	5897	5372	250360
2008: 2008	18240	6308	6535	246613
2009: 2009	16559	4798	5696	230613
2010: 2010	14215	2954	3492	217700
2011: 2011	14799	3206	4600	204830
2012: 2012	16340	4424	5610	207138
2013: 2013	14383	3890	7807	194057

Dati estratti il 10.XII.2014, 16h21 UTC (GMT), da Immigra.Stat

The table shows the number of marriages celebrated in Italy between two foreigners, between an Italian man and a foreign woman and the opposite. By way of example, one should note that, in 2012, "mixed" marriages represented 10% of the marriages celebrated in Italy.⁴

⁴ http://www.repubblica.it/solidarieta/immigrazione/2013/12/05/news/matrimoni_misti-72749886/.

In 2013, the total number of marriages celebrated in Italy dropped for the first time under 200,000 and amounted to 194.057 marriages, i.e. 53.000 marriages less than in the previous 5 years.⁵

However, the descending trend concerns primarily marriages between Italian citizens – these explain the 77% of the diminution observed in the years 2008-2013.⁶

No clear trend, on the contrary, can be found with regard to marriages between an Italian and a foreigner – as shown in the last column of the above figure – that are fluctuating between 20, 000 to 30,000. The prevailing figure is that of an Italian man marrying a foreign woman. Of note, even if not shown by the tables, is that the foreign spouse is, in 50% of cases, a native of an East European country (EU or not EU). Foreign men marrying foreign women are slightly more than those who marry Italian women: slightly more than one out of two.⁷

Second marriages are diminishing in numbers but increasing in percentage in Italy.

In 2013, they represented 15.8% of the total of marriages celebrated in Italy.⁸

4.8.2.2.2. International Separations and Divorces

Italian family law only allows divorce after a judicial decree of separation. An interruption of cohabitation between the parents may occur many years prior to divorce and, usually, the firsts decisions concerning children are taken by the judge pronouncing on the separation.

The following tables present different figures on separation and divorces of mixed couples.

Since most mixed marriages concern an Italian man and a foreign woman, almost the same percentage may be found in the statistics concerning separations and divorces.

Table 1: Separations

Year	Separations of "mixed couples"	In %	Foreign and foreign-born wife (%)	Foreign and foreign-born husband (%)	Agreed separations of "mixed couples" (instead of contentious separations) (%)	Average duration of marriage in mixed couples
2007	5447	6.7	72.5	27.5	83.5	9
2008	5996	7.1	71.6	28.4	83.6	9
2009	6685	7.8	72.5	27.5	81	9
2010	7173	8.1	70.5	29.5	80.1	9
2011	7144	8	69.1	30.9	80	10
2012	8176	9.3	68.9	31.1	78.3	10

⁵ <http://www.istat.it/it/archivio/138266>

⁶ Ibidem.

⁷ Ibidem.

⁸ Ibidem.

Table 2: Divorces

Year	Divorce of "mixed couples"	In %	Foreign and foreign-born wife (%)	Foreign and foreign-born husband (%)	Agreed divorce of "mixed couples" (instead of contentious separations) (%)
2007	2926	5.8	70.5	29.5	74.9
2008	3246	6	67.7	32.3	74.6
2009	3453	6.3	73.4	26.6	73
2010	4163	7.7	70.9	29.1	66.3
2011	4213	7.8	70.7	29.3	70.2
2012	4584	8.9	70.1	29.9	74.6

A negative trend is recorded also as regards to the total number of separation and divorces, although the percentage of separation and divorces of "mixed couples" is growing.

Recent marriages last comparatively less than less recent ones. For example, in 1985 the interruption of marital cohabitation after 7 years concerned only 4,5% of separations, whilst in 2005 it concerned more than the double (9.3%).⁹

Religious marriages are comparatively more stable than civil ones. The average age of separation and divorce is between 40 and 50 years old.¹⁰

In a large majority, separations and divorces are pronounced by the judge on the basis of an agreement.¹¹

Also in a large majority separations and divorces involve children.¹² In 2012, for example, children have been put under joint custody of the parents in 89.9 % of the cases of separations.¹³

The following table shows the figures concerning divorces involving children in 2012.

Divorce per habitant (%)	Divorces involving children (%)	Number of children involved in divorces	Children in exclusive custody of the mother after divorce (%)	Children in exclusive custody of the father after divorce (%)	Children in joint-custody after divorce (%)
0.9	66.2	22653	22.4	1.5	74.8

Source: ISTAT, 11 December 2014 at 15h04 UTC (GMT)

4.8.2.3. Child abductions

Data recorded by the Italian Central Authority on child abductions are not the same as those collected by INCASTAT and also include non-Hague Convention abductions.

Italy collects data on applications to the Italian Central Authority from 2000 to 2013 identifying applications for return and applications for the exercise of visiting rights.

⁹ <http://www.istat.it/it/archivio/126552>

¹⁰ According to ISTAT, in 2012, 85,4% of separations and 77,4% of divorces were decreed as a result of an agreement.

¹¹ According to ISTAT, in 2012, 73,3% of separations and 66,2% of divorces involved children.

¹² Ibidem.

¹³ Ibidem.

Year	Visiting rights	Return	Total number
2000	41	100	141
2001	26	99	125
2002	26	94	120
2003	24	99	123
2004	32	98	130
2005	21	130	151
2006	27	124	151
2007	40	169	209
2008	41	197	238
2009	40	179	219
2010	34	159	193
2011	23	153	176
2012	25	173	198
2013	28	176	204
Total	428	1950	2378

Source: Dipartimento per la Giustizia Minorile – <http://www.giustiziaminorile.it/statistica/>

Moreover, for the same time period, the following data can be found on the number of applications made by individuals (active cases, i.e. outgoing requests) to the Italian Central Authority and applications coming to Italy from foreign Central authorities (passive cases, i.e. incoming requests)

	Applications for the exercise of visiting rights	Applications for return	Total number
outgoing	261	1264	1525
incoming	167	686	853
Total	428	1950	2378

Source: Dipartimento per la Giustizia Minorile – <http://www.giustiziaminorile.it/statistica/>

For each year, data are collected with regard to the minors involved, to the presumed author of the abduction (see table below), to the countries involved, to the time elapsed between the abduction and the application to the Central Authority etc.

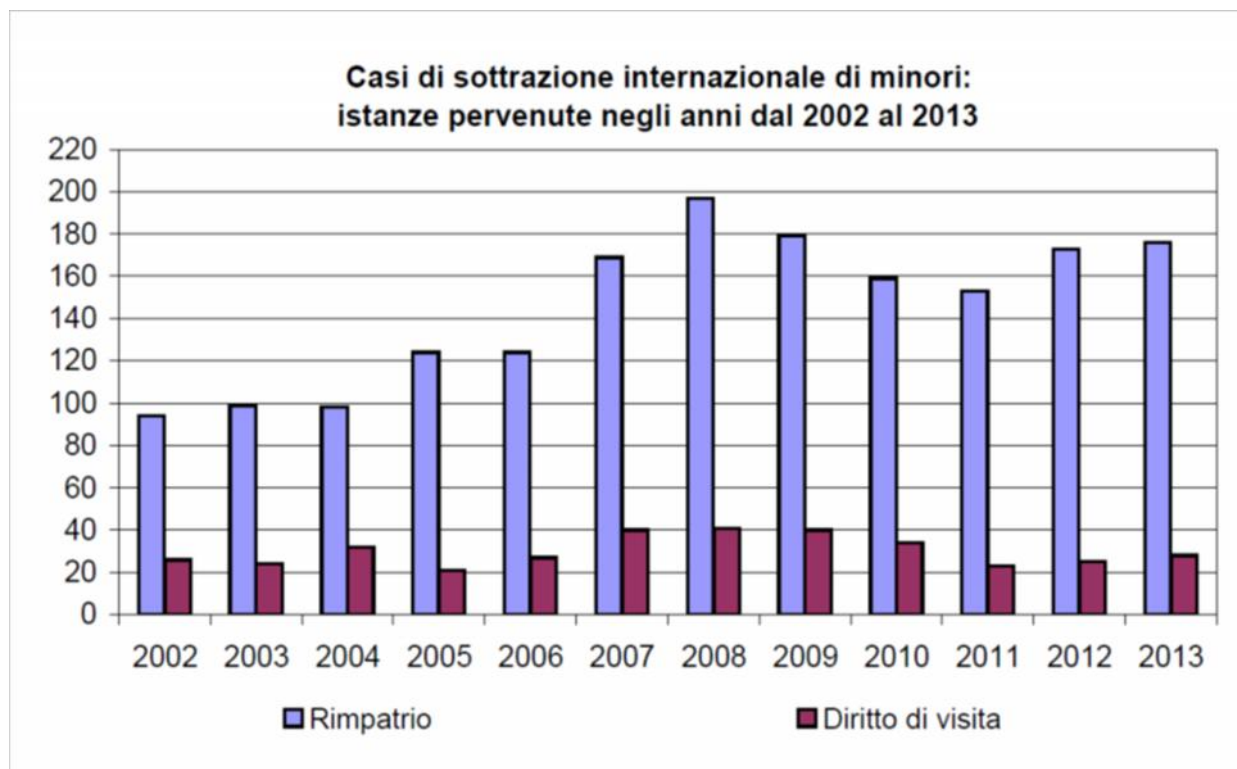
2013	Return	Visiting Rights	Total
outgoing	139	21	160
incoming	37	7	44
Total	176	28	204
Number of children involved	208	36	244
Applications from fathers	148(84%)	--	--
Applications from mothers	28(16%)	--	--

Source: Dipartimento per la Giustizia Minorile – <http://www.giustiziaminorile.it/statistica/>

Statistical analysis of available data is regularly provided by the “Dipartimento di Giustizia minorile”, e.g. in a document issued on March, 24th 2014;¹⁴ and in other public documents.¹⁵

From 2000 to 2013, 18% of the applications based on the Hague Convention on Child abduction concern visiting rights, whereas 82% are application for immediate return.

Overall, the data reveal an increase, although not continuous, in the number of child abduction cases:



Child Abduction cases. Requests received by the Italian Central Authority from 2002 to 2013. Return requests (rimpatrio) and Visiting rights requests (Diritto di visita), Source: Dipartimento per la Giustizia Minorile – <http://www.giustiziaminorile.it/statistica/>

Data are being collected also with regard to the age, sex and number of children involved in each child abduction application. In 2013, the largest majority of requests involved one child (85%), only 15% of the applications involved two children and only 1% more than two (0.5% three and 0.5% four).¹⁶

As for age, in 2013 most of the requests involved children from 0 to 8 years old (79.92% of the children involved in child abduction cases), with a peak involving children from 1 to 4 years old (49.18% of children involved in child abduction cases).¹⁷

Other data are collected to monitor the issues of the procedure: judicial as well as non-judicial issues as a result of an agreement between parents, a voluntary return, renunciation etc.

¹⁴ http://www.giustiziaminorile.it/statistica/analisi_statistiche/sottrazione_intern/AACC_2013.pdf

¹⁵ Document signed Ufficio I del Capo Dipartimento Ufficio Statistica, S. Totaro, M. Nolfo, V. Condò and I. Pergolini: http://www.giustiziaminorile.it/statistica/analisi_storiche/AA_CC_serie_storiche.pdf

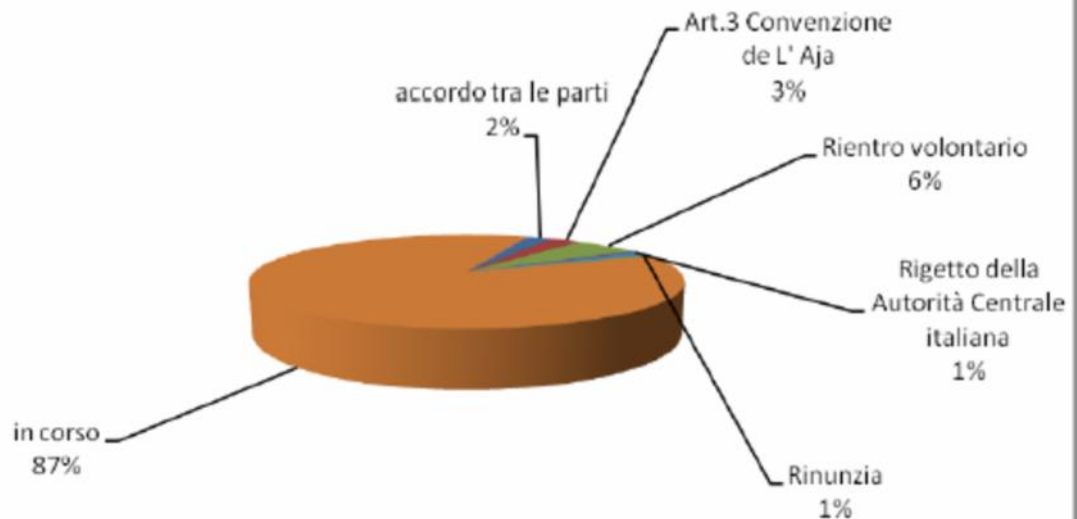
¹⁶ Documento del Dipartimento di Giustizia minorile, March, 24th 2014, p. 13,

http://www.giustiziaminorile.it/statistica/analisi_statistiche/sottrazione_intern/AACC_2013.pdf

¹⁷ Elaboration from the document of March, 24th 2014, p. 23-26,

http://www.giustiziaminorile.it/statistica/analisi_statistiche/sottrazione_intern/AACC_2013.pdf

**Grafico 2.9 - Istanze di rimpatrio pervenute nell'anno 2013:
composizione percentuale secondo il motivo di archiviazione.
Casi attivi.**



Return requests (Istanze di rimpatrio) received in 2013: 87% in process (in corso); 2% settled by agreement between the parties (accordo tra le parti); settled ex 3% Art. 3 Hague Convention; settled after spontaneous return 6% (rientro volontario); 1% refused by the Italian Central Authority (Rigetto della Autorità Centrale Italiana); 1% Abandoned (Rinunzia). Source: Dipartimento di Giustizia minorile - Ufficio I del Capo Dipartimento Ufficio Statistica", 24 March 2014.

The six week time-limit set out in art. 11 of the Hague Convention is not always respected in Italy.

Only 20% of the applications received between 2000 and 2013 have led to procedures closed within three months (6.21% within 1 month) and 21.85% have led to procedure longer than a year.¹⁸

4.8.3. Characterisation of parental child abduction

Italian Courts usually repeat the definition of the Convention stated in art. 3 a) and b) and in art. 5 a) and b).¹⁹

In particular, the Italian Corte di Cassazione has recently stated that child abduction supposes an illegal transfer of the child's residence from his habitual household.²⁰ The judge orders the return of the child if s/he verifies that the child is removed from the country of his/her habitual residence to another country by one parent in the absence of the other parent's consent and in violation of custody rights.²¹ The wrongful retention of a

¹⁸ Ibidem, p. 8.

¹⁹ See e.g. Cass. civile 27/01/2010 n. 1250, Cass. civile 19/05/2010 n. 12293, Cass. civile 07/01/2011 n. 277, Cass. civile 23/01/2013 n. 1527, Cass. civile 14/02/2014 n. 3540,

²⁰ Cass. civile 02/07/2014 n. 16648.

²¹ Ibidem.

child is also characterized as “abduction”, regardless of the lawfulness of the initial transfer – e.g. if the initial transfer was necessary to exercise visiting rights.²²

More particularly, characterisation of parental child abduction is based on the following principles:

a) *Imbalance in the protection of custodial parents and parents that have visiting rights*

The transfer abroad or the non-return to Italy of children after the separation of their parents does not qualify as abduction, when the transfer is operated by the parent in charge of the fostering; the consequence is that in such a case, the return mechanism of the Hague Convention on child abduction does not apply and the protection of the parent having visiting rights is granted through art. 21 of the Convention.

As shown above, from 2000 to 2013, 1 in every 5 applications based on the Hague Convention was an application for the protection of visiting rights.

This distinction has led to a series of judgments of the Supreme Court, in civil and criminal cases.

It is clear that the transfer of a child’s residence abroad, lawfully decided by the custodial parent, cannot be characterized as an unlawful abduction, even when it impairs the exercise of visiting rights, provided that there is no violation of custody rights.

In a criminal case, the characterization of child abduction was excluded and return was avoided, where a separated woman had answered a job offer in Germany and had moved with her child to Germany without giving any prior information to her former husband. The husband was informed by text message, after the transfer.²³ In other words, the transfer of residence had been planned without giving any information to the father of the child. Clearly, the transfer impaired de facto his visiting rights.

Even though the Supreme Court acknowledges that the protection of the parent in charge of fostering is stronger than that of the parent with visiting rights, such imbalance is authorized by the Convention and may also be understood in light of the principle of the best interest of the child that may justify it in a number of cases. According to the Court, the parent whose visiting rights are impaired may seek – through art. 21 and Italian rules – a protection of his/her rights demanding more suitable ways of exercising his visiting rights in light of the increased distance between him/her and his/her child/ren as a consequence of the transfer of residence abroad.²⁴

The Supreme Court had already upheld the imbalance of the protection of the two parents in the name of the best interest of the child in a previous civil case.²⁵

The child lived in Argentina with his mother, while the father had access rights. After his transfer of residence to Italy with his mother, the father had requested return of the child to Argentina, not only because the transfer of residence impaired his visiting rights but also because he affirmed that his Argentinian visiting rights corresponded – as a matter of fact – to Italian custody rights. In other words, in Italy, a court would have pronounced joint-custody with a principal residence of the child with the mother.²⁶

Interestingly, the Supreme Court identifies the foundation of the imbalance of the protection granted to the parents in the “absolute pre-eminence, in light of the best interest of the child, of his relationship with the fostering parent” and in the circumstances “that a return order would invariably entail the necessity of a return of the

²² Cass. civile 22/11/1997 n. 11696; Cass. civile 07/12/1999 n. 13657

²³ Cass. penale 29/07/2008 n. 31717.

²⁴ Ibidem.-

²⁵ Cass. civile 05/05/2006 n. 10374.

²⁶ Ibidem.-

fostering parent, unlawfully limiting her freedom to decide where it would be more convenient for her to reside."²⁷

The different intensity of the protection granted to the custodial and non-custodial parent has led the Italian Supreme Court to define this specific juridical situation as "differentiated protection" (protezione differenziata).²⁸

A de facto notion of fostering rights has allowed the Supreme Court to solve another German-Italian case.²⁹ German Courts had given to the father sole custody over a child that had been brought to Italy by her mother without the father's consent.

Upon confirming these circumstances, the judge of the new residence of the child in Palermo issued a return order. However, return had been challenged by the mother in light of the circumstance that – although sole custody belonged to the father – the child who was 13 years old, had been living with her mother for a year prior to the transfer of residence and she had expressed the will to continue to do so. The Supreme Court reversed the decision on return stating that the judge had based the decision on return limiting the analyses to the "legal ownership" – so to say – of custody rights, without considering who was de facto exercising such custody rights.³⁰

The main circumstance justifying the non-return of the child to Germany was the non-effective exercise of custody rights by the father at the time of the transfer.³¹

b) Transfers of residence prior to the removal (how to assess the habitual residence in case of multiple transfers)

The parent who returns to the State of a previous habitual residence after the transfer of the family's residence to another State for several months, without breaking the habits and affective relations that existed in the State of origin is not necessarily characterized as an abduction, even if the transfer is unilaterally decided by one parent.

In these cases, it becomes difficult for the judge to distinguish between temporary transfers of residence and permanent transfers.

Paradigmatic are an Italian-Brazilian case³² and an Italian-Swedish case³³ where the family had been living in Italy and subsequently spent months in the country of origin of the mother (in both cases the mothers were foreign-born and the fathers Italian).

The amount of time spent abroad (several months in both cases) and other circumstances allowed speculations on an initial intention of the parties to transfer the family residence abroad, although other circumstances suggested that, despite their length, the stays abroad were only temporary.

In both cases, the transfers of children were not characterized as "child abduction" because the Supreme Court held that it had not altered the affective and relational environment of the child.³⁴

c) Legal vs Factual notion of abduction

The Italian Supreme Court considers that the Hague Convention on child abduction is aimed at protecting the genuine situation of a child, not a judicial decision on custody.³⁵

²⁷ Ibidem. Unofficial translation made for the purpose of the present study.

²⁸ See, ex multis, Cass. civile 05/05/2006 n. 10374, Cass. civile 4/04/2007 n. 8481, Cass. civile 02/07/2007 n. 14960, Cass. penale 29/07/2008 n. 31717, Cass. civile 19/05/2010 n. 12293.

²⁹ Cass. civile 26/06/2014 n. 14561

³⁰ Ibidem.-

³¹ Ibidem.-

³² Cass. civile 02/07/2014 n. 16648.

³³ Cass. civile 16/06/2009 n. 13936.

³⁴ Ibidem.

³⁵ Cass. civile 19/12/2003 n. 19544, assessing that the Hague Convention aims at protecting a factual situation, not a judicial decision on custody.

In other words, Italian courts recurrently state that the sole purpose of the Convention is the restoration of the “status quo ante” of a child, in order to prevent illegal changes. The unlawfulness of the transfer is determined by the breach of the rights of custody actually exercised, regardless of the legal basis on which such rights are grounded (be it a legal rule, a judicial decision, an administrative action or agreement).

Hence, the object of the protection in the “right of the child to live – and thus not to be arbitrarily abducted from – the place where he usually lives and grows together with the person that is effectively taking care of him, in conformity with the legal order of the State of his/her habitual residence”.³⁶

In other words, the judge needs merely to verify that the left-behind parent was living with the child in his/her former habitual residence in conformity with the legal order of that State and will not examine, according to the law of the former habitual residence, the merits and the content of custody rights. This is due to the circumstance that the Hague Convention protects and aims to restore a factual situation.

Concerning joint-custody rights, Italian courts have considered that the retention of a child by a parent, even in case of joint custody rights, must be regarded as unlawful in the light of the Hague Convention on Child Abduction, when it is in contrast to the factual situation accepted by the parents.

This is based on the presumption³⁷ that the child’s best interest is that of not being moved from the place where s/he habitually carries out his daily life and, in case of removal, that of being immediately brought back to the place of his/her previous residence.³⁸

4.8.4. Acknowledged possibilities to reverse the presumption that the child’s best interest commands his/her return

a) Effective exercise of custody rights

Under art. 3 b) the Convention requests that at the time of removal or retention, custody rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Concerning this provision and in connection with joint custody rights, Italian courts state the following:

The Convention requires an examination of whether the parent who complained about the violation of his/her custody rights, exercised this right. In the case of joint custody, it means that the step of moving abroad has not only arbitrarily changed the place of residence of the child previously arranged with the other parent, but, what’s more, it has negatively affected the child-carer relationship.³⁹ In this respect, the transfer of residence must have had an impact in that relationship e.g. preventing the other parent from continuing to satisfy with assiduity the many basic needs of the child and to maintain the habits of life s/he had with the child, even though they were not “living under the same roof”.⁴⁰

³⁶ Cass. civile 07/03/2007 n. 5236, See also: Cass. civile 20/03/1998 n. 2954; Cass. civile 23/09/1998 n. 9501; Cass. civile 28/03/2000 n. 3701.

³⁷ This presumption stems from the fact that, to protect the child, it is considered important to be aware of his/her habits of life, his/her place in the social context in which he/she develops his/her own personality and its emotional bonds and relationships, considering therefore the place in which the minor habitually resides as a central element of his/her life and the move away from it as not favourable to his/her interests (Cass. civile 23/01/2013 n. 1527).

³⁸ Ibidem.

³⁹ Cass. civile 07/01/2011 n. 277.

⁴⁰ Ibidem.

In the case of joint-custody, retention has to be considered unlawful when it contrasts with a prior factual situation. This derives from the presumption that it is contrary to the interests of the child to transfer him/her to a different place from his/her habitual residence where s/he has developed the centre of his interests and relationships.⁴¹

4.8.5. Rights of access and child's objection

As to the issue of the right of access of the minor, the protection granted by the Convention does not extend to cases where the rights of the parent are not exercised. Even if a right of access has been recognized and regulated by judicial order, whenever its exercise is prevented by the insurmountable refusal of the child, or for any other reason, the parent will not benefit from protection. The reason is that, in this case, the request of the parent to protect his right of access does not aim at the reestablishment of the effective exercise of a right that has been arbitrarily disconcerted, restricted and, thus, unlawfully trampled.⁴²

By affording two separate types of protection, the Hague Convention clearly distinguishes the rights to custody or to fostering on one hand, and the rights of access, on the other.

A violation of custody rights will result in the immediate return of the child to the State of habitual residence, whereas in the case of access rights, the Convention merely provides that, in the absence of the transfer or retention of the child being illegal, the non-custodial parent is guaranteed, with the help of the central authority, the effective exercise of rights of access, through a redefinition of the necessary arrangements.⁴³

4.8.6. Judicial and non-judicial tools available to the parties, including mediation

In May 2009 Italy created "the Inter-Ministerial Task Force on International Child Abduction", acting through the cooperation of the Ministries of Foreign Affairs, Interior and Justice, in order to confront the phenomenon.

According to a statement of the Italian Minister that promoted the task force, in his first two years of activity, the Task Force had dealt with 37 cases and obtained the return to Italy of 12 Italian children.⁴⁴

No specific body of mediation exists in Italy. The ministerial guide to child abduction⁴⁵ encourages parents involved in situations of severe family conflict to refer themselves to the European Parliament Mediator for cases of international child abduction. However, the Italian diplomatic-consular missions are prepared to bring about an amicable settlement of the dispute in the interest of the child.⁴⁶

⁴¹ Cass. civile 10/08/2007 n. 17648; Cass. civile 23/01/2013 n. 1527.

⁴² In the case that an insuperable resistance of the minor, such as if he opposes the request of the parent to visit him/her, the request is considered inadmissible, Cass. civile 29/03/2011 n. 7117.

⁴³ Cass. civile 02/07/2007 n. 14960. Cfr. Alberto Salzano, Sui rapporti intercorrenti (e sulle reciproche implicazioni) tra il cd. Regolamento di Bruxelles II bis e la Convenzione de L'Aja del 25 ottobre 1980 sugli aspetti civili della sottrazione internazionale dei minori: per una maggiore effettiva loro tutela, in *Diritto di famiglia e delle persone* (II), fasc.1, 2012, p. 104; Elena Zincone, Primo, il minore deve tornare a casa sua, in *Diritto e giustizia*, fasc.32, 2006, p. 23 ss.

⁴⁴ Intervento del Ministro Frattini, Villa Madama 10 febbraio 2011
http://www.esteri.it/mae/it/sala_stampa/archivionotizie/interventi/2011/02/20110210_interventoministro_bambinicontesi.html

⁴⁵ Ministero degli Affari Esteri e della Cooperazione Internazionale, Direzione Generale per gli Italiani all'Estero e le Politiche Migratorie Ufficio IV, Bambini contesi: Guida di orientamento
http://www.esteri.it/mae/approfondimenti/20110210_guida_bambini_contesi.pdf.

⁴⁶ Ibidem.

4.8.7. Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages

Civil law sanctions can be granted according to art. 614^{bis}⁴⁷ and art. 709^{ter}⁴⁸ of the Italian civil procedure code.⁴⁹

Recently, a mother and her two children was awarded economic compensation in connection with a case of child abduction.⁵⁰ Damages were quantified at 8000 €, in addition to an administrative penalty of 4000 €.

4.8.8. Existing criminal sanctions

International child abduction constitutes criminal conduct according to art. 574bis of the Italian criminal code.⁵¹ This article of the Italian criminal code regulates a “special” kind of the more general criminal conduct of “child abduction” of art. 574. Both rules punish kidnapping, but international kidnapping is punished – in particular – through the new provision of art. 574bis⁵², in parallel with and/or in addition to the crimes of art. 388,⁵³ art. 574,⁵⁴ and art. 605.⁵⁵

⁴⁷ Art. 614^{bis} Italian civil procedure code (law n. 69/2009) – Attuazione degli obblighi di fare infungibile o di non fare: “Con il provvedimento di condanna il giudice, salvo che ciò sia manifestamente iniquo, fissa, su richiesta di parte, la somma di denaro dovuta dall’obligato per ogni violazione o inosservanza successiva, ovvero per ogni ritardo nell’esecuzione del provvedimento. Il provvedimento di condanna costituisce titolo esecutivo per il pagamento delle somme dovute per ogni violazione o inosservanza. Le disposizioni di cui al presente comma non si applicano alle controversie di lavoro subordinato pubblico e privato e ai rapporti di collaborazione coordinata e continuativa di cui all’articolo 409. Il giudice determina l’ammontare della somma di cui al primo comma tenuto conto del valore della controversia, della natura della prestazione, del danno quantificato o prevedibile e di ogni altra circostanza utile”. This article introduces in the Italian legal order the instrument of “indirect coercion” with the objective of encouraging the spontaneous fulfillment of obligations. In this case, along with the condemnation to do or not to do something, a lump sum of money for subsequent violations or delays in the execution of the decision may be systematically awarded.

⁴⁸ Art. 709^{ter} Italian civil procedure code (law n. 54/2006) – Soluzione delle controversie e provvedimenti in caso di inadempienze e violazioni: “Per la soluzione delle controversie insorte tra i genitori in ordine all’esercizio della potestà genitoriale o delle modalità dell’affidamento è competente il giudice del procedimento in corso. Per i procedimenti di cui all’articolo 710 è competente il tribunale del luogo di residenza del minore. A seguito del ricorso, il giudice convoca le parti e adotta i provvedimenti opportuni. In caso di gravi inadempienze o di atti che comunque arrechino pregiudizio al minore od ostacolino il corretto svolgimento delle modalità dell’affidamento, può modificare i provvedimenti in vigore e può, anche congiuntamente: 1) ammonire il genitore inadempiente; 2) disporre il risarcimento dei danni, a carico di uno dei genitori, nei confronti del minore; 3) disporre il risarcimento dei danni, a carico di uno dei genitori, nei confronti dell’altro; 4) condannare il genitore inadempiente al pagamento di una sanzione amministrativa pecuniaria, da un minimo di 75 euro a un massimo di 5.000 euro a favore della Cassa delle ammende. I provvedimenti assunti dal giudice del procedimento sono impugnabili nei modi ordinari”.

⁴⁹ For an exhaustive examination of this subject see Giovanni Morani, Ancora sull’attuazione coattiva dei provvedimenti giurisdizionali (del T.o. e del T.m.) relativi alla prole minorenni: effetti delle nuove norme di cui agli artt. 709 ter e 614 bis c.p.c.; in *Diritto di Famiglia e delle Persone* (II), fasc.2, 2013, pp. 753-770.

⁵⁰ Cass. civile 08/08/2013 n. 18977.

⁵¹ Art. 574bis of the Italian criminal code – “Sottrazione e trattenimento di minore all’estero: Salvo che il fatto costituisca più grave reato, chiunque sottrae un minore al genitore esercente la potestà dei genitori o al tutore, conducendolo o trattenendolo all’estero contro la volontà del medesimo genitore o tutore, impedendo in tutto o in parte allo stesso l’esercizio della potestà genitoriale, è punito con la reclusione da uno a quattro anni. Se il fatto di cui al primo comma è commesso nei confronti di un minore che abbia compiuto gli anni quattordici e con il suo consenso, si applica la pena della reclusione da sei mesi a tre anni. Se i fatti di cui al primo e secondo comma sono commessi da un genitore in danno del figlio minore, la condanna comporta la sospensione dall’esercizio della potestà dei genitori.”

⁵² Cass. penale 03/11/2014 n.45266. See G. Fiandaca, E. Musco, *Diritto Penale. Parte speciale*, vol. II, tomo I, Bologna, 2011, p. 380 ss.

⁵³ Art. 388 of the Italian criminal code – “Mancata esecuzione dolosa di un provvedimento del giudice: “Chiunque, per sottrarsi all’adempimento degli obblighi civili nascenti da una sentenza di condanna, o dei quali è in corso l’accertamento dinanzi l’Autorità giudiziaria, compie, sui propri o sugli altrui beni, atti simulati o fraudolenti, o commette allo stesso scopo altri fatti fraudolenti, è punito, qualora non ottemperi

In one case of child abduction, a mother, domiciled in Germany, who had brought her children from Monaco of Bavaria, home of the parent having sole custody of children, first in France, then in Italy and Slovenia, with the help her own mother was punished by way of application of art. 574bis. The Supreme Court held that this crime is different from that of art. 574 because the bringing of a child abroad resulted in the impairment of the exercise of parental authority by the person entitled to the exercise it.⁵⁶

4.8.9. Sensitive issues featured in national case law

The most delicate feature discussed in recent case law concerns habitual residence, the right of the child to be heard and the exception to ordering the return of the child.

a) The concept of habitual residence

The concept of habitual residence is not comparable to the legal concept of residence enshrined in Art. 43 of the Italian civil code, nor with the formal residence chosen by agreement between the spouses according to Art. 144 of the Italian civil code. Instead, it corresponds to the place in which the child, by virtue of a lasting and stable permanence, even de facto, has the centre of his emotional ties, not only parental and social, but also where his personality develops during his/her daily routine for a meaningful period. The

alla ingiunzione di eseguire la sentenza, con la reclusione fino a tre anni o con la multa da 103 euro a 1032 euro. La stessa pena si applica a chi elude l'esecuzione di un provvedimento del giudice civile, che concerna l'affidamento di minori o di altre persone incapaci, ovvero prescrive misure cautelari a difesa della proprietà, del possesso o del credito. Chiunque sottrae, sopprime, distrugge, disperde o deteriora una cosa di sua proprietà sottoposta a pignoramento ovvero a sequestro giudiziario o conservativo è punito con la reclusione fino a un anno e con la multa fino a 309 euro. Si applicano la reclusione da due mesi a due anni e la multa da trenta euro a 309 euro se il fatto è commesso dal proprietario su una cosa affidata alla sua custodia e la reclusione da quattro mesi a tre anni e la multa da cinquantuno euro a 516 euro se il fatto è commesso dal custode al solo scopo di favorire il proprietario della cosa. Il custode di una cosa sottoposta a pignoramento ovvero a sequestro giudiziario o conservativo che indebitamente rifiuta, omette o ritarda un atto dell'ufficio è punito con la reclusione fino ad un anno o con la multa fino a 516 euro. La pena di cui al quinto comma si applica al debitore o all'amministratore, direttore generale o liquidatore della società debitrice che, invitato dall'ufficiale giudiziario a indicare le cose o i crediti pignorabili, omette di rispondere nel termine di quindici giorni o effettua una falsa dichiarazione. Il colpevole è punito a querela della persona offesa".

⁵⁴ Art. 574 of the Italian criminal code – "Sottrazione di persone incapaci: Chiunque sottrae un minore degli anni quattordici, o un infermo di mente, al genitore esercente la responsabilità genitoriale, al tutore, o al curatore, o a chi ne abbia la vigilanza o la custodia, ovvero lo ritiene contro la volontà dei medesimi, è punito, a querela del genitore esercente la responsabilità genitoriale, del tutore o del curatore, con la reclusione da uno a tre anni. Alla stessa pena soggiace, a querela delle stesse persone, chi sottrae o ritiene un minore che abbia compiuto gli anni quattordici, senza il consenso di esso per fine diverso da quello di libidine o di matrimonio".

⁵⁵ Art. 605 Italian criminal code - "Sequestro di persona: Chiunque priva taluno della libertà personale è punito con la reclusione da sei mesi a otto anni. La pena è della reclusione da uno a dieci anni, se il fatto è commesso: 1) in danno di un ascendente, di un discendente, o del coniuge; 2) da un pubblico ufficiale, con abuso dei poteri inerenti alle sue funzioni. Se il fatto di cui al primo comma è commesso in danno di un minore, si applica la pena della reclusione da tre a dodici anni. Se il fatto è commesso in presenza di taluna delle circostanze di cui al secondo comma, ovvero in danno di minore di anni quattordici o se il minore sequestrato è condotto o trattenuto all'estero, si applica la pena della reclusione da tre a quindici anni. Se il colpevole cagiona la morte del minore sequestrato si applica la pena dell'ergastolo. Le pene previste dal terzo comma sono altresì diminuite fino alla metà nei confronti dell'imputato che si adopera concretamente: 1) affinché il minore riacquisti la propria libertà; 2) per evitare che l'attività delittuosa sia portata a conseguenze ulteriori, aiutando concretamente l'autorità di polizia o l'autorità giudiziaria nella raccolta di elementi di prova decisivi per la ricostruzione dei fatti e per l'individuazione o la cattura di uno o più autori di reati; 3) per evitare la commissione di ulteriori fatti di sequestro di minore". See Mariagabriella Corbi, *Le conseguenze penali della sottrazione internazionale di minori*, *Diritto di famiglia*, 30 Maggio 2009; Simona Carneseccchi, *Sequestro o sottrazione? Minori ai confini*, in *Diritto e giustizia*, fasc.28, 2006, p. 52 ss.

⁵⁶ Cass. penale 03/11/2014 n.45266.

determination of habitual residence is made by the judge, by the exercise of his discretionary powers.⁵⁷

b) Right of the child to be heard

There are many different views – sometimes even opposite views - in Italian legal doctrine as regards to the child's opinion and his/her right to be heard in court according to art. 13 of the Convention.

According to case law, in proceedings for the non-return of the child to the original habitual residence, the hearing of the child's views is not required by Italian law, by reason of the urgency of the situation and the simple restorative character of this procedure.⁵⁸ However, such a hearing is now based on art. 11, paragraph 2, of Regulation 2201/2003 specifically providing for the hearing of the child as part of the application of articles 12 and 13 of the Hague Convention of 1980, unless this appears inappropriate having regard to the age or degree of maturity of the child.⁵⁹ Moreover, courts have indicated that the taking into account of the child's views, already mentioned in art. 12 of the New York Convention on the Rights of the Child, has become a necessary part of fulfilling the procedures affecting them, in accordance with the Articles 3 and 6 of the Strasbourg Convention of 25 January 1996; therefore the child should be heard, except for when the hearing may cause harm to the child itself.⁶⁰ Moreover, as a result of the urgent nature of the procedure and its simple restorative character, the trial judge must then determine, whether the hearing of the child is appropriate, in light of the degree of discernment reached.⁶¹ Accordingly, in an Italian-Finnish case, the Court held that the hearing of two children aged 10 and 12 was compulsory under art. 111 of the Italian Constitution and art. 6 EConvHR, since it was the only way to grant protection to their legitimate interests.⁶²

In this respect, the Court has observed, persistently, that the child is, substantially, a party to the proceedings given that s/he is the object of conflicting interests and carries his/her own peculiar interest, different from that of his/her parents.⁶³

However, in another case the hearing of the child was evaluated in light of the following factors: the age and maturity of the child (the capacity of discernment), the need to prevent additional psychological trauma and, finally, the speed of the procedure.⁶⁴ Similarly, the Court held that the lack of discernment – provided it is sufficiently described – prevents the hearing of a child since his/her objection to return would be irrelevant.⁶⁵ The hearing of the child requires that the child receives appropriate information, in respect of

⁵⁷ According to Cass. civile 21/03/2011 n. 6345, the ascertainment of the habitual residence is discretionary. It is up to the judge verify the facts justifying the assessment of the place where the residence can be said to be habitual.

⁵⁸ Cass. civile 04/04/2007 n. 8481, Cass. civile 19/12/2003 n. 19544. The Supreme Court states that it is up to the judge to evaluate if the circumstances of the case allow the children to express their opinion, also in light of the expenditure of the procedure commanded by the need of ensuring a prompt protection of the interest of the child. In the second judgment, the Court states that the judge may hear the child only if he considers it appropriate, in his discretion, in light of the situation, of his general experience and prudence, of the age of the child, of the need to prevent a psychological additional trauma to the child and taking into account the needs related to procedural efficiency and urgency.

⁵⁹ Cass. civile 19/05/2010 n. 12293.

⁶⁰ Cass. civile 16/04/2007 n. 9094, Cass. civile 07/01/2009 n. 22238, Cass. civile 11/08/2011 n. 17201.

⁶¹ Cass. civile 04/04/2007 n. 8481, Cass. civile 19/12/2003 n. 19544, Cass. civile 23/01/2013 n. 1527, Cass. civile 21/10/2009 n. 22238.

⁶² Cass. civile 21/10/2009 n. 22238. See Silvia Tarricone, *Le S.U. civili e la giustizia minorile: nuovi passi verso l'effettività della tutela impartita, tra fonti interne e spazio giuridico sovranazionale*, in *Diritto di famiglia e delle persone (II)*, fasc.4, 2010, pp. 1567-1604 and Maria Giovanna Ruo, "The long, long way" del processo minorile verso il giusto processo, in *Diritto di famiglia e delle persone (II)*, fasc.1, 2010, pp. 119-141.

⁶³ Cass. civile 21/10/2009 n. 22238 and in the same sense Cass. civile 12/06/2007 n. 13761, Cass. civile 18/06/2005 n. 13173.

⁶⁴ Cass. civile 11/08/2011 n. 17201.

⁶⁵ Cass. civile 15/02/2008 n. 3798.

his/her age and his/her level of development, since such information shall not affect his/her well-being.⁶⁶

c) Exceptions to return based on an evaluation of the best interest of the child

It is often stated that the judgment on the question of return should not be concerned with the merits of the dispute concerning the best possible placement of the child. The only exception to this principle is where one of the circumstances specified by the articles 12, 13 and 20 of that Convention is present. These shall not be specious and, thus, shall be limited to actual risks in connection with a possible exposure to physical or psychological harm or to an intolerable situation in case of return.⁶⁷ The obstacles to return, even in the case of babies or children of tender age should not be reduced to mere inconvenience to temporary or transient emotional reactions, but shall consist of objective risk of physical and psychological danger. In sum, in case of return, the child should be exposed to a real risk of physical or psychological harm, and not merely to an inconvenient situation.⁶⁸

However, in assessing the existence of such circumstances, the court may take into account the educational attitudes of the custodial parent, as his/her aptness to ensure adequate conditions, including material care (nutrition, hygiene) of children.⁶⁹ An intolerable situation for the child can also be caused by the relationship between the parents, when it is characterized by an irremediable conflict, objectively appreciated and possible to control through judicial measures. Such a conflict can have an extremely negative impact on the physical well-being and the mental state of the child.⁷⁰

The existence of a risk leading to allow the judge to decide a non-return is recurrently verified when there is a high probability that the child will be exposed, because of the return, to a physical or mental harm, and not merely a psychological one.⁷¹ The ultimate judgment must be made with the protection of the interests of the child in mind.⁷²

An objection by the child to be returned, does not automatically lead to a refusal of repatriation by the court of the requested State, especially when it comes from a child who - in the view of the juvenile court - has not yet reached the age and degree of maturity sufficient to justify the respect of his/her opinion. Listening to a mature child may nevertheless influence the decision on return, as the interview may allow the court to judge for itself whether or not there is a grave risk for the child of being exposed to physical or psychological danger or otherwise placed in an intolerable situation by being returned.⁷³

In cases in which the court hears the child for the purpose of assessing the risk of psychological harm or of him/her being placed in an intolerable situation in case of return, one must take into account the following:

Where the opinion expressed by the child is that of objection to being returned, the judge shall not base his/her refusal to return on the sole objection of the child but shall take into account the potential risk of psychic injury – a circumstance that may be sufficient per se for grounding an exception to the general principle of the immediate return.⁷⁴

The appointment of a psychologist or other person is also a measure taken into account by the Law n. 64 of 1994, having implemented the Hague Convention of 1980. In fact, the burden of proof as regards to the existence of circumstances which - pursuant to art. 13, paragraph 1, letter b, of the Convention - justify derogation from the obligation to return the child to the custodial parent, is on those who invoke the existence of such

⁶⁶ Cass. civile 27/07/2007 n. 16753.

⁶⁷ Cass. civile 07/03/2007 n. 5236.

⁶⁸ Cass. civile 10/02/2004 n. 2474.

⁶⁹ Cass. civile 05/10/2011 n. 20365.

⁷⁰ Cass. civile 14/07/2010 n. 16549.

⁷¹ Cass. civile 04/07/2003 n. 10577.

⁷² Cass. civile 05/10/2011 n. 20365.

⁷³ Cass. civile 27/07/2007 n. 16753.

⁷⁴ Cass. civile 18/03/2006 n. 6081.

circumstances; the rule does not authorize any limitation of the sources from which the court may draw its belief.⁷⁵

4.8.10. Existing critics and comments on the legal rules in force

In 2011, the compatibility with the Italian Constitution of certain articles of the Act implementing the Hague Convention was challenged in front of the Italian Constitutional Court.⁷⁶

Articles 1, 2 and 7, law of 15 January 1994 n. 64⁷⁷, implementing art. 13 of the Convention were challenged in front of the Constitutional Court. It was argued that, in conformity with the Constitution, the judge should have the power to consider the child's objection to return in every stage of the procedure, even after having already issued a return order and even on his own motion (*ex officio*).

In other words, it was argued that the Italian Constitution prescribed to the judge to withdraw – even *ex officio* – a return order – in case of subsequent evidence of the child's objection to return.

The lack of a provision granting such power to Italian courts was said to violate art. 2 of the Italian Constitution,⁷⁸ as well as art. 3 on the right to equality before the law⁷⁹, art. 11 on international treaties⁸⁰ and, finally, art. 31 on the protection of the family.⁸¹

⁷⁵ Cass. civile 19/12/2003 n. 19546.

⁷⁶ Corte costituzionale 06/07/2001 n. 231.

⁷⁷ L. 64/94, art. 1: "Il Presidente della Repubblica è autorizzato a ratificare la Convenzione europea sul riconoscimento e l'esecuzione delle decisioni in materia di affidamento dei minori e di ristabilimento dell'affidamento, aperta alla firma a Lussemburgo il 20 maggio 1980, nonché la Convenzione sugli aspetti civili della sottrazione internazionale di minori, aperta alla firma a l'Aja il 25 ottobre 1980".

L. 64/94, art. 2: "Piena ed intera esecuzione è data alle convenzioni di cui all'articolo 1, a decorrere dalla data della loro entrata in vigore, in conformità a quanto previsto dall'articolo 22 della Convenzione di Lussemburgo e dall'articolo 43 della Convenzione de l'Aja".

L. 64/94, art. 7: "1. Le richieste tendenti ad ottenere il ritorno del minore presso l'affidatario al quale è Stato sottratto, o a ristabilire l'esercizio effettivo del diritto di visita, sono presentate per il tramite dell'autorità centrale a norma degli articoli 8 e 21 della Convenzione de l'Aja del 25 ottobre 1980. 2. L'autorità centrale, premessi se del caso i necessari accertamenti, trasmette senza indugio gli atti al procuratore della repubblica presso il tribunale per i minorenni del luogo in cui si trova il minore. Il procuratore della repubblica richiede con ricorso in via d'urgenza al tribunale l'ordine di restituzione o il ripristino del diritto di visita. 3. Il presidente del tribunale, assunte se del caso sommarie informazioni, fissa con decreto l'udienza in camera di consiglio, dandone comunicazione all'autorità centrale. Il tribunale decide con decreto entro trenta giorni dalla data di ricezione della richiesta di cui al comma 1, sentiti la persona presso cui si trova il minore, il pubblico ministero, e, se del caso, il minore medesimo. La persona che ha presentato la richiesta è informata della data dell'udienza a cura dell'autorità centrale e può comparire a sue spese e chiedere di essere sentita. 4. Il decreto è immediatamente esecutivo. Contro di esso può essere proposto ricorso per cassazione. La presentazione del ricorso non sospende l'esecuzione del decreto. 5. Il procuratore della repubblica presso il tribunale per i minorenni cura l'esecuzione delle decisioni anche avvalendosi dei servizi minorili dell'amministrazione della giustizia, e ne dà immediatamente avviso all'autorità centrale. 6. È fatta salva la facoltà per l'interessato di adire direttamente le competenti autorità, a norma dell'articolo 29 della Convenzione di cui al comma 1".

⁷⁸ Art. 2 Italian Constitution: "The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled" translation by the Italian Senato della Repubblica, available at:

https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

⁷⁹ Art. 3 Italian Constitution: "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country." *Idem*.

⁸⁰ Art. 11 Italian Constitution: "Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace

According to the Constitutional Court, however, the exclusion of the possibility of a re-examination of the return order by the judge who issued it - whether on his motion or not - is completely consistent with the ratio of the Hague Convention on Child Abduction.

According to the Italian Constitutional Court,⁸² the return order is an urgent measure, which must be issued in a very short time frame and every subsequent circumstance should be weighed according to an ordinary procedure on custody rights.⁸³

and justice among the Nations. Italy promotes and encourages international organisations furthering such ends." Idem.

⁸¹ Art. 31 Italian Constitution: "The Republic assists the formation of the family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits. The Republic protects mothers, children and the young by adopting necessary provisions." Idem.

⁸² Corte costituzionale 06/07/2001 n. 231.

⁸³ The author wishes to thank Alessandra Arnoldi and Edoardo Rossi for their fruitful contribution to the report. The report was last updated on 20 December 2014.

4.9. Lithuania

Glossary of terms

DELK 2002	Ratification of the Hague Convention on Child Abduction - D I konvencijos d I tarptautinio vaik grobimo civilini aspekt ratifikavimo - 2002 m. kovo 19 d. Nr. IX-793 https://www.e-tar.lt/portal/lt/legalAct/TAR.40CFD40E230C
DELK 2003	Ratification of the 1996 Hague Convention on Parental Responsibility - D I konvencijos d I jurisdikcijos, taikytinos teis s, pripažinimo, vykdymo ir bendradarbiavimo t v pareig ir vaik apsaugos priemoni srityje ratifikavimo - 2003 m. liepos 3 d. Nr. IX-1686 https://www.e-tar.lt/portal/lt/legalAct/TAR.289DC6811DC9
CIVPRO	Law on the Implementation of European Union and International Legal Acts Regulating Civil Procedure: "Civilin proces reglamentuojan i europos s jungos ir tarptautin s teis s akt gyvendinimo statymas"
Supreme Court of Lithuania	Lietuvos Aukš iausiasis Teismas http://www.lat.lt/en/home.html
PC	Penal Code of the Republic of Lithuania English version available but not up to date http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=366707
CCP	Code of Civil Procedure of the Republic of Lithuania
CC	Civil Code of the Republic of Lithuania http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=245495
Law on Conciliatory mediation in civil disputes	Lietuvos Respublikos Civilini Gin Taikinamojo Tarpininkavimo statymas – Official Gazette. 2008, No. 87-3462. Available English version at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=404617

4.9.1. Statistical assessment

4.9.1.1. Key statistics overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	n/a	n/a	14.0%	2960 (14.3%)
International divorces	n/a	n/a	8.0%	804 (7.7%)
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	n/a	0	7	9
Outgoing return requests made under the Hague Convention	n/a	0	12	29

* Marriage and divorce figures based on centrally-collected Eurostat data. 2007 figures not available; approximated 2008 figures used instead. Approximated figures obtained from 2011 article by G. Lanzieri of Eurostat, "A Comparison of Recent Trends of International Marriages and Divorces in European Countries". Percentages indicate international marriages/divorces as a proportion of all marriages/divorces.

4.9.1.2. Available national data

Data on international marriages celebrated in Lithuania are publicly available through the Official Portal of Statistics administered by the Department of Statistics of Lithuania. Various search criteria are available for selection by individual users.

Detailed information on married persons, divided, by citizenship, is publicly available.¹ Detailed information on dissolutions of marriages, divided, by citizenship, is also publicly available.²

Data collected by the country's statistical authority however does not include data on international dissolutions of marriages which involve children. The Department of Statistics of Lithuania collects only general data on the total number of divorced couples with common children aged 0–17 and the total number of children aged 0–17 who after divorce stayed with one of the parents. No data is available with respect to citizenship or nationality of such parents and (or) children.

Official statistics provided by the Department of Statistics of Lithuania are reflected in the following table:

Marriages and Divorces	2008	2009	2010	2011	2012	2013
All marriages	24063	20542	18688	19221	20660	20469
International marriages ³	3178	3316	3100	3047	3019	3175
Percentage of international marriages (%)	13,21	16,14	16,59	15,85	14,61	15,51
All divorces	10317	9270	10006	10341	10399	9974
International divorces ⁴	800	804	839	847	870	906
Percentage of international divorces (%)	7,75	8,67	8,38	8,19	8,37	9,08
International divorces involving children	n/a	n/a	n/a	n/a	n/a	n/a

Data in the table reveals that the number of international marriages was quite stable in the country in recent years and was around 3000 (approximately 16% of all marriages) per year. The number of international divorces however is constantly increasing from 800 (7,75% of all divorces) in the year 2008 to 906 (9,08% of all divorces) in the year 2013.

¹ See <http://osp.stat.gov.lt/en/statistiniu-rodikliu-analize?portletFormName=visualization&hash=82908c63-ec39-4e04-9d0c-dd3cd0535eae>

² See <http://osp.stat.gov.lt/en/statistiniu-rodikliu-analize?portletFormName=visualization&hash=08995b74-2397-47d6-a66e-bbdf5cb6d386>

³ Data on international marriages include also marriages between two foreigners.

⁴ Data on international divorces include also marriages between two foreigners.

Data on parental child abduction are available as part of INCASTAT (provided by Hague Conference on Private International law) and are also collected and published in the annual reports of State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labour⁵ which is appointed as Central Authority for implementation of Hague Convention on Child Abduction (hereinafter also referred to as “Central Authority”).

Data published in the annual reports of State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labour Lithuania⁶ are reflected in the following table:

Parental child abduction	2008	2009	2010	2011	2012	2013
Child abduction return requests	4	5	1	4	9	10
Child abduction outgoing requests	17	5	16	22	29	31

Data for the year 2008 provided by the Central Authority in Lithuania do not match the data collected by INCASTAT. It is difficult to explain the reasons for this discrepancy. It is clearly indicated in the annual reports of the Central Authority that statistics take into account only the child abduction requests made under Hague Convention on Child Abduction.

Nevertheless it can be concluded that the number of child abduction outgoing and return requests made under the Hague Convention on Child Abduction is constantly growing in Lithuania.

4.9.2. National laws implementing the Hague Convention

The Parliament of the Republic of Lithuania (called the “Seimas”) ratified the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the “Hague Convention on Child Abduction”) on 19 March 2002. The Hague Convention on Child Abduction was ratified with the following reservations, provided for in Arts. 24 and 26 of the Convention:

In line with Art. 42 and the second paragraph of Art. 24, Lithuania agreed to use English only in any application, communication or other document sent to its Central Authority;

In line with Art. 42 and the third paragraph of Art. 26, Lithuania declared that it shall not be bound to assume any costs referred to in the second paragraph of Article 26 resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

The Hague Convention on Child Abduction came into force in the Republic of Lithuania on 1 September 2002, after its ratification through the law entitled “D I konvencijos d I tarptautinio vaik grobimo civilini aspekt ratifikavimo” (DELK 2002). In order to implement the Convention, the Government adopted Decision No. 1322 “On designation of the institution responsible for execution of the duties of the Central Authority established in the Convention on the Civil Aspects of International Child Abduction” on 21 August 2002.

⁵ Full annual reports are available in Lithuanian only at <http://www.vaikoteises.lt/en/information/reports/>. Summaries of the annual reports are available in English at <http://www.vaikoteises.lt/en/information/reports/>.

⁶ For example, Report for the year 2013, p. 131. Available in Lithuanian at <http://www.vaikoteises.lt/media/file/ataskaitos/2013metuataskaita.pdf>; Report for the year 2011, p. 145. Available in Lithuanian at <http://www.vaikoteises.lt/media/file/2011patigalutine.pdf>; Report for the year 2009, p. 136, 139. Available in Lithuanian at <http://www.vaikoteises.lt/media/file/2009%20piilna%20visu.pdf>.

On 13 November 2008, the Parliament enacted a Law on the Implementation of European Union and International Legal Acts Regulating Civil Procedure: "Civilin proces reglamentuojan i europos s jungos ir tarptautin s teis s akt gyvendinimo statymas" (CIVPRO). This law also deals with the implementation of the Hague Convention on Child Abduction. It came into force on 29 November 2008 and is still in force today.

Moreover, Lithuania is a party to the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The Parliament of the Republic of Lithuania ratified the 1996 Hague Convention on 3 July 2003 through the law entitled "D l konvencijos d l jurisdikcijos, taikytinos teis s, pripažinimo, vykdymo ir bendradarbiavimo t v pareig ir vaik apsaugos priemoni srityje ratifikavimo" (DELK 2003). The 1996 Hague Convention came into force in Lithuania on 1 September 2004.

4.9.3. Characterisation of parental child abduction

Pursuant to Article 3.156 of the Civil Code of the Republic of Lithuania (hereinafter "CC"), parents have equal rights and duties in respect of their children, irrespective of whether the child was born to a married or unmarried couple, after divorce or judicial nullity of marriage or separation. Article 3.159 of the CC establishes that parents are jointly and severally responsible for the care and education of their children. Article 3.165 of the CC provides that parents decide all questions concerning children by their mutual agreement. In the event of a lack of agreement, the dispute shall be resolved by the court. This means that every parent may act alone only in respect of matters of a daily nature and only as long as the other parent does not raise any objections.

Article 3.169 of the CC provides that where the parents are separated, the child's residence shall be decided by the mutual agreement of the parents. In the event of a dispute over the child's residence, the child's residence shall be determined by a residence order awarded by the court in favour of one of the parents. If the circumstances change or if the parent with whom the child was to live lets the other parent live with and bring up the child, the other parent may file a second suit for the determination of the child's residence.

Paragraphs 1, 2, 3 and 4 of Article 3.170 of the CC provides that the father or the mother who lives separately from the child shall have a right to have contact with the child and be involved in the child's education. A child whose parents are separated shall have a right to have constant and direct contact with both the parents irrespective of their residence. The father or the mother with whom the child resides may not interfere with the other parent's contacts with the child or involvement in the child's education. Where the parents cannot agree as to the involvement of the separated father or mother in the education of and association with the child, the procedure of the separated parent's association with the child and involvement in the child's education shall be determined by the court.

Therefore, de facto "parental child abduction" is treated in some cases as a civil dispute in court between parents regarding questions relating to their children (regarding visiting rights, rules on communication with the child or similar matters).

In such cases, however, the legal term "parental child abduction" is not used as long as issues are resolved through internal civil procedural means, i.e. without filing any application under the Hague Convention on Child Abduction and/or the EU Regulation 2201/2003.

Parental child abduction is a crime in Lithuania, according to the Penal Code of the Republic of Lithuania (hereinafter "PC"). The second paragraph of Article 156 of the PC provides that: "A father, mother or a close relative who abducts their own or their relatives' young child from a children's establishment or from a person with whom the child lawfully resides shall be punished by community service or by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to two years."

This is a special crime in connection with the first paragraph of Article 156 of the PC, which establishes the general crime of child abduction. In this light, the perpetrator of the specific crime must be a person no younger than 16 years old who is a parent or close relative of the child.

These criminal offences aim at protecting the child's right to live with his parents or other persons with whom s/he lawfully resides. Moreover, the criminal sanction aims at protecting the rights of the parents or other persons with whom the child lawfully resides. The decision of the County Court of Kaunas in its decision of 17 March 2013 in the criminal case No. 1A-177-245-2011 refers to both objectives, by order of importance.⁷

The objective element of the crime analysed requires an act of abduction. Abduction is understood as an act of taking the young child into the abductor's own charge in a secret or open manner, or by deception with the purpose of holding the child in a selected place. The child can be taken from a children's establishment or from a person with whom the child lawfully resides. In order to verify whether the child has been abducted from his "lawful residence", the Court needs first to determine such lawful residence. The lawful residence of the child may have been previously established by a judicial decision, otherwise it is determined by law. Therefore, civil law and criminal law rules need to be applied simultaneously to identify the person with whom the child has the right to lawfully reside. At this point it should be mentioned that if the habitual residence of the child was not determined by the court or the child is taken by the parent with whom s/he lawfully resides, the removal of the child shall not be regarded as a criminal offence. This is the main criterion which determines that some "international child abduction" cases are treated as a civil dispute between parents rather than as a criminal offence. Article 2.14 of the CC provides that habitual residence (domicile) of minor natural persons shall be deemed to be the habitual residence (domicile) of their parents or guardians (foster parents). Where parents of a minor natural person fail to have a common habitual residence (domicile), the habitual residence (domicile) of a minor shall be deemed to be the habitual residence (domicile) of one of his parents with whom the minor resides most of the time, unless the court has established the habitual residence (domicile) of a minor with one of his parents. Thus CC does not associate habitual residence of the child with a certain address. Habitual residence of the child is associated and linked to the habitual residence of his/her parents, i.e. if one of the parents with whom the child resides most of the time changes his/her habitual residence, habitual residence of the child also changes automatically. For this reason if one of the parents with whom the child resides most of the time leaves the country (moves to live to the other country) with his/her child such case is not regarded as a criminal offence.

The offence of child abduction is committed as soon as the child is taken from the person with whom he lawfully resides. The Supreme Court of Lithuania "Lietuvos Aukš̄iausiasis Teismas" noted in its case law that the legal framework does not link the crime to the purposes of the abduction nor to its consequences nor to its duration.

Thus child abduction is committed and complete as soon as the child is taken from a children's establishment or from a person with whom the child lawfully resides without the consent of those persons or against their will.

Child abduction may only be committed with a specific intent, i.e. when committing it, the person must be aware of his or her criminal act and willing to engage therein. The reasons behind the abduction are not important for it to be legally qualified as a criminal act. The aim of protecting the child does not justify the criminal action: the child can be abducted even with the purpose to ensure the real or imaginary interests of the child, for example, to protect him from harm, bad influence, because of love".

It is true that courts sometimes deviate from this rule insofar as they seek to verify whether there has been actual damage of the legal interest safeguarded by the criminal

⁷ Infra, section 4.10.5.

regulation of child abduction. In particular, they analyse what is in the best interests of the child. For example, the County Court of Kaunas in its decision of 17 March 2013 in the criminal case No. 1A-177-245-2011 ruled that the second paragraph of Article 156 of the PC requires an act against the child's will, with the use of psychological or physical violence, implying the hiding of the child or his permanent removal. In that case, a father had taken his child to visit the father's mother (the child's grandmother) at the child's personal request and had brought him back after two hours. Although this went against the earlier court's ruling (decision), i.e. infringing the ruling, it was established in the present case that the mother very often left the country for long periods of time, leaving her child with her mother (the child's grandmother), while at those times the father took his children with him and took care of them. During his examination in court, the child stated that he would like to live with his father because his mother constantly left the country and he, together with his brother, had to stay with his grandmother (his mother's mother). On those grounds the court arrived at the conclusion that no crime of child abduction had been committed. It should be stressed though that this is rather an example of case law of the court of lower instance (the County Court) and is not a rule or pattern of case law.

Unlawful international parental child abduction in Lithuania's legal system is understood to be defined as it is in EU Regulation 2201/2003 and the Hague Convention on Child Abduction. This conclusion can be drawn from the fact that Lithuanian courts and institutions directly apply definitions provided in the aforementioned legislation when these legal instruments are applied.

The Supreme Court of Lithuania, in its case law, noted that "in accordance with the EU Regulation 2201/2003, the definition of child abduction includes illegal removal and illegal retention, i.e. removal of a child or his 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. Therefore, in order to apply legal norms regulating child abduction, the factual situation must qualify as child abduction within the meaning of the EU Regulation 2201/2003. In the current case, it is established that neither the child was taken from his permanent habitual residence in violation of rights of custody nor was the child returned to the state of his permanent habitual residence. It was mentioned that both claimant and respondent together with their child went to live in the Republic of Poland by mutual consent'. The Supreme Court further noted that "illegal retention might be identified when the child was legally taken to the other Member State after a defined period of time and is not returned back to the state of his permanent residence in breach of rights of custody. However in the light of this case, illegal retention cannot be understood as factual retention of the child after the simple claim (demand) of one of the holders of custody rights whose habitual residence is in the other state than habitual residence of his child".

The Court of Appeal of Lithuania (hereinafter 'the Court of Appeal') has also addressed the definition of international child abduction in its case law. In its decision of 23 September 2013 in civil case No. 2-2114/2013 and its decision of 3 January 2013 in civil case No. 2-6/2013, the Court of Appeal quoted paragraph 11 of Article 2 of EU Regulation 2201/2003 and Article 3 of the Hague Convention on Child Abduction. In its decision of 11 February 2014 in civil case No. 2-372/2014, it stated that the consequence of child abduction is the infringement of custody rights. In this case, it further explained that in such a situation, the following harmful consequences appear: the person who holds custody rights loses the possibility of exercising those rights in the place of habitual residence of a child and the child loses the household that he/she was sharing with his/her primary caregiver in his habitual residence prior to his/her illegal removal or retention.

4.9.4 Judicial and non-judicial tools available to the parties, including mediation

It should be mentioned that some illegal activities directly and/or indirectly related to international child abduction are established in the Code of Administrative Offences of the Republic of Lithuania:⁸ Article 181 “Non-performance of Parental Authority or Usage of Parental Authority against the Interests of the Child”, Article 181⁽³⁾ “Infringement of Child’s Rights”. Because of this, some actions might also be qualified as administrative offences, and administrative sanctions might be imposed.

Basically, all important issues related to international child abduction are ruled by the courts. The Code of Civil Procedure of the Republic of Lithuania⁹ (hereinafter – the CCP) is therefore of particular importance, applied by directly taking into consideration specific regulations established in the Law on Implementation of European Union and International Legal Acts Regulating Civil Procedure (as already quoted above).

There is no compulsory mediation in the Republic of Lithuania, including in civil family disputes (family mediation). Two types of mediation are present in Lithuania’s law:

1. Judicial mediation – stipulated in paragraph 1 of Article 231 of the CCP) and “Rules on Judicial Mediation” approved by the Decision of Council of the Courts No. 13P-348, May 20, 2005 and No. 13 P-53-(7.1.2), April 29, 2011¹⁰; and
2. Non-judicial mediation – regulated by Law on Conciliatory mediation in civil disputes¹¹.

As already mentioned both types of mediation are not compulsory, and disputes can be settled through mediation only by consent of the parties.

The Lithuanian Central Authority always offers the parties the chance to settle their dispute out of court through conciliatory mediation. Conciliatory mediation can take place only where the parties to a dispute agree to settle the dispute through conciliatory mediation. The Central Authority only informs the parties about such possibility and offers some assistance (for example, consultations or premises for mediation procedures). No special provisions on family mediation are established by the Central Authority. There were some cases where parties to a dispute agreed to settle their dispute through conciliatory mediation and conciliatory mediation took place on the premises of the Central Authority. Where parties agree to settle the dispute through mediation, such meetings are organized a few days before the court hearing. If mediation is not successful parties can further settle their dispute in court. Conciliatory mediation must be paid for, and this is the usual reason why parties refuse mediation services.¹²

To characterize an act as illegal or as international child abduction, it might be important to establish whether the child left the country unlawfully. In this regard, the Decision of the Government No. 302 adopted on February 28 2002 “On the Approval of Procedure of Temporary Leave of the Child to Foreign States”¹³ with its amendments is of particular importance.

There are orders issued by the Director of State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labour on the procedures of submitting, filing and handling applications for return of a child under the Hague Convention on Child

⁸ Lietuvos Respublikos administracini teis s pažeidim kodeksas // Vyriausyb s žinios, 1985, Nr. 1-1.

⁹ Lietuvos Respublikos civilinio proceso kodeksas // Žin., 2002, Nr. 36-1340.

¹⁰ Teismin s meditacijos taisykl s. Patvirtinta Teism tarybos 2005 m. geguž s 20 d. nutarimu Nr. 13P- 348, pakeista Teis j tarybos 2011 m. balandžio 29 d. nutarimu Nr. 13 P-53-(7.1.2) [interactive].
http://www.teismai.lt/dokumentai/teismines%20mediacijos%20taisykles_aktuali%20redakcija.doc

¹¹ Law on Conciliatory mediation in civil disputes Official Gazette. 2008, No. 87-3462. Available English version at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=404617

¹² According to the information provided by Central Authority to the author of the present national report.

¹³ Lietuvos Respublikos Vyriausyb s 2002 m. vasario 28 d. nutarimas Nr. 302 „D l vaiko laikino išvykimo užsienio valstybes tvarkos patvirtinimo (D l vaiko laikino išvykimo užsienio valstybes, nepriklausan ias šengeno erdvei, tvarkos aprašo patvirtinimo)“ // Žin., 2002, Nr. 23-858.

Abduction. For example, Order No. BV-7 of Director of State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labour adopted on 23 March 2012. By this order the form of application for return of a child under the Hague Convention on Child Abduction was approved.¹⁴

4.9.5. Existing criminal sanctions

Child abduction is punished, as a crime by Article 156 of the Lithuanian Penal Code (PC):¹⁵

"Article 156. Abduction of a Child or Exchange of Children

1. A person who abducts another person's young child or exchanges infants shall be punished by arrest or by imprisonment for a term of up to eight years.
2. A father, mother or a close relative who abducts their own or their relatives' young child from a children's establishment or from a person with whom the child lawfully resides shall be punished by community service or by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to two year."

According to Article 156 of the PC, the victim of the crime is a "young child", i.e. a child under the age of 14. If a 14 year old or older child is abducted, the crime shall be qualified as crime of Unlawful Deprivation of Liberty:

"Article 146. Unlawful Deprivation of Liberty

1. A person who unlawfully deprives a person of his liberty, in the absence of characteristics of hostage taking, shall be punished by a fine or by arrest or by imprisonment for a term of up to three years.
2. A person who commits the act provided for in paragraph 1 of this Article by using violence or posing a threat to the victim's life or health or by holding the victim in captivity for a period exceeding 48 hours shall be punished by arrest or by imprisonment for a term of up to four years.
3. A person who unlawfully deprives a person of his liberty by committing him to a psychiatric hospital for reasons other than an illness shall be punished by arrest or by imprisonment for a term of up to five years."

In addition, application of Article 163 of the PC is possible in some cases:

"Article 163. Abuse of the Rights or Duties of Parents, a Guardian or Custodian or Other Lawful Representatives of a Child

A person who abuses the rights of a father, mother, guardian or custodian or other lawful representatives of a child by physically or mentally harassing a child, leaving him for long periods without care or by maltreating him in a similar cruel manner shall be punished by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to five years."

As already indicated in this report, the child can lawfully reside with certain persons by judgment of the court or by applicable law. In cases where judgement of the court is intentionally infringed such action might be qualified as a crime of "Failure to comply with a Court's Decision Not Associated with a Penalty":

"Article 245. Failure to Comply with a Court's Decision Not Associated with a Penalty

A person who fails to comply with a court's decision not associated with a penalty shall be considered to have committed a misdemeanour and shall be punished by community service or by a fine or by restriction of liberty or by arrest."¹⁶

¹⁴ Application form in English: [http://www.vaikoteises.lt/media/file/Application%20angl\(2\).doc](http://www.vaikoteises.lt/media/file/Application%20angl(2).doc)

¹⁵ The English translation of the Penal Code of the Republic of Lithuania is available at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=366707, as last amended on 11 February 2010 – No XI-677, which is not up to the date. However, articles quoted herein were not amended later to that date so are actual and up to date.

¹⁶ Ibidem.

4.9.6. Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages

Article 1.138 of the CC called "Protection of civil rights" provides:

"1. Civil rights shall be protected by the court acting within its competence and according to the procedure established by laws. The ways of protecting civil rights are the following:

- 1) acknowledgement of rights;
- 2) restoration of the situation that existed before the right was violated;
- 3) prevention of unlawful actions or prohibition to perform actions that pose reasonable threat of the occurrence of damage (preventive action);
- 4) ad judgement to perform an obligation in kind;
- 5) interruption or modification of a legal relationship;
- 6) recovery of pecuniary or non-pecuniary damage from the person who infringes the law and, in cases established by the law or contract, recovery of a penalty (fine, interest);
- 7) declaration as voidable of unlawful acts of the state or those of the institutions of local governments or the officials thereof in the cases established in paragraph 4 Article 1.3 of this Code;
- 8) other ways provided by laws".

No exceptions on types of rights are established therefore rights of the parents and rights of a child can be protected by the mentioned ways of protection.

More specifically dealing with the possibility of claiming damages it should be noted, that Article 6.263 called "Obligation to compensate for damage caused" provides:

"1. Every person shall have the duty to abide by the rules of conduct so as not to cause damage to another by his actions (active actions or refrainment from acting).

2. Any bodily or property damage caused to another person and, in the cases established by the law, non-pecuniary damage must be fully compensated by the liable person.

3. In cases established by laws, a person shall also be liable to compensation for damage caused by the actions of another person or by the action of things in his custody."

As child abduction might qualify as a crime in some cases (as indicated already in this report), the second paragraph of Article 6.250 of the CC should be mentioned which provides, that "Non-pecuniary damage shall be compensated only in cases provided for by laws. Non-pecuniary damage shall be compensated in all cases where it is incurred due to crime, health impairment or deprivation of life, as well as in other cases provided for by laws. <...>".

4.9.7. Enforcement methods

First of all it should be mentioned that the Police Department under the Ministry of the Interior and its subordinate police authorities organise and conduct the location of persons, including children, whose whereabouts are not known in the Republic of Lithuania.

In accordance with the CCP (Article 620, 621), in executing court decisions adopted in civil cases, the process of locating a debtor or a child is announced by a bailiff's order.

In locating persons, police authorities act in accordance with the Instruction for Locating Persons approved by Order No. 4RN of the Minister of the Interior of the Republic of Lithuania of July 16, 2013¹⁷. In locating persons, data contained in state registers and state or municipal information systems, operational measures and methods, such as mass media

¹⁷ Lietuvos Respublikos vidaus reikalų ministro 2003 m. liepos 16 d. sakymas Nr. 4RN „Asmenų paieškos instrukcija“. The act is confidential as publicly not available.

and other possibilities can be used. The Police Department under the Ministry of the Interior can announce an international search through Interpol. The Lithuanian Branch of Interpol under the International Communication Service of the Lithuanian National Branch of Interpol under the International Communication Service of the Lithuanian Criminal Police Bureau conducts searches of lost persons on an international scale.

The State Border Protection Service, under the Ministry of Interior, controls persons and vehicles crossing the state border, participates in implementing control of state migration processes and cooperates in the prevention of child abduction and wrongful removal from or into the country.

Paragraph 1 of Article 9 of the Law on the Implementation of European Union and International Legal Acts Regulating Civil Procedure¹⁸ stipulates that decisions regarding the return of a child are enforced according to the rules established in section VI of CCP.

Article 588 of CCP establishes a general provision that court decisions, verdicts, rulings, judgements or orders shall be executed after their enforcement, except in a case of urgency. Enforcement of writs of executions is performed by bailiffs in line with the Law on Bailiffs of the Republic of Lithuania¹⁹ and the Instruction for the Execution of Decisions.²⁰

Pursuant to Article 764 of the CCP, in executing a court decision concerning the transmission of a child, a bailiff acts in the presence of the person to whom the child is transmitted and a representative of the state institution of protection of children rights. This Article also lays down a requirement to secure the protection of children's rights in executing decisions of this kind. Article 711 of CCP regulates the execution of decisions requiring the debtor to take or terminate certain measures. Article 283 of the CCP empowers courts to legitimate an urgent execution, in part or in whole, where a delay in executing the court decision, due to special circumstances, threatens to do significant harm to the creditor or if the execution of the court decision can become impossible or very difficult. This procedure is very important in executing court decisions concerning the return of children under the Hague Convention on Child Abduction and EU Regulation 2201/2003.

Important case law was shaped by the Supreme Court regarding the stage of enforcement.

The Supreme Court, in its decision of 7 January 2008 in the civil case No. 3K-3-91/2008,²¹ ruled that only Courts of the Republic of Lithuania (i.e. not bailiff or any other authority) are authorised institutions to take binding decisions regarding the order of the return of a child on the grounds of Article 13 paragraph 1 (b) of the Hague Convention on Child Abduction at all stages of procedure (including at the stage of enforcement). The Supreme Court also established that at the enforcement stage, once the person has objected to the return of his child, has claimed to stop the enforcement procedure and provides convincing evidence that there is a grave risk that child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, the bailiff has a duty to appeal to the court ex officio. A court must then, through the institute of renewal of the process (reopening/re-examination of the case), evaluate the changes to factual circumstances of the case in line with Article 13 paragraph 1 (b) of Hague Convention on Child Abduction.

In addition, the Supreme Court concluded that national rules on the renewal of the process (reopening/re-examination of the case) are compatible with legal regulation provided in the Hague Convention on Child Abduction and EU Regulation 2201/2003 except for the rule provided in paragraph 2 of Article 372 of CCP stating that "the court which examines request for process renewal (reopening the case) has a right to stop execution

¹⁸ Lietuvos Respublikos civilin proces reglamentuojan i Europos S jungos ir tarptautin s teis s akt gyvendinimo statymas (Žin., 2008, Nr. 137-5366).

¹⁹ Lietuvos Respublikos antstoli statymas // Žin., 2002, Nr. 53-2042.

²⁰ Lietuvos Respublikos teisingumo ministro 2005 m. spalio 27 d. sakymas Nr. 1R-352 „D I Sprendim vykdymo instrukcijos patvirtinimo“ // Žin., 2005, Nr. 130-4682.

²¹ Lietuvos Aukš iausiojo Teismo Civilini byl skyriaus 2008 m. sausio 7 d. nutartis civilin je byloje Nr. 3K-3-91/2008

(enforcement) of the judgement until the case regarding process renewal is examined". Therefore, this rule shall not be applied in such cases.²²

At the Lithuanian Central Authority, there is one permanent employee accountable for child abduction cases. In cases of necessity, one additional employee is temporarily appointed. The Central Authority deals merely with 'civil' parental child abduction cases and does not deal with other kinds of kidnapping (for example, criminal kidnapping). In such cases, it advises people to contact the police, prosecution and (or) other institutions which are responsible for criminal investigations. The Central Authority does not deal directly with international parental child abduction cases where countries which are not parties to the Hague Convention on Child Abduction are involved. In such cases, the Central Authority recommends solving the dispute through diplomatic means (with the help of embassies, diplomatic missions, etc.).

4.9.8. Sensitive issues featured in national case law²³

Jurisdiction

The Supreme Court in its decision of 19 May 2007, in the civil case No. 3K-3-254/2007,²⁴ dealt with the questions of the court's jurisdiction under EU Regulation 2201/2003. The Supreme Court stated that EU Regulation 2201/2003 is directly applicable in the case. The court further noted that it has to answer the question first whether it has jurisdiction to rule in the case. The court emphasised that the grounds of jurisdiction in matters of parental responsibility established in EU Regulation 2201/2003 are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility. The Supreme Court noted that the present EU Regulation 2201/2003 does not provide a definition for the child's habitual residence, and therefore courts shall answer the question in which State the child's habitual residence is. The court explained that this is the question of fact which shall be established. The Supreme Court concluded that in light of this, the courts of lower instances arrived at a legitimate conclusion that under the circumstances of the case, the child's habitual residence was the Republic of Poland. In this regard, Polish courts shall have jurisdiction over the case at issue.

The courts of lower instances of the Republic of Lithuania dealt many times with issues of application of paragraph 1 of Article 8 of EU Regulation 2201/2003 in determining whether the courts have jurisdiction in matters of parental responsibility over a child, i.e. whether the child is habitually resident in Lithuania or in another Member State at the time the court is seized.²⁵

²² Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2008 m. sausio 7 d. nutartis civilinėje byloje Nr. 3K-3-91/2008

²³ All case law was translated from Lithuanian (original language) to English by the author of this report. All quotations used are not official translations.

²⁴ Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2007 m. birželio 19 d. nutartis civilinėje byloje Nr. 3K-3-254/2007.

²⁵ Panevėžio apygardos teismo 2011 m. gruodžio 23 d. nutartis civilinėje byloje Nr. 2S-851-252-2011; Vilniaus apygardos teismo 2012 m. balandžio 26 d. nutartis civilinėje byloje Nr. 2S-312-653/2012 ir Nr. 2S-688-653/2012; Panevėžio apygardos teismo 2012 m. birželio 15 d. nutartis civilinėje byloje Nr. 2S-447-252-2012; Kauno apygardos teismo 2012 m. spalio 15 d. nutartis civilinėje byloje Nr. 2S-2311-658/2012; Šiaulių apygardos teismo 2013 m. gegužės 30 d. nutartis civilinėje byloje Nr. 2S-383-210/2013; Kauno apygardos teismo 2013 m. rugpjūčio 4 d. nutartis civilinėje byloje Nr. 2S-1297-480/2013; Kauno apygardos teismo 2013 m. lapkričio 19 d. nutartis civilinėje byloje Nr. 2A-2165-527/2013; Kauno apygardos teismo 2014 m. birželio 16 d. nutartis civilinėje byloje Nr. 2S-1414-254/2014; Panevėžio apygardos teismo 2014 m. vasario 27 d. nutartis civilinėje byloje Nr. 2S-145-227/2014.

Definition and concept of "child abduction"

The Supreme Court, in its decision of 19 May 2007 in civil case No. 3K-3-254/2007,²⁶ also addressed the argument of the claimant regarding the definition of child abduction and the possibility of applying legal norms regarding the child abduction per se. The Supreme Court stated that "in accordance with EU Regulation 2201/2003, the definition of child abduction includes illegal removal and illegal retention, i.e. removal of a child or his 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. Therefore, in order to apply legal norms regulating child abduction, the factual situation shall qualify as child abduction within the meaning of EU Regulation 2201/2003. In the current case, it is established that neither the child was taken from his permanent habitual residence in violation of rights of custody nor was the child returned to the state of his permanent habitual residence. It was mentioned that both claimant and respondent, together with their child, went to live in the Republic of Poland by mutual consent".²⁷

The Supreme Court further addressed the issue on the application of Article 10 (a) (i). It noted, that "illegal retention might be identified even when the child was legally taken to another Member State but after a defined period of time, has not returned back to the State of his permanent residence, in breach of rights of custody. However, in light of this case, illegal retention cannot be understood as factual retention of the child after the simple claim (demand) of one of the holders of custody rights whose habitual residence is in the other state than habitual residence of his child".²⁸ The Supreme Court concluded that as long as there was no child abduction within the meaning of paragraph 11 of Article 2, the Court of Appeal wrongly applied the rule established in Article 10 (a) and Article 10 (b) (i).

Procedural autonomy

The Supreme Court adopted an important decision on 25 August 2008 in civil case No. 3K-3-126/2008.²⁹ This was the case which attracted a lot of attention and was widely commented on through mass media by different authorities and individuals. Furthermore, the Supreme Court in this case referred it for a preliminary ruling to the Court of Justice of the European Union (hereinafter – ECJ). The ECJ adopted the Judgment of the Court (Third Chamber) of 11 July 2008 in case no. C-195/08 PPU – *Rinau*³⁰ (hereinafter – Preliminary Ruling). The Supreme Court adopted its final decision based on the legal findings provided in the Preliminary Ruling of ECJ. In this case, the Supreme Court addressed the concept of procedural autonomy established in EU Regulation 2201/2003.

The Supreme Court quoted the Preliminary Ruling, stating that the enforceability of a judgment requiring the return of a child following a judgment of non-return enjoys procedural autonomy, so as not to delay the return of a child who has been wrongfully removed to or retained in a Member State other than that in which that child was habitually resident immediately before the wrongful removal or retention. The Supreme Court further noted that, the procedural autonomy of the provisions in Articles 11(8), 40 and 42 of EU

²⁶ Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2007 m. birželio 19 d. nutartis civilinėje byloje Nr. 3K-3-254/2007.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2008 m. rugpjūčio 25 d. nutartis civilinėje byloje Nr. 3K-3-126/2008

³⁰ Case C-195/08 PPU *Rinau v. Rinau*, [2008] E.C.R. I-5271, [2008] 2 FLR 1495

Regulation 2201/2003 and the priority given to the jurisdiction of the court of origin, in the context of Section 4 of Chapter III of EU Regulation 2201/2003, are reflected in Articles 43 and 44 of EU Regulation 2201/2003, which provide that the law of the Member State of origin is to be applicable to any rectification of the certificate, that no appeal is to lie against the issuing of a certificate and that that certificate is to take effect only within the limits of enforceability of the judgment. The procedure culminates in the certification of the decision which gives it special enforceability, the conditions for granting that certificate and the effects thereof being expressly set out in EU Regulation 2201/2003. Once the certificate has been issued, the judgment requiring the return of a child referred to in Article 40(1)(b) is to be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition. Provisions of EU Regulation 2201/2003 seek not only to secure the immediate return of the child to the Member State where he or she was habitually resident immediately before the wrongful removal or retention, but also to enable the court of origin to assess the reasons for and evidence underlying the non-return decision issued. In this case, it was proved that the County Court of Klaipeda issued a non-return decision on 22 December 2006. However, later, the court of the Federal Republic of Germany adopted a decision by which it was ruled that the child be returned, and a certificate was issued. No doubt has been expressed as regards the authenticity of that certificate. There is no right of appeal granted against such certificate, as it was ruled by the ECJ that opposition to the recognition of the decision ordering return is not permitted and it is for the requested court only to declare the enforceability of the certified decision and to allow the immediate return of the child. Therefore, the Supreme Court concluded that, in accordance with Lithuanian procedural laws, it means that claims regarding the part of the decision of the court of the Federation of Germany (by which it was decided that the child be returned) cannot be ruled on. Such claim shall not be accepted by the court (Article 137 paragraph 2 point 1 of the CCP).

The Supreme Court further elaborated that the decision of the County Court of Klaipeda is a non-return decision within the meaning of Regulation and Article 13 of Hague Convention on Child Abduction. As it was ruled by the ECJ in the Preliminary Ruling, once a non-return decision has been taken and brought to the attention of the court of origin, it is irrelevant, for the purposes of issuing the certificate provided for in EU Regulation 2201/2003, that that decision has been suspended, overturned, set aside or, in any event, has not become *res judicata* or has been replaced by a decision ordering return, in so far as the return of the child has not actually taken place. Procedural steps which, after a non-return decision has been taken, occur or recur in the Member State of enforcement are not decisive and may be regarded as irrelevant for the purposes of implementing the Regulation.

The Supreme Court addressed the question on application of Article 21 paragraph 3 of EU Regulation 2201/2003. Article 21 paragraph 3 of EU Regulation 2201/2003 provides that any interested party may apply for a decision that the judgment be or not be recognised. In the view of the Supreme Court, this legal norm does not provide the right to apply for a decision on recognition only in cases where the earlier application for a decision on non-recognition exists. As was clearly stated by the ECJ, the interested party can apply for non-recognition of a judicial decision, even if no application for recognition of the decision has been submitted beforehand, except where the procedure concerns a decision certified pursuant to Articles 11(8) and 40 to 42 of EU Regulation 2201/2003. The peculiarity of this case is that a return decision was certified. Article 21 paragraph 3 allows applications on recognition or non-recognition only without prejudice to Section 4. If a certificate is issued in the case, all the parts of the court decision which are related to the effective execution of the aim of EU Regulation 2201/2003 – to return the child immediately – are valid and shall be executed without any recognition procedure and with no right to objections or appeals. The Court concluded that all requests, appeals, objections or other actions in the case which harms the aim of the mentioned aim of EU Regulation 2201/2003 shall not be applied so long as the child has not been returned.

Exceptions to return

The Supreme Court, in its decision of 25 August 2008 in the civil case No. 3K-3-403/2008,³¹ interpreted conditions for application of Article 13 (1) (b) of Hague Convention on Child Abduction. The Supreme Court ruled that conditions provided in Article 13 (1) (b) of Hague Convention on Child Abduction, "encompass the exceptional cases when the child would not be able to develop normally in his country of origin due to the fact that the holder of parental rights does not perform or unduly perform his parental rights and duties and there is a reason to believe that this kind of behaviour would not change in the future (behaves improperly in full view of the child, abuses alcohol, drugs or psychotropic materials, etc.), or that there are no objective conditions for child's development in his country of origin (for example, due to martial law)".³² The Supreme Court found the following circumstances not sufficient for the application of Article 13 (1) b): the child will fall into an unfamiliar linguistic environment, the health condition of the child's brother will deteriorate.

The Supreme Court, in its decision of 23 May 2008 in civil case No. 3K-3-305/2008,³³ dealt with the important issue as to the application of Article 13 paragraph 1 (b) of the Hague Convention on Child Abduction, i.e. which institution in Lithuania can question or take any decisions regarding the binding power of the order to return the child on the grounds provided for in Article 13 paragraph 1 (b) of the Hague Convention on Child Abduction (there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation). The Supreme Court had to answer the following questions of law: i) whether the bailiff at the stage of enforcement is the authorised institution to stop execution of the order to return the child on the grounds of Article 13 paragraph 1 (b)?; ii) whether the bailiff has a duty to take actions ex officio to take all procedural steps and means to achieve the goals of the Hague Convention on Child Abduction?

After analysis of Lithuanian laws, applicable International treaties and case law of the European Court of Human Rights (case *Sylvester v. Austria*³⁴ in particular), the Supreme Court arrived at the following conclusions:

First, it is true that effective protection of children's rights requires an evaluation of the existence of circumstances provided in Article 13 paragraph 1 (b) of the Hague Convention on Child Abduction (is there a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation?) at each procedural stage, including at the stage of enforcement. However the Hague Convention on Child Abduction leaves open a discretion for each State to choose who – the courts or administrative institutions – have legal power to take decisions regarding the return or non-return of the child. The Republic of Lithuania, in the context of its obligations under the Hague Convention on Child Abduction, declared that applications regarding the orders to return the child shall be examined by Courts in line with the rules laid down in the Code of Civil Procedure of the Republic of Lithuania. Due to the above-mentioned reasons, only Courts of the Republic of Lithuania (i.e. not a bailiff or any other authority) are authorised institutions to take binding decisions regarding the order of the return of a child on the grounds of Article 13 paragraph 1 (b) at all stages of procedure (including at the stage of enforcement). Lithuania is obliged to create a functional court system capable of ensuring effective protection of a child's rights, including to ensure effective application of Article 13 paragraph 1 (b) of the Hague Convention on Child Abduction at the stage of enforcement. For this purpose, the institution of proceedings to renew the process

³¹ Lietuvos Aukšiausiojo Teismo Civilinių bylų skyriaus 2008 m. rugpjūčio 25 d. nutartis civilinėje byloje Nr. 3K-3-403/2008

³² Ibid.

³³ Lietuvos Aukšiausiojo Teismo Civilinių bylų skyriaus 2008 m. gegužės 23 d. nutartis civilinėje byloje Nr. 3K-3-305/2008

³⁴ *Sylvester v. Austria*, nos. 36812/97 and 40104/98, (2003) 37 E.H.R.R. 17, Incadat HC/E/ 502.

(reopening/re-examination of the case) is established in section XVIII of the Code of Civil Procedure of the Republic of Lithuania, which shall be applied in such cases.

Second, at the enforcement stage, once the person who has objected to the return of his child has claimed a halt to the enforcement procedure and has provided convincing evidence that there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, the bailiff has a duty to appeal to the court *ex officio*, and a court, through the institute of renewal of the process (reopening/re-examination of the case), must evaluate the changes to the factual circumstances of the case in line with Article 13 paragraph 1 (b) of the Hague Convention on Child Abduction. The requirement of the provision of "convincing evidence" for the bailiff flows from the Article 13 of Hague Convention on Child Abduction which lays down the exceptions of a duty to return the child.

The Court of Appeal adopted informative and instructive guidance regarding the conditions for adoption of non-return decision of the child according to EU Regulation 2201/2003 and the Hague Convention on Child Abduction on 11 February 2014, in civil case No. 2-372/2014,³⁵ and on 3 January 2013, in civil case No. 2-6/2013.³⁶

The Court of Appeal stated that it is established in EU Regulation 2201/2003 that 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 EU Regulation 2201/2003, in particular Article 11. Thus principle of supremacy of the Regulation shall be coordinated with subsidiary application of Hague Convention on Child Abduction.

The Court stated that the consequence of child abduction is an infringement of custody rights. The Court of Appeal in this case further explained, that in such a situation, the following harmful consequences appear: the person who holds custody rights loses the possibility to exercise those rights in the place of habitual residence of a child and the child loses the custody, which he enjoyed in his habitual residence until the moment of illegal removal or retention.

The Court of Appeal noted that both EU Regulation 2201/2003 (paragraph 1 of Article 11) and the Hague Convention on Child Abduction (Article 1, paragraph 1 of Article 12) establish a common rule that the child must be promptly returned to the country from which he was wrongfully removed and retained. However the Court emphasized that the procedure of child return shall not be applied mechanically or automatically. The Hague Convention leaves a discretion for the court to evaluate the surrounding environment of certain child and the child himself and to adopt a decision regarding the return or non-return of the child. EU Regulation 2201/2003 does not provide any new grounds for non-return of the child but establishes restrictions on the application of certain grounds for non-return of the Hague Convention on Child Abduction. The following exceptions are established in the Hague Convention on Child Abduction which might be applied as a reason to adopt a decision of non-return:

1. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention (Article 13 paragraph 1 (a) of the Hague Convention); or
2. had consented to or subsequently acquiesced in the removal or retention (Article 13 paragraph 1 (a) of the Hague Convention); or
3. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13 paragraph 1 (b) of the Hague Convention); or

³⁵ Lietuvos apeliacinio teismo 2014 m. vasario 11 d. nutartis civilin je byloje Nr. 2-372/2014

³⁶ Lietuvos apeliacinio teismo 2013 m. Sausio 3 d. nutartis civilin je byloje Nr. 2-6/2013

4. the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views (Article 13 paragraph 2 of the Hague Convention); or
5. procedures started after expiration of a period of less than one year from the date of the wrongful removal or retention and it is demonstrated that the child is now settled in its new environment (Article 12 paragraph 2 of the Hague Convention).

In the view of the Court of Appeal, in all those grounds except for the first and the second, priority is directly given to the protection of the rights and interests of the child. Interests of the child are dependent on many circumstances in each individual case – age, level of maturity, environment, and experience. In such cases, the court shall maintain a balance between the aim of the Hague Convention, which is to promptly return the child to the country from which he was wrongfully removed and the interests of the child. It should refuse to return the child only in exceptional cases, when the facts established in the case clearly confirm that non-return is necessary for the proper protection of child's interests.

The Court of Appeal further interpreted Article 13 paragraph 1 (b) of the Hague Convention on Child Abduction and emphasised that paragraph 4 of Article 11 of EU Regulation 2201/2003 establishes an additional rule on the application of the above-mentioned article of the Hague Convention on Child Abduction: a court cannot refuse to return a child on the basis of Article 13 par. 1 (b) of the Hague Convention on Child Abduction if it is established that adequate arrangements have been made to secure the protection of the child after his or her return. In this way, EU Regulation 2201/2003 strengthens the principle of return of the child in each case by narrowing the exception provided in Article 13 par. 1 (b) of the Hague Convention on Child Abduction. The Court of Appeal elaborated that the exception provided in Article 13 paragraph 1 (b) is established for those cases where return would be in contradiction with the interests of the child as they are defined in paragraph 1 (b), namely, the interests of the child not to be transferred from his or her place of residence to a new environment without sufficient guarantees of stability, not to be affected by threats to his or her physical or psychological health and not to be placed in any other intolerable situation.

In light of this, the Court of Appeal concluded that there were no grounds to apply this exception in either case.

- i) In case No. 2-372/2014, the following circumstances pointed out by the claimants were evaluated as not satisfactory for application of the exception at stake: psychological harm which would be caused by separation from mother, termination of ties with close relatives, taking the child from familiar environment, possible threats regarding the right to housing, education, care during father's working hours.
- ii) In case No. 2-6/2013, the court stressed the following circumstances: in the conclusions of complex psychiatric-psychological examination it was confirmed that the girl does not express or report any improper behaviour of her mother and her negative opinion on return to the UK is not determined by her relations with her mother; during her residence in the UK both parents equally participated in her upbringing; during her residence with both parents no intolerable incidents such as violence or a harmful way of life were detected or reported regarding any of the parents.

The Court of Appeal stressed in both cases that the exception at issue encompasses very exceptional cases (as explained in the jurisprudence of the Supreme Court) when the child would not be able to develop normally in his country of origin due to the fact that the holder of parental rights does not perform or unduly perform his parental rights and duties and there is a reason to believe that this kind of behaviour would not change in the future (behaves improperly at the sight of the child, abuses alcohol, drugs or psychotropic materials, etc.), or that there are no objective conditions for the child's development in his country of origin (for example, due to martial law). But this is not true in either case as sufficient evidence that a possible exceptional threat existed.

The Court of Appeal, in both cases, provided detailed reasoning on the application of paragraph 2 of Article 12 of Hague Convention on Child Abduction. In the view of the Court of Appeal, the term “settled in its new environment” in this context consists of two elements. The first is a physical element – settlement in the society and new environment. The second is an emotional element – security and stability. The term “new environment” encompasses place, home, educational institution, friends, activities and opportunities. Taking into consideration the fact that the aim of the Hague Convention is to prevent the illegal removal of the child and to reduce the cases of non-return to a minimum, the court in the cases of non-return on the analysed basis must achieve such level of assurance which would justify non-return on this exceptional basis. The Court ruled that in a factual situation where procedures regarding the return of a child are started once a period of less than one year has elapsed, but where such procedures have been lasting for long time and this situation determines adaptation and settlement of the child in its new environment, principles of justice and reasonableness demand that the ground of non-return established in paragraph 2 of Article 12 of Hague Convention on Child Abduction shall be interpreted and applied not formally but by taking into consideration the main aim of this exception – to ensure protection of the interests of the child who has already settled in its new environment. In cases regarding the return of a child, the court shall give the priority to the child’s interests in comparison to the rights of the parents and public order. This conclusion of the Court of Appeal was supported by norms of Hague Convention, EU Charter of Fundamental Rights, case law of European Court of Human Rights (in particular *Sahin v. Germany*, no. 30943/96; *Haase v Germany*, no. 11057/02; *Kutzner v. Germany*, no. 46544/99; *Gnahoré v. France*, no. 40031/98; *Neulinger ir Shuruk v. Switzerland*, no. 41615/07).

In light of the interpretation provided, the Court of Appeal applied the exception of paragraph 2 of Article 12 of the Hague Convention on Child Abduction in both cases, based on the following circumstances:

i) In case No. 2-372/2014³⁷: the girl had lived in the new environment for 22 months and had settled there and had adapted to her new physical and psychological environment; the girl at the time of the illegal removal from Ireland was 2 years and 7 months old, thus her physical and social environment was that of her mother; in Lithuania the girl lived in a big flat, this being the personal property of her mother; she lived together with her grandparents and her uncle who helped to raise the girl and the girl had strong emotional ties with the aforementioned relatives; the girl had started to attend the kindergarten and had adapted therein; the girl’s mother had a job and earned a sufficient amount of money to raise the child in good conditions; the girl’s emotional condition was good, she developed normally; the girl could speak fluent Lithuanian. The Court of Appeal doubted whether the father who earned 1500 to 2000 EUR per month and spent 750 EUR for housing would be able to ensure pre-school education to his daughter, since the cost amounted to 700 EUR per month. It was further stressed that the girl did not speak English. The Court critically evaluated the efforts of the Central Authority of Ireland and concluded that adequate arrangements had not been made to secure the protection of the child after his or her return. On those grounds, the Court of Appeal opposed the child’s return to Ireland from where the child had been wrongfully removed.

ii) In case No. 2-6/2013: The Court of Appeal in its decision of 3 January 2013 in the civil case No. 2-6/2013³⁸ relied on the following criterions: the girl had lived in the new environment for 18 months; the girl had started school in Lithuania and was attending the second school year; the girl was integrated in her educational environment had made new friends among the classmates, did not have any barriers of communication with other children, was not afraid to express her opinion, actively participated in the discussions during class; the girl had easily learned to write and read in Lithuanian, had a strong sense

³⁷ Lietuvos apeliacinio teismo 2014 (Court of Appeal) m. vasario 11 d. nutartis civilin je byloje Nr. 2-372/2014

³⁸ Lietuvos apeliacinio teismo 2013 (Court of Appeal) m. Sausio 3 d. nutartis civilin je byloje Nr. 2-6/2013

of responsibility, always did her homework, did not skip classes, came to school clean and appropriately dressed; she attended dancing classes at school and enjoyed swimming and horse riding; she loved animals, had a dog at home, loved painting and played with her brother; lived in a three-room apartment in a separate and well decorated and equipped room, had good conditions for rest, leisure and learning; her father, with whom she lived, was employed, his wife raised their common young child, and the income of the family was sufficient; the girl was able to communicate and seemed happy, however she did not want to talk about her mother, she had expressed her strong will to live with her father and his new family; the girl, almost every day, had the opportunity to communicate with her mother via computer, but was afraid to meet her mother in person; the girl herself told her mother that she did not want to return to the UK; the mother never came to visit her daughter in Lithuania; the girl loved her new family, especially her little brother; the mother's earnings were small in the UK, the majority of the income was social allowances; the conclusions of complex psychiatric-psychological examination showed that the girl had closer and better emotional ties with her father, she had difficulties with adaptation and settlement in new environments; even up until the wrongful removal, the girl's relations with her mother were complicated whereas relations with her father were natural and emotionally stable; the mother had given permission to her daughter to become a citizen of the Republic of Lithuania.

In case No. 2-6/2013 the Court of Appeal, in addition, interpreted paragraph 2 of Article 13 of the Hague Convention on Child Abduction. This basis of non-return is based on the clearly expressed opinion of the child that s/he objects to his or her return. The Court of Appeal ruled that a necessary condition for the application of this Article is the age and maturity of a child, and that it would be logical and appropriate to take into consideration the child's opinion. The Court of Appeal stressed that in these type of cases, even if the parties are active, the court shall be active as well. The court shall ex officio take measures to evaluate the capability of a child to express his true will and opinion. As this question requires the specific knowledge of psychology and psychiatry, the complex psychiatric – psychological examination or expertise must be performed. The Court of Appeal took into account conclusions of a complex psychiatric – psychological examination which was carried out at the request of the court and concluded that the child at issue cannot express his motivated will and opinion which could be a motive for the court to apply paragraph 2 of Article 13 of the Hague Convention on Child Abduction.

Renewal of the process

The Supreme Court, in its decision of 7 January 2008 in civil case No. 3K-3-91/2008,³⁹ analysed the question of whether renewal of the process (reopening/re-examination of the case) which is established in section XVIII of the CCP is possible in the civil case where the child return issue (regarding the abducted child who was kept in Lithuania) was ruled on in accordance with the Hague Convention on Child Abduction and EU Regulation 2201/2003. In this case, the Supreme Court ruled that the renewal of the process (reopening/re-examination of the case) is possible per se if all necessary conditions for application of this institute are fulfilled. The Supreme Court concluded that national rules on the renewal of the process (reopening/re-examination of the case) are compatible with legal regulation provided for in the Hague Convention on Child Abduction and EU Regulation 2201/2003 except for the rule provided in paragraph 2 of Article 372 of CCP stating that, "the court which examines a request for process renewal (reopening the case) has a right to stop execution (enforcement) of the judgement until the case regarding process renewal is examined." Therefore this rule shall not be applied in such cases.

³⁹ Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2008 m. sausio 7 d. nutartis civilinėje byloje Nr. 3K-3-91/2008

Prorogation of jurisdiction and *lis pendens*

The courts of lower instances of the Republic of Lithuania have, many times dealt with issues of prorogation of jurisdiction established in Article 12 of EU Regulation 2201/2003 and application of *lis pendens* rule established in Article 12 of the EU Regulation 2201/2003.⁴⁰

4.9.9. Existing critics and comments on the legal rules in force

It could be concluded that the general approach is that parental child abduction takes place when one parent takes a child unlawfully with a purpose to hold the child in the selected place. "Unlawfulness" is commonly understood by way of the meaning established in EU Regulation 2201/2003 and the Hague Convention on Child Abduction: 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 and 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. This definition is also provided in the doctrine.⁴¹

As already established, the child can lawfully reside with certain persons on account of a judgment of the court, agreement or applicable law. Article 3.165 of the CC provides that parents decide all questions concerning children by their mutual agreement. In the event of a lack of agreement, the dispute matter shall be resolved by the court. This means that one of the parents may act alone only in respect of matters of a daily nature and only as long as the other parent does not make any objections.

So no dispute shall arise when exact rules established in law, in the judgement of the court or in the agreement of the parents are infringed. Disputable issues may arise when there is no infringement of an exact rule but rather a possibility that one parent exercised his right to decide the question concerning the mobility of his/her child in such a way that it is obvious that the rights of the other parent are infringed. It is evidenced by the case law⁴² that one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility. Therefore, once there is no consent of the other parent, it shall be analysed whether the child left his habitual residence on a temporary basis. The State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labour provides commentary as to what shall be deemed as temporary leave: "There is no precise definition of what is temporary leave of a child, therefore the factual situation should be assessed in every case particularly paying attention to: the duration of leave; the purpose of leave. If a child is leaving for a tourist trip, for a visit of relatives during his holidays or is leaving for medical treatment although he does not intend to settle down in that country, it is considered that the leave is temporary. In the case when a child is signed out of school having the purpose of settling down abroad (even if just for one year), the leave cannot be considered as temporary."⁴³ So it might be concluded that the duration of leave and the purpose of leave are of crucial importance in the cases where both parents have equal rights to decide all questions concerning children.

⁴⁰ Vilniaus apygardos teismo 2012 m. geguž s 18 d. nutartis civilin je byloje Nr. 2S-1039-464/2012; Kauno apygardos teismo 2008 m. gruodžio 18 d. nutartis civilin je byloje Nr. 2S-1526-230/2008; Kauno apygardos teismo 2008 m. gruodžio 18 d. nutartis civilin je byloje Nr. 2S-1526-230/2008

⁴¹ Pranevi ien , V. Vaik grobimo Europos S jungos valstyb se nar se atvejais taikomos teisingumo nustatymo taisykl s. P. 17 (page number of the article). Available at

<<http://www.vu.lt/leidyba/dokumentai/zurnalai/TeisAe/TeisAe%202010%2077%20tomas/162-180.pdf>>

⁴² Lietuvos Aukš iausiojo Teismo Civilini byl skyriaus 2007 m. birželio 19 d. nutartis civilin je byloje Nr. 3K-3-254/2007

⁴³ <http://www.vaikoteises.lt/en/international_childs_protection/temporary_leave/>

It should be noted that there is a rule in Lithuanian Criminal Law that criminal liability is a form of liability *ultima ratio*, i.e. it shall be applied when there are no ways to achieve the same purpose with less severe forms of responsibility. Some reflections of this rule can be found in some case law related to child abduction. In cases where the question of whether the crime of "Abduction of a Child" has been committed is established, the courts do pay attention to how severely, for example, a certain court ruling was infringed, and what consequences it brought to the child. For example, the County Court of Kaunas in its decision⁴⁴ noted that the father took his child to visit the father's mother (the child's grandmother) under the child's personal request and returned him in two hours. Although this was against the earlier court's ruling (decision), i.e. infringing the ruling, it was established in the present case that the mother very often left the country for long periods of time, left her child with her mother (child's grandmother), at those times the father took his children with him and took care of them, that the child through his examination in court told that he would like to live with his father because his mother constantly leaves the country and he together with his brother has to stay with his grandmother (mother's mother). On those grounds the court arrived at the conclusion that no crime of abduction of a child was committed.

The Central Authority of Lithuania constantly points out the following legal problems in its annual reports:⁴⁵

1. Unknown child's location. In order to start procedures under the Hague Convention on Child Abduction and EU Regulation 2201/2003, it is necessary to know at least the country where the child factually is. When the country is unknown, the Central Authority suggests applicants contact local police, which will then organise and conduct a search of persons. However, in some cases police authorities do not take any action due to the fact that certain factual circumstances show that no criminal offence is committed (peculiarities of crime 'Abduction of a Child' and other crimes enacted in the PC of Lithuania are described earlier in this report) and there is just a civil dispute between the parents.
2. National laws are too liberal with respect to a declaration of the child's habitual residence and the issuance of the child's passport. One (any) of the parents can unilaterally declare any habitual residence of the child as well as applying for a passport to be issued to the child without the consent of the other parent. Such liberal rules create practical problems associated with prevention, qualification and examination of international parental child abduction cases.
3. The accession to the Hague Convention on Child Abduction will have effect only as regards to the relations between the acceding State and such Contracting States which have declared their acceptance of the accession. The delay of Lithuanian authorities to accept the particular accession might result in infringement of rights of the child and (or) parents.⁴⁶

⁴⁴ Kauno apygardos teismo Baudžiam j byl skyriaus 2011 m. kovo 17 d. nuosprendis baudžiamojoje byloje Nr. 1A-177-245-2011

⁴⁵ Report for the year 2013, p. 134, 135. Available in Lithuanian at <<http://www.vaikoteises.lt/media/file/ataskaitos/2013metuataskaita.pdf>>; Report for the year 2012, p. 116, 117. Available in Lithuanian at <<http://www.vaikoteises.lt/media/file/2012mataskaita3.pdf>>. Report for the year 2011, p. 150-152. Available in Lithuanian at <<http://www.vaikoteises.lt/media/file/2011patigalutine.pdf>>.

⁴⁶ This statement is however to be nuanced in light of the opinion 1/13 of the CJEU of 14 October 2014, which confirmed that "[t]he exclusive competence of the European Union encompasses the acceptance of the accession of a third State to the Convention on the civil aspects of international child abduction concluded in The Hague on 25 October 1980." Since the Convention does not provide for autonomous action by Regional Economic Integration Organisations, EU Member States still have to declare individually the acceptance of accessions. However this should be done "in the interest of the European Union" and simultaneously by the Member States within a time frame established by Council Decision. The Commission proposes that declarations should be deposited by the Member States no later than 2 months after the adoption of the Council Decision (Editor's note).

4.9.10. Justifications for refusing to return a child relocated to Lithuania

It can be concluded that the effectiveness of the return mechanism is considered to be the main goal of the regime. It is clearly evidenced by case law. For example, the Supreme Court in its decision of 7 January 2008 in the civil case No. 3K-3-91/2008⁴⁷ clearly stressed this goal, supporting its argumentation with jurisprudence of European Court of Human Rights (namely *Iglesias Gil and A. U. I. V. Spain*, no. 56673/00, judgment of April 2003; *Maire v. Portugal* no. 48206/99, judgment of 26 June 2003; *Hornsby v. Greece*, no. 18357/91, judgment of 19 March 1997; *Ignaccolo-Zenide v. Romania*, no. 31679/96, judgment of 25 January 2000, § 102; *Karadžić v. Croatia*, no. 35030/04, judgment of 15 December 2005) and “Practical Guide for the application of the new Brussels II Regulation”. It is agreed that decisions on return require urgent execution as the passage of time can have irremediable consequences for relations between the children and the parent who does not live with them. Even in cases where courts have adopted decisions on the “non-return” of a child, time factors and the effectiveness of the return mechanism are clearly supported as the main goals of the regime.⁴⁸

Doctrine (although there is very little of it on this issue) also notes this goal,⁴⁹ concluding that the “risk of harm to a child’s interests which is caused by the fast execution of decisions is far less than the mentioned risk of alienation.”⁵⁰

4.9.11. Criteria to assess the “best interest of the child”

The Courts and other authorities rely and will continue to rely in future cases on the understanding of the “best interests of a child” provided for in jurisprudence of the European Court of Human Rights in this field. This conclusion is drawn inter alia because it was published in the bulletin “Court Practice”⁵¹ the summary of the recent decisions of the European Court of Human Rights on determination of best interests of a child (called “Civil Aspects of International Abduction of Children: Determination of the Best Interests of the Child under the Article 8 of European Convention of Human Rights. The Summary of the Recent Decisions of European Court of Human Rights”).⁵² Thus there is no doubt that authorities shall apply interpretations provided therein.

Moreover, the State Child Rights Protection and Adoption Service under the Ministry of Social Security and Labour (which performs functions of Central Authority) on its website provides summaries of case law in two sections⁵³: “Main trends in the recent case law of Court of Justice of the European Union” and “Concept of “best interests” of the child”,

⁴⁷ Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus 2008 m. sausio 7 d. nutartis civilinėje byloje Nr. 3K-3-91/2008

⁴⁸ Lietuvos apeliacinio teismo 2014 m. vasario 11 d. nutartis civilinėje byloje Nr. 2-372/2014; Lietuvos apeliacinio teismo 2013 m. sausio 3 d. nutartis civilinėje byloje Nr. 2-6/2013

⁴⁹ Pranešimas, V. Vaikų grobimo Europos Sąjungos valstybėse narėse atvejais taikomos teismo sprendimų nustatymo taisyklė, s. 6 (page number of the article) Available at <<http://www.vu.lt/leidyba/dokumentai/zurnalai/TeisAe/TeisAe%202010%2077%20tomas/162-180.pdf>>

⁵⁰ Nekrošius, V. Vaikų grobimas ES teisėje. P. 18. Available at

<<http://www.ivaiknimas.lt/assets/V.Nekrošius.%20Grobimas%20ES%20teiseje.pdf>>

⁵¹ Since 1995, the Supreme Court of Lithuania has been issuing a bulletin “Teisės Praktika” (Court Practice). Until the middle of 2006, there have been published 24 issues of the Bulletin (generally 2 issues per year). The Bulletin includes the rulings found by the Divisions of the Supreme Court as being the most important, methodical material – summary reviews of the court practice, summaries of judgements passed by the European Court of Human Rights and other information. The Bulletin also presents information about the most significant events in the activity of the Supreme Court.

⁵² Tarptautinio vaikų grobimo civiliniai aspektai: geriausi vaiko interesų vertinimas pagal Žmogaus teisių pagrindinį laisvės apsaugos konvencijos 8 straipsnį (teisė privataus ir šeimos gyvenimo gerbimui). Aktualūs pastarųjų metų Europos Žmogaus Teisių Teismo praktika. Nr. ŽT-C-38. // Teisės praktika. 2013, 38, p. 557-574.

⁵³ Available at <http://www.vaikoteises.lt/en/international_childs_protection/case_law/>

where a summary of case law of the European Court of Human Rights regarding the concept of "best interests" of the child is provided. This also strengthens the position that Lithuanian authorities constantly monitor case law of the Court of Justice of the European Union and of the European Court of Human Rights and shall apply actual interpretations provided therein in everyday practice.⁵⁴

⁵⁴ Accomplished by dr. Azuolas Cekanavicius on 17 December 2014

4.10. Hungary

4.10.1. Introduction

Hungary became part of the European Union in 2004, and since then the country has seen a continuous, linear increase in the number of child abduction cases in the country, which clearly shows that the problem is becoming increasingly important. As the country became more international, so too did its citizens, as well as the international relations between the citizens and foreigners. Back in 1999, a report by the Hague Conference on Private International Law found¹ that there had only been a couple of cases (only eight incoming return applications) related to Hungary, while currently the number of such cases has increased above one hundred per year. On the other hand, interestingly, the assessment highlighted two important facts which would appear not to have changed over time.

First, the typical cases of child abduction involve a family situation in which a woman who possesses Hungarian citizenship married a man from somewhere in Western-Europe or Canada. They subsequently file for divorce, the woman takes the child to Hungary and the man starts a procedure for the return of the child. In most of these cases, especially the most important ones, it was the man who wanted the child to be returned to a Western-European country. Unfortunately, however, there is no way in Hungary to obtain proper statistics regarding gender balance on such questions: no authority keeps a record of the gender background of such cases, so we can only ascertain this by checking reports of the most important cases and by talking to practitioners.

Secondly, in most of the cases, the other State concerned, i.e., the place from which the child was removed, is not typically a Central- or Eastern-European country (with the exception of Austria). However, there is a chance this will change in the future. In 2011, the Hungarian State allowed those who had Hungarian roots and live in a foreign country to obtain Hungarian citizenship using an easier process than before (nearly automatically) if they apply for it.² As a result, according to the announcement of vice-prime minister Zsolt Semjén, there may be about nearly 550,000 new citizens of the country who live outside Hungary and who received citizenship in recent years. Most of them live in Romania, Slovakia and Ukraine.³ Besides new citizens, about 350-600,000 Hungarians (according to the Central Statistical Authority, at least 350.000 people permanently)⁴ left Hungary to live abroad and according to press releases, more and more people leave the country to make a living outside of Hungary. However, the concrete number of this latter group is also uncertain, even among scholars, since the majority do not inform Hungarian authorities that they no longer live in Hungary. If the two groups are combined, then it may be determined relatively quickly that approximately 850,000-1,200,000 Hungarians could live abroad, compared to the relatively low mobility rate of the country in the 1990s. Consequently, it is likely that the number of cross border child abduction cases will also grow in the future.

Before going into details and analysing the situation, it must also be highlighted that a number of cases have received serious media attention. Probably the best known of them concerned a boy called Karoly Mehmet (called in the media by his nickname Mehmet Karcsi) whose mother was Hungarian and father Turkish. The father kept the child illegally in Turkey, but the boy was returned to Hungary after 2.5 years as a result of successful investigation of Turkish authorities in 2009. During that time, even former Hungarian Prime

¹ http://www.hcch.net/upload/stats_hu.pdf

² Nick Thorpe, 'Hungary Creating New Mass of EU Citizens. BBC News', accessed on 10 July 2014 <[Http://www.bbc.com/news/world-europe-24848361](http://www.bbc.com/news/world-europe-24848361)> accessed on 1 July 2014.

³ For a long time, concrete numbers were kept as secret, and details are even now not available for the public in order to protect new citizens from their domestic governments. On the other hand, the government also announced that more than 600.000 people asked for a citizenship http://hvg.hu/itthon/20140313_600_ezren_kerelmezttek_a_magyar_allampolga

⁴ http://www.ksh.hu/docs/szolgalatasok/sajtoszoba/seemig_sajto_reszletes.pdf;

Minister Gyurcsány and Turkish Prime Minister Erdogan discussed the case in their meetings. The case received especially high media attention when border control officers found illegal drugs in the mother's car when she wanted to leave the country to Serbia. As a result, the mother was retained in police custody for some time. Police officers later received proof, however, that the drugs were placed in the car by the boy. Later, it was also explained that the boy received them from his father, who planned the whole situation in order to ensure the mother's arrest. After releasing the mother, since the child wanted to leave Hungary and return to his father in Turkey, the parents agreed on the mother's right to maintain contact with him and he was allowed to return to Turkey to his father.

Another case also entered into the terrain of EU politics. A Hungarian woman moved to Bora Bora with her husband and the mother subsequently claimed that the husband prevented the child and the mother from returning to Hungary by withholding their passports. She also claimed that the French national husband asked her to move to Bora Bora with the intention of preventing her from moving back to Hungary with the child. In this case, former Hungarian Minister of Justice Navracsics had a dispute with Commissioner Reding⁵ and a Hungarian MEP, Krisztina Morvai also asked⁶ for the return of the child, while a Hungarian court decided in February 2014 that it did not have jurisdiction because the habitual residence of the child was not in Hungary.

In another case, a Russian woman wanted to take her child from France to Russia and was caught at the Hungarian border to Ukraine. The question was raised what Hungarian authorities should do in such cases? Since French authorities issued a European arrest award in connection with other crimes as well, the woman was taken to France for further investigation.

Finally, before Christmas 2014 a father of three protested in front of the National Assembly because the mother of his children (his former wife) took the kids to Mongolia, even though a Hungarian court decided earlier to keep the children at the father's, and he is/was unable to bring them back during the last couple of years.

The continuous growth of the number of cases, the intensity of media discussions and the political relevance also show that the public impact of child abduction cases makes the area an increasingly important legal field in Hungary.

4.10.2. Statistical Assessment

4.10.2.1. Key statistics overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	2555 (4.7%)	2551 (5.8%)	1852 (4.5%)	1081 (3.0%)
International divorces	376 (1.6%)	421 (1.7%)	511 (2.0%)	502 (2.3%)
International divorces involving children	n/a	n/a	n/a	n/a

⁵ "Reding–Navracsics Tug Of War – Brussels Considers Tobin Case Closed". Budapest Telegraph. http://bptelegraph.idg.hu/news/304/reding%E2%80%93navracsics_tug_of_war_%E2%80%93_brussels_considers_tobin_case_closed, accessed on 1 July 2014.

⁶ For her complete speech in the European Parliament see "Morvai segélykiáltása az EP-ben a Bora Borán rekedt magyar n úgyében" [Morvai's call for help in the case of the woman kept in Bora Bora] <<https://www.youtube.com/watch?v=n2vyQTMZxMo>> accessed on 1 July 2014.

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	8	13	8	54
Outgoing return requests made under the Hague Convention	n/a	12	16	27

* Marriage and divorce figures based on centrally-collected Eurostat data, and may not correspond exactly to data provided to us by the relevant national statistical authority. Percentages indicate international marriages/divorces as a proportion of all marriages/divorces.

4.10.2.2. Available national data

Generally, statistical data on international marriages in Hungary are collected by several institutions:

First of all, at the Hungarian Central Statistical Office (KSH, hereinafter referred to as: "Statistical Office"),⁷ which is the central office collecting statistics on Hungarian society and economics. This office is a government agency, tasked to provide information for the public on general issues. One of its most well-known publications is the Hungarian Statistical Yearbook, which also contains English translations of its content (it is a bilingual, Hungarian-English publication).⁸ The Yearbook is useful if one wants to get a broader perspective on local child related cases, but it does not help in more special, international cases. On the other hand, the Statistical Authority also publishes other materials, which can be useful (see later).

Secondly, information is kept at the National Office of Judiciary,⁹ which is the Office heading the courts of the country. This office also has a statistical department, to provide government/judges/public with data on court procedures. Unfortunately, the data stored by them is not useful in connection with international child abduction cases; they do not have statistics or any further details or information on such cases. The authority does not have statistics on the number of family law (especially child abduction or divorce) cases in which one of the parties was foreign national. They only store data on the general number of divorce cases. In 2013, according to information received from them, this was approximately 11.000, in the country. However, this data cannot help with further investigation.

Thirdly, statistics may be obtained from the Central Authority in child abduction cases, which is in Hungary the Ministry of Justice.¹⁰ The Ministry of Justice has a special department on private international law issues, they are responsible for the solution and administration of child abduction cases in Hungary, and keep statistics on international child abductions.

As a result of the system, it is relatively complicated to receive data from institutions, or to find necessary information. For example, the Hungarian Central Statistical Office only keeps general statistics on nearly every aspect of life in Hungary, including economic and social issues. However, this office does not necessarily keep data that can be found at ministries,

⁷ Hungarian Central Statistical Office <<http://www.ksh.hu/?lang=en>> accessed on 1 July 2014

⁸ For an older version see Magyar statisztikai évkönyv, 2010 Statistical Yearbook of Hungary, 2010 Központi Statisztikai Hivatal, Budapest, also available at <http://www.ksh.hu/docs/hun/xftp/idoszaki/evkonyv/stat2010_nograf.pdf> accessed on 1 July 2014. The new ones can be ordered on the website of the Statistical Office (see above).

⁹ See National Office for Judiciary contact details at <<http://www.birosag.hu/en/noj/cobtact-details>> accessed on 1 July 2014.

¹⁰ Hungarian Government official website <<http://www.kormany.hu/en/contacts>> Please note that the Ministry of Justice had several official names in recent times, between 2010 and 2014 it was called Ministry of Public Administration and Justice. As of 6 June 2014 it is called Ministry of Justice again.

and its statistics are relatively hidden among other statistics. Furthermore, the National Office of Judiciary only keeps data on court proceedings, and none of the authorities keep data on gender balance.

Beside the traditional sources on statistics, it is highly important to mention that the Supreme Court of Hungary, (Kúria, hereinafter referred to as: "Supreme Court") created a so called "Research group on legal practice", which (among other topics) published a handy and useful 40-page long report in 2013 on international child abduction cases in front of Hungarian courts.¹¹ The research group consisted of four judges, a law professor, an attorney and a responsible person from the Foreign Ministry. One of the judges also functions as mediator at the court. This report also contains statistical data, based on the collection and analysis of one of the judges, and it also consisted of an in-depth analysis of international child abduction cases.¹² However, it is important to stress that even though the report seems to be very useful concerning our topic, it was a one-time report, and supposedly there will be no similar report issued by the Supreme Court in the near future, or at least not in this particular field.

4.10.2.3 Data on International Marriages Celebrated in Hungary

Data on international marriages celebrated in Hungary are held by the Central Statistical Office, and can be found in their "Demographic Yearbook series".¹³ Year 2013 includes the latest statistics on such questions.¹⁴

One can observe from the numbers that for a long time, less and less marriages are concluded. E.g. in 1980 approximately 80,000 marriages were concluded, while the number is about 36,000 today. The same is true for marriages between persons with different citizenship.

Number of marriages-intermarriages per year

Year	2008	2009	2010	2011	2012	2013
Overall number of marriages	40,105	36,730	35,520	35,812	36,161	36,986
Number of international marriages	1685*	1653*	1501	1274	1083	1049
Ratio of international marriages	4,2%*	4,5%*	4,2%	3,5%	2,99%	2,83%

* The chart was based on official information provided by the Central statistical Authority through Demographic Yearbooks mentioned above. However, for the years 2008 and 2009 we had to use the rates mentioned by the Lanzieri paper (see above)

¹¹ A jogellenesen Magyarországra hozott gyermekek visszavitelével kapcsolatos eljárások vizsgálatára létrehozott joggyakorlat elemző csoport összefoglaló véleménye [Concluding Opinion of the Legal Practice Analyzing Group on the Return Processes of Children Illegally Brought to Hungary]. http://www.lb.hu/sites/default/files/joggyak/osszefoglalo_velemeney_2013_el_ii_g_1_14.pdf

¹² On the other hand, when using or citing the findings of the report of the Supreme Court, I read background materials or consulted with other scholars and professionals to have a balanced view on such cases. Thus, I also contacted on statistics and the functioning of the system other scholars and professionals, such as the officers of the government agency for child protection (TEGYESZ, official Hungarian language site: <http://www.tegyesz.hu/>), or the responsible person at the ministry on private international law questions.

¹³ Demográfiai évkönyv [Demographic Yearbook], KSH, Budapest, 2012.

¹⁴ For a historical perspective see Martha Dóczy, 'The Current Laws Regulating Marital and Quasi-Marital Relationships in Hungary'. In: Marriage and Quasi-Marital Relationships in Central and Eastern Europe: From the 2006 Vienna Colloquium on Marriage (eds Lynn D. Wardle & A. Scott Loveless). BYU, 2008. p. 118 et seq. also available at http://www.law2.byu.edu/page/categories/marriage_family/past_conferences/oct2006/pb_chapters/08%20-%20Doczi.pdf > accessed on 1 July 2014.

On the other hand, contrary to the changes in the number of marriages, the number of international child related disputes is continuously growing (see later). The reason for this could be that earlier, before 1990, and also between 1990 and 2000 the mobility rate of the country was relatively low, compared to other countries.

Altogether there were 36,986 marriages concluded in 2013, and there were 1049 marriages in which one of the parties, or both parties was/were foreign citizen(s). Regarding the number of marriages them we may ascertain three main points concerning the year 2013. Firstly, there were 345 marriages concluded in which the man was Hungarian and the woman had a foreign citizenship. Secondly, there were 662 cases in which the man had foreign citizenship and the woman was Hungarian. Thus, in about two-thirds of international marriages concluded in Hungary the woman had Hungarian nationality, which is twice as much as men being in possession of Hungarian nationality (i.e., only one third).

There were altogether 1,007 international marriages in which one of the parties had Hungarian citizenship concluded in Hungary in the year 2013. There were 42 marriages in which both parties were foreign citizens, the highest number among them are Slovak parties (8).

Out of the 1,007 marriages with Hungarian relevance, most typical was the marriage concluded between a Hungarian and a Slovak citizen (107), Hungarian and Romanian citizen (86) and Hungarian and German citizen (84).

It is very important to highlight that these are only the Hungarian statistics. In Hungary, Government offices do not necessarily store data on Hungarian citizens who conclude marriages outside the country.¹⁵

4.10.2.4. Data on International Dissolutions of Marriages

The overall number of marriage dissolution follows the statistics on marriages: the less marriages are concluded, the less marriage dissolution takes place. If we check the number of international divorces, we see a slow growth on a longer term (compared to the nineties), but decrease in the last couple of years. This is also in connection with Hungary's situation in the EU.

Number of marriage dissolutions per year

Year	2008	2009	2010	2011	2012	2013
Number of marriage dissolutions	25,155	23,820	23,873	23,335	21,830	20,209
Number of marriage dissolutions (at least one foreign party concerned)	579*	524*	496	541	509	430
Ratio of marriage dissolutions (at least one foreign party concerned)	2,3%*	2,20%*	2,07%	2,31%	2,33%	2,13%

* The chart was based on official information provided by the Central statistical Authority through Demographic Yearbooks mentioned above. However, for the years 2008 and 2009 we had to use the rates mentioned by the Lanzieri paper (see above)

¹⁵ For complete charts see Demográfiai évkönyv 2013, online Annex.

As mentioned before, data on international dissolutions of marriages that involve children is not available in Hungary. The Judicial Office can only provide public with data on the overall number of marriage dissolutions. Furthermore they can also provide information on domestic and international criminal cases in the country. However, this data seems relatively uninteresting regarding the topic.

On the other hand, the Statistical Office stores data on the dissolution of international marriages, which can be found in the Demographic Yearbook mentioned before.

There were altogether 20,209 marriage dissolutions in the country in 2013, and altogether 430 marriage dissolutions in which one or both parties were foreign citizens. There were 127 marriage dissolutions in which the man was Hungarian and the woman had another citizenship, and 278 cases in which the woman was Hungarian and the man had a foreign citizenship. Altogether there were 405 marriage dissolutions in which one party was Hungarian and the other party a foreign citizen. There were 25 divorces in which neither party had Hungarian citizenship.¹⁶

4.10.2.5. Data on Registered Parental Child Abduction

4.10.2.5.1. Cases at the Central authority

There is data on registered international child abduction available in Hungary. In this regard, one must separate cases before the courts and cases that belong to the Central Authority (Ministry of Justice). Beside cases in which a parent wrongfully brings the child to Hungary, the Central Authority also assists in cases in which someone commences an action, because the child was unlawfully removed from Hungary.

The Central Authority has a Department on Private International Law of about ten people who work on child abduction cases. However, this department also has other tasks to fulfil, and does not only deal with family law cases. It collects data regarding all international child abduction cases (i.e. data recorded by the Central authority is not retained on the same basis as that provided by INCASTAT).¹⁷ Since (according to the guidelines on the good practice of central authorities)¹⁸ mediation by the central authority is not a requirement, but can be useful in such cases, the authority usually asks the parties to use mediation and informs them on the available opportunities. However, it neither acts as an official mediator, nor has the authority to force parties to use mediation. Compulsory mediation can only be used by courts (see later). However, the Central authority has no right to start such a court procedure (esp. not in child abduction cases, in which the child must get returned), and in court procedures it is absolutely in the discretionary power of judges to use it. If a court procedure had already been started, the Central Authority does not have the right to ask for a mediator either. On the other hand, even though it is not institutionalized, the authority still tries to mediate between parties in order to have a better outcome in most of the cases (apart of cases in which parties refuse such help). The authority does not deal with the criminal law background either. If other authorities (esp. police) ask for information, it provides them with the necessary data. On the other hand, the simple fact that a parent takes the child to another country is in itself not a crime in Hungary (see later).

Regarding the activity of the Authority, it can surely be stated that it performs relatively well, and most of the cases in which a delay occurred were in connection with the activities of other, lower level authorities.

In light of the number of cases, one can observe some differences between the overall statistics of the Hague Conference¹⁹ and the numbers of the Central Authority.

¹⁶ Source: Demográfiai évkönyv 2013. online Annex, *ibid.*

¹⁷ http://www.hcch.net/index_en.php?act=events.details&year=2007&varevent=138

¹⁸ http://www.hcch.net/upload/abdguide_e.pdf

¹⁹ http://www.hcch.net/index_en.php?act=conventions.publications&dtid=32&cid=24

Consequently, for the future data received directly from the Authority will be added. It should be noted that this data includes also cases in which the 1980 Convention could not get applied. Moreover, under outgoing/incoming requests it included access and return applications as well.

Number of requests received*

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013
Requests received	5	5	12	11	27	48	59	54	69

* The chart was based on information received from the Central Authority.

The number of cases at the Central Authority in which people requested help accounts for approximately 110 per year. According to the Ministry's announcements, it seems this is double as in the period before 2010. According to the Ministry's opinion, recently a higher number of Hungarians moved back from foreign countries, and, as a result, there are more child related disputes. On the other hand, there are by far fewer court judgments than this number, i.e., cases in which a party from abroad wants to have the child returned and the court has to decide to return the child (approximately 15-20 cases per year). This indicates that in a high number of cases the parties or mediators solve the cases without reaching the last phase of the procedure. The numbers of requests received from abroad to return a child grew from 5 (2005) to 69 (2013).

Outgoing requests*

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013
Requests received	5	6	9	16	14	18	27	25	39

* The chart was based on information given from the Central Authority.

The Ministry also maintains data on the number of outgoing requests (i.e., requests started by a Hungarian party to have a child returned from abroad). There were 5 of such requests in 2005, and 38 in 2013. Consequently, from a less important area the handling of such cases became a kind of priority in the ministry.

Growth in the number of cases is evident, especially, if we compare the two charts seen above.

Overall number of cases (requests received + outgoing requests)*

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013
Requests received	13	11	21	27	41	66	86	79	107

* The chart was based on information received from the Central Authority.

In 2005 there were only 13 cases altogether (including incoming and outgoing requests), while there were 11 in 2006, we find 107 in 2013. If Hungary follows this path, it is likely that the growth in the number of cases will continue in the future as well, especially, if we add the higher mobility rate, and the fact that the internationalisation of marriages and partnerships is a relatively new phenomenon in the country (even if in certain years earlier

there were more cases, like the 23 Hague Convention related cases in 1999).²⁰ Based on the chart we can state that there is a boom in the number of cases in the country, which is likely to continue in the future as well.

However, it can also be stated that the Central Authority has developed some routine in handling such cases. Between 2010 and 2013, Hungary received 228 requests to return a child to a foreign country from Hungary. The highest number of requests received came from the United Kingdom (69), Austria (36), and Canada (31). Besides them, there were countries with a moderate number of cases like the Netherlands (19), Ireland (18), France (13), and Belgium (12). There were countries from which authorities in Hungary only occasionally receive requests such as Israel (6), Greece (4), Denmark (3), Argentina (2), Australia (2), Bulgaria (2), Kazakhstan (2), Poland (2), Jordan (1), and South-Africa (1).

In examining the number of requests filed to the Ministry by a Hungarian party to have a child returned to Hungary from abroad, it is clear that between 2010 and 2013 the Ministry received a total of 42 requests. However, according to international standards, they are not responsible in such questions, but instead they forward such claims to the responsible Central Authority of the foreign country. The applicant's intention was to have the child returned from the United Kingdom (15), Austria (4), France (4), Canada (3), Denmark (3), and Poland (3), while 2 requests were received regarding Australia, Belgium, Bulgaria, and Israel.

Number of cases based on the 1980 Hague Convention as provided by the reports of HCCH

Year	1999	2003 ²¹	2008
Overall number of cases	23	32	16
Requests received	8	13	8 ²²

Regarding such cases it can be highlighted that the relevance of EU Regulation 2201/2003 takes over the Hague Convention, and just like in other EU member state countries, the majority of requests are received from EU states. However, the detailed statistics of the Central Authority shown above are more important if we want to receive a precise view on the changes. Furthermore, there were serious changes in the number of cases in the last 4-6 years, and the statistics of HCCH do not include them.

4.10.2.5.2. Cases in the Hungarian Court System

The aforementioned Report on the Legal Practice analysing group²³ checked all decided cases before Hungarian courts, and found a total of 32 cases which were finished at the first instance, and another 21 at the second instance (the majority of these cases involved the same cases, i.e., cases received from the first instance between 1 January 2010 and 31

²⁰ On detailed statistics for the year 1999 see the national report in the INCASTAT database, http://www.hcch.net/upload/stats_hu.pdf

²¹ http://www.hcch.net/upload/wop/abd_pd03ef2007.pdf.

²² Hungary was not included in the detailed national reports, see <http://www.hcch.net/upload/wop/abduct2011pd08c.pdf>. However, some statistics still could be found in <http://www.hcch.net/upload/wop/abduct2011pd08be.pdf> and also in <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf>.

²³ Concluding opinion of the legal practice analysing group on the return processes of children illegally brought to Hungary, p. 32.

December 2012, namely during two years). 6 cases reached the Supreme Court – such cases are not part of the normal appeal procedure, because the Supreme Court only checks cases if the claimant claims there were serious breaches of law or procedural rules (extraordinary review of cases). Other cases could get solved without issuing a judgment, e.g., the parties made an agreement in the process, or the child was returned relatively quickly.

It is important to highlight that in Hungary only the Pest Central District Court (Pesti Központi Kerületi Bíróság) has jurisdiction and necessary competency to decide in such cases. Out of these 32 judgments, 28 cases were related to the abduction of a child/children from a foreign country, and 4 were intended to return a child/children back to Hungary. In these four cases courts did not have jurisdiction, so they refused to proceed.

4.10.3. Sources of the National Regulatory Framework

4.10.3.1. General Questions – Recent Changes In the Family Law Regime

Before going into legal details, it must be highlighted that in Hungary a new civil code was introduced, which is applicable as of 15 March 2014.²⁴ Before this date, the matter was regulated by a separate civil code (Act IV of 1959 on the Civil Code of Hungary) and an independent code on family law (Act IV. of 1952 on Marriage, Family and Custody),²⁵ which separated these two areas. However, family law was integrated into the new Civil Code, and it currently forms the fourth book of the Civil Code (Sections 4:1-4:244). It is not expected that such a change will happen again in the near future as the preliminary works on the Civil Code took about a decade. The change has several serious consequences.

First of all, a major part of old case law can no longer be used in legal procedures; accordingly, different decisions will need to be brought. This is especially true in cases in which the old law had significantly different content to the new one. Since the re-formulation of the text was relatively deep and several basic concepts were changed, there is a chance that the former practice cannot (or may not) be followed in several important cases. For such cases, as a result, Hungary's law is currently in an interim period; old laws and related interpretations cannot be applied, but alternatively there is far less new case law available. Furthermore, the Supreme Court issued several general opinions on different areas of law. Such opinions were not officially binding for lower level courts, but in most of the cases courts accepted and followed them. One of them was Opinion Nr. 284 of the Civil Chamber of the Supreme Court on international child abduction, which, as a result of the changes, was repealed by the Supreme Court itself in Uniformity Decision Nr. 1/2014.²⁶ A subsequent opinion served as a guideline for practice for a long time, even if it was harshly criticised by scholars and practitioners.

Secondly, all of the formerly adopted lower level laws and judgments must be interpreted in conformity with new Civil Code in the upcoming cases.

²⁴ Act V of 2013 on the Civil Code of Hungary. You find the English language version of the law on the following link: https://tdziegler.files.wordpress.com/2014/06/civil_code.pdf For background materials see A Polgári Törvénykönyv – magyarázatokkal [The Civil Code and its Commentary] (ed. Lajos Vékás), CompLex, 2014.; for the latest commentary on family matters see also Polgári Jog Családi jog – Az új Ptk. magyarázata III/VI (ed. András Körös), HVG ORAC, Budapest, 2013. (new edition is published in August 2014.); See also 'A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja' [The Comprehensive Commentary of Act V of 2013 and Related Laws] (Ed. András Osztoivits). Opten, Budapest, 2014.

²⁵ For the provisions of this former law see "European Family Law in Action. Volume III. Parental Responsibilities" (ed. Katharina Boele-Woelki, Bente Braat, Ian Curry-Summer). Intersentia, 2005.

²⁶ Available in Hungarian at <<http://www.lb.hu/hu/joghat/12014-szamu-pje-hatarozat>> accessed on 1 July 2012. Please also note that the earlier opinion was harshly criticized in Hungarian legal literature as being discriminatory and too rigid in certain cases. Consequently, the change was of use for the Supreme Court as well to repeal it.

4.10.3.2. Hungary as a Party to the Hague Convention on Child Abduction

Hungary joined the Hague Convention in 1986 by virtue of Law Decree 14 of 1986,²⁷ which entered into force on 11 September 1986. The Decree itself contains the translation of the Convention itself, and only a couple of extra sentences.

Its Section 1 states that Hungary joined the 1980 Hague Convention, Section 2 contains the official translation of the Convention and Section 3 mentions very briefly a number of details related to the entry into force of the Convention and the appointment of the Central authority.

Thus, there are no special rules attached to the Convention in the law. On the other hand, another decree, namely Minister of Justice Decree 7 of 1988 on the Enforcement of the 1980 Convention contains some special rules,²⁸ especially on the role of the Central Authority and the right of the parent to keep contact with the child.

4.10.3.3. Hungary as a Party to the 1996 Hague Convention

Hungary joined the 1996 Hague Convention through Act CXL of 2005 on the promulgation of the 1996 Hague Convention.²⁹ The act entered into force on 16 December 2005. Section 1 expresses that Hungary joins the Convention, Section 2 says that Hungary officially promulgates the mandatory text of the Convention. Section 3 contains the official text of the Convention.

From our point of view, Section 4 contains some important provisions on reservations.³⁰

Concerning Section 34(2) of the 1996 Hague Convention on Parental Responsibility, the Act states that international inquiries may only be dealt with through the Central Authority.

Concerning Section 54(2) of the Hague Child Protection Convention 1996, the Act emphasises that the Hungarian Republic maintains the right only to accept official documents from foreign Central Authorities or other authorities which were written in Hungarian, or, if this would be very complicated to achieve, with an English translation.

Concerning Section 55(1) it expresses that the Hungarian Republic maintains jurisdiction for his authorities in connection with the protection of the child's assets which can be found in Hungary. Moreover, Hungary also maintains its right not to recognise foreign parental responsibility or actions, which would be incompatible with the measures taken by her authorities concerning the asset (of course, unless EU Regulation 2201/2003 applies concerning EU MSs).

Its Section 5 stresses that the Parliament promulgates the Convention with the abovementioned reservations.

Finally, Section 6 sets out the date of entry into force, and also talks shortly about the obligations of the minister in connection with the Convention.

4.10.3.4. Other Important Rules

Hungary joined the 1989 UN Convention on the Right of the Child through Act LXIV of 1991.³¹ The law had to get applied after 6 November 1991.

²⁷ A Hungarian language version of the law is available here:

<http://njt.hu/cgi_bin/njt_doc.cgi?docid=8207.11308> accessed on 1 July 2014.

²⁸ For a Hungarian version see <http://njt.hu/cgi_bin/njt_doc.cgi?docid=9697.260983> accessed on 1 July 2014.

²⁹ A Hungarian language version of the law is available here:

<http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0500140.TV> accessed on 1 July 2014.

³⁰ For a proper English language translation of the reservations see

<http://www.hcch.net/index_en.php?act=status.comment&csid=948&disp=resdn> accessed on 1 July 2014.

³¹ <http://njt.hu/cgi_bin/njt_doc.cgi?docid=15579.23642> accessed on 1 July 2014.

Of course, as an EU Member State, in Hungary the rules of Regulation 2201/2003 are also binding.

The country must also respect Council of Europe Guidelines on child friendly justice³² and the EU Commission Communication on the rights of the Child.³³ As a result, we are able to note some recent developments in the treatment of children in the court proceedings (see later under the subtitle "Reforms").

Beside these hard and soft laws, the Supreme Court also adopted several judgments, which were intended to serve as guidelines for the court procedures. However, in a number of cases this "guideline feature" of the judgments was later revoked because of the changes in the legal system.

4.10.4. Existing criminal sanctions

Regarding criminal sanctions it is important to stress that besides the new Civil Code, Hungary has a relatively new Criminal Code,³⁴ namely Act C of 2012. The Criminal Code entered into force on 1 July 2013.

Regarding criminal sanctions, several of its provisions are of importance.³⁵

4.10.4.1. Altering Family Status

Section 213 Criminal Code expresses that "any person who alters or terminates the family status of another person is guilty of a felony punishable by imprisonment not exceeding three years". The crime can be committed two ways. Firstly, by changing the child's family status, i.e. his/her physical situation and documents or by putting the child into a new family (this could typically done by a nurse). This could also be the case if a person (either parent or someone else) takes the child abroad into a completely new family, i.e., s/he cuts the child out his/her family, and also purchases new, fake documents for the child. The same could happen if parents of two families knowingly swap their children.

Secondly, by terminating the family law status of a child. In such cases there is no new family relationship, but the former one is removed (e.g., the child is left in a foreign country without any reference to his/her parents).

Please note that these cases apply to an abduction committed by a parent with or even without parental responsibility as well, but also to other outsiders.

4.10.4.2. Changing the Custody of a Minor

The crime can be committed in one of two ways. Firstly, it is committed by any person who takes away a minor from the person who has been granted custody by the decision of a competent authority, with the purpose of changing custody permanently. Secondly, by someone who keeps the minor hidden or in secret.

³² Guidelines on child friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, available at http://www.coe.int/t/dghl/standardsetting/childjustice/publicationsavailable_en.asp accessed on 1 July 2014.

³³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An EU Agenda for the Rights of the Child. COM (2011) 60., online available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52011DC0060>.

³⁴ For a Hungarian Version see http://njt.hu/cgi_bin/njt_doc.cgi?docid=152383.262832.

³⁵ For commentaries see "Új Btk Kommentár" [New Penal Code Commentary] (ed. Péter Polt) (Nemzeti Közszerkesztési és Tankönyv Kiadó Zrt., 2013.; Magyar büntető jog I-II-III. - Kommentár a gyakorlat számára – Harmadik kiadás [Hungarian Criminal Law I-II-III – A Commentary for Practice – Third edition] (ed. István Kónya). HVG Orac, Budapest, 2013.; Kommentár a Büntető Törvénykönyvhöz [Commentary on the Penal Code] (ed. Krisztina Karsai), Wolters Kluwer, Budapest, 2013.

If someone commits one of the first two crimes, s/he is guilty of a misdemeanour punishable by imprisonment not exceeding one year. The perpetrator is punishable by imprisonment up to three years, if the offence is committed by use of force or threats against life or bodily integrity.

4.10.4.3. Preventing the Exercise of Visitation Rights

Where a person has been granted custody over a minor by virtue of an administrative decision, and this person prevents someone holding rights of access, they are guilty of a misdemeanour punishable by imprisonment not exceeding one year.

4.10.4.4. Abuse of a Minor

There is another crime that can be committed concerning the abduction of a child; the abuse of a minor as set in Section 208 Criminal Code can get applied if a parent removes the child. However, compared to the former crimes, in such cases some extra elements are necessary: a person must seriously violate his/her parental obligation and thereby endanger the child. In such cases courts check the circumstances, and if they regard that in the development of the child maintaining contact with the other parent is essential (as is usually the case with children), they may sanction the parent who takes the child away. The code says the following:

“a person who is given custody of a minor to maintain and care for the person in his charge... and who seriously violates the obligations arising from such duty and thereby endangers the physical, intellectual, moral or mental development of the minor, is guilty of a felony punishable by imprisonment between one to five years. ”

4.10.4.5. Imposing a Fine: Criminal Law and Civil Law Application

In case the abovementioned crimes are committed, the court orders the regular sanctions as described in the Criminal Code. However, beside courts, Guardianship Authorities have the right to issue a fine in case a party violates the rules of parental responsibility.

4.10.5. Characterisation of parental child abduction

4.10.5.1. General Questions

The Hungarian courts expressed in several decisions how they interpret the best interests of the child. One of these, EBH 2002.634 of the Supreme Court³⁶ (Legal principle decision, i.e., a decision which also may serve as guideline for courts) expressed that the courts must enforce the best interests of the child, and that the best interests of a child are the immediate reconstruction of parental responsibility rights of the child. Thus, according to the main rule, the child must be returned as quickly as possible. The Supreme Court in its judgments stresses the fact that lower level courts may not examine all aspects of the case, only those decisions regarding the return of the child (i.e., they may not examine other merits of the case). However, in a number of cases the courts that started to examine the merits of a case did not know there was an ongoing procedure started to bring the child back to another country, which caused confusion in jurisdiction. Normally, if such a process is started at the Central Authority, the Central Authority lets the courts know about the procedure. It is also important to stress that in several child abduction related cases, courts introduced interim measures to allow the other parent keeping contact with the child until a final decision.

³⁶ <<http://lb.hu/hu/elvhat/6342002-szamu-polgari-elvi-hatarozat>> accessed on 1 July 2014.

Regarding unlawfulness, the concept of habitual residence is regularly disputed by the parties before the courts. In Hungary, courts use the autonomous interpretation of habitual residence as set in EU law³⁷ (which, is, in fact, very much different from the provisions of the local PIL Code, namely of Decree No 13 of 1979 on Private International Law.³⁸ In this regard, based on the guidelines provided by some relatively recent European Law cases,³⁹ the Supreme Court stressed that Hungary will not be the habitual residence of a child, if the parents consider their work in Hungary as transitory and thus retain their habitual residence in another EU member state".⁴⁰ Beyond, the return of the child cannot be refused only because the child likes his/her parent who lives in Hungary more than the other parent.⁴¹

The return of the child was refused in a number of cases. At the first instance, out of 28 "incoming" requests of child abduction related procedures, in 24 there were final decisions adopted between 2010 and 2012. Out of these 24 cases, the court ordered the child to be returned in 13, and in 11 the court refused to return the child to the other parent or country. Furthermore, in three cases the procedure was terminated, and in one the parties reached an agreement. At the second (appeal) level, out of 21 cases, the court ordered the return of the child in 10 cases, whilst the court refused the return in 11.⁴² At both levels, the number of refusals seems to be relatively high. On the other hand, if we check the cases thoroughly, it seems in most of the cases courts had a relatively valid reason to refuse the return.

4.10.5.2. Main Reasons Of Refusal

There were several, diverse reasons why courts refused to grant the return of the child.

If more than 12 months had passed after the unlawful removal, the courts nearly always checked whether the child was now settled in his/her new environment. Please note that before 12 months the courts do not refuse the return solely based on this argument. On the one hand, even after 12 months, only the time factor itself does not give enough ground for the refusal of return. E.g. in a case, the mother's claims that children were "better off with her" were dismissed. Later, even though about three years passed since the abduction took place, the order was enforced.⁴³

On the other hand, courts take into consideration if a party gave permission for the other party to bring the child to Hungary and stay there for longer with him/her (this practice is based on Section 13(1)(a) Hague Child Abduction Convention 1980).

In a number of cases the parent's situation was dubious; father could physically attack the mother, and the mother did not have permission to stay in the foreign country, so she could not see the child (for me this seems a bad argument: the case was in connection with

³⁷ Peter Stone, 'Private International Law', Edward Elgar Publishing, Cheltenham-Northampton, 2010, p. 431.

³⁸ Which only requires longer physical presence in a country and does not take other factors into consideration. The text is as follows:
Section 12

(1) a place of residence is a place where a person resides permanently or with the intention of settling.

(2) a usual place of abode is a place where a person stays for a longer period of time without the intention of settling.

³⁹ Case C-497/10 PPU, Judgment of the Court (First Chamber) of 22 December 2010 (reference for a preliminary ruling from the Court of Appeal of England and Wales (Civil Division)). OJ C 55, 19/02/2011, p. 17–17.

⁴⁰ <<http://www.lb.hu/hu/elvhat/23182011-szamu-polgari-elvi-hatarozat>> accessed on 1 July 2014.

⁴¹ <<http://www.lb.hu/hu/elvhat/23182011-szamu-polgari-elvi-hatarozat>> accessed on 1 July 2014.

⁴² Statistical data was taken from the Concluding Opinion of the Legal Practice Analyzing Group on the Return Processes of Children Illegally Brought to Hungary.

http://www.lb.hu/sites/default/files/joggyak/osszefoglalo_velemeney_2013_el_ii_g_1_14.pdf, p. 6.

⁴³ Mezei v. Biró 23.P.500023/98/5. (27. 03. 1998, Central District Court of Budapest; First Instance); 50.Pkf.23.732/1998/2. 16. 06. 1998., (Capital Court as Appellate Court)

Canada, so the mother had the right to visit her child relatively often, Hungarians are not required to ask for a visa concerning their travel to Canada).

In some other cases the child needed special care, e.g., a 3-year old child had a hearing impairment and was blind. Consequently, s/he needed the care of the mother. In a number of cases courts also took into consideration whether there is a chance the foreign country would punish the party who unlawfully removed the child, because in case of returning him/her, the other parent could not keep contact with him/her (I am again sceptical regarding this method, see my opinion later).

4.10.5.3. Moving to a Foreign Country – No More Doubt between Legal and Illegal Actions

In Hungary, because of the changes on the New Civil Code, there was a shift in the procedure necessary for moving abroad with children.

Before 15th March 2014, according to several rules which were later repealed (Section 72/B of the former Code of Family Law, Section 33 of Ministry of Justice Decree 4 of 1987 and Section 22 of Government Decree 149 of 1997), in the earlier system there were two periods regarding the relocation of a child. Firstly, there was a shorter period. If the stay was intended to be less than a year, parents only needed to agree upon the method of keeping contact with the child. If parents could not agree, the Public Guardianship Authority decided the case. Secondly, there existed a longer period for such stays. If the stay was intended to be for more than one year, the permission of the Public Guardianship Authority (the so-called *gyámhatóság*) was necessary to bring the child abroad. The Authority checked the new environment of the child based on the documents presented by the parents. This situation resulted in a high number of cases when the parents wrongfully removed the child abroad; they did not intend to take the child away outside of Hungary wrongfully, but simply did not think they needed permission to move abroad with their own child. However, Public Guardian Authorities did not start cases against the parents, because they were also concerned the situation was absurd. Furthermore, this system was contrary to EU law, especially with the free movement of persons.

As of 15th March 2014, with the introduction of the new Civil Code, the system has completely changed. Now, for a shorter period (e.g., for holiday or a shorter trip), a parent may take remove the child without the consent of the other party. If the child stays abroad for a longer period (e.g., educational programmes), the agreement of the parents is necessary (similarly to the previous system). If parents want to move abroad together with the child, no permission is necessary from the Guardianship authority. They may do so without asking for permission. However, they must notify some authorities on their decision, including local notary (an official at the municipalities) that the child shall perform the obligatory schooling outside the country as well as the authorities about the change of their current address.

4.10.6. Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages

In a court procedure, the court decides concerning the fees related to the process, including the fees of attorneys, or the travel fees of the claimant. If the application is successful, generally the abductor is ordered to pay these fees, beside the fees of the procedure. Furthermore, in a guideline case, the Supreme Court found that the parent who prohibits the other parent to see his/her child must compensate the other parent for all extra costs.⁴⁴ In this case, the court emphasized damages must be compensated according to the general rules of private law (esp. Section 339 of the former Civil Code).

⁴⁴ Case 320/2000 of the Suoreme Court, <http://www.lb.hu/hu/elvhat/3202000-szamu-polgari-elvi-hatarozat>

Claiming other damages can be more complex. The general rules on damages can be found in the Civil Code (see in Annex). Section 6:518 of the Civil Code states that all torts are prohibited by law. According to Section 6:519, any person who causes damage to another person wrongfully shall be liable for such damage. Thus, there are no special rules for this group of expenses. This could be the case, for example, in compensating the psychological damage of the child/parent. Moreover, the new Civil Code amended the former rules in this regard as well (see Annex). In the future, non-pecuniary damages must only be compensated if rights relating to personality were breached (e.g., in case of defamation).

It must also be mentioned that in the Hungarian legal system there is a chance to combine a criminal procedure and civil law claims. According to Section 54 of the Criminal Procedure Code,⁴⁵ someone may claim damages which occurred in connection with the crime committed.⁴⁶

4.10.7. Judicial and non-judicial tools available to the parties, including mediation

4.10.7.1. Voluntary Mediation (Esp. In Court Procedures)

Mediation is a relatively new institution in Hungary; it exists since 2003. Act III of 1952 on the civil procedure (hereinafter referred to as: "Code on Civil procedure")⁴⁷ provides the right for judges to transmit a case to mediation if they believe it could be useful.⁴⁸

The main, independent legal source on mediation is Act CXVII of 2012 on mediation activity. Furthermore, an institutional background has also been created, with a list of mediators and an official mediator education. On the other hand, as the report of the Supreme Court states, at the present time there is only one mediator who has received an international mediator degree working in Hungary, the others received their education from Hungary, which is mainly focused on local matters. Nevertheless, a majority of mediators can speak foreign languages, which can be useful in the process.

Alongside the official list of mediators, one can also become a mediator by virtue of a different route; a number of judges or court clerks have been appointed as mediators.

Other laws also contain rules on mediators, e.g., the Guardianship Authorities may also start such a procedure, if there is a dispute between the parties/parents on the rules of interrelation with the child.

4.10.7.2. Compulsory Mediation: A Major Shift In Hungarian Law

As one of the most important rules in this regard, the new Civil Code introduced the concept of compulsory mediation. Two such proceedings are available.

Firstly, the court can order mediation. Section 4:172 of the Civil Code says that in justified cases, the court may order the parents to submit to mediation in the interest of properly exercising parental supervision and to ensure their cooperation.

Secondly, the Guardian Authority may also commence such proceedings. Section 4:177 of the Civil Code states that the guardian authority may order the parent to use mediation.

⁴⁵ Act XIX of 1998 on Criminal Proceedings.

⁴⁶ Tahy-Kiss Karolina, 'Bírósági rendelkezés a – büntetőeljárásban érvényesített – polgári jogi igényről' [Court Decision on Private Claims in Criminal Procedures]. *Iustum Aequum Salutare* VII. 2011/2. 160 et seq.

⁴⁷ For a Hungarian language version of the law see <http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=5200003.TV>.

⁴⁸ For a proper Hungarian language material on the background see Enikő Ágnes Béky, A gyermekek szerepe a családi jogi mediációban, különös figyelemmel az ítélt képesség kérdésére [The Role of Children in Mediation, with Special Regard at the Question of Perception of Children] *Jogelméleti Szemle* [Journal of Legal Theory], 2013, also available at <http://jesz.ajk.elte.hu/beky53.pdf>.

4.10.8. Sensitive issues brought to the ECHR

There were some very important cases decided by the Strasbourg Court (ECtHR), which highlight the Hungarian problems as mentioned in the next section of this contribution.

4.10.8.1. The Shaw Case (Case 6457/09)⁴⁹

Mr Shaw, an Irish citizen started a procedure in 2006 to have his daughter returned. His former wife came to Hungary with the girl and hid her for five years. Authorities repeatedly failed to assure the rights of the claimant. The mother refused to return the child, because she claimed she was sexually harassed; a claim that was later held to be unfounded. In 2011, ECHR found that there has been a violation of Article 8 of the European Convention of Human Rights,⁵⁰ and Mr Shaw could not get proper access to justice as was necessary for him. As a result, the Hungarian state also had to pay EUR 20,000 in respect of non-pecuniary damage and EUR 12,000 (twelve thousand euros in respect of costs and expenses for Mr Shaw.

4.10.8.2. Németh Zoltán Case (Case 29436/05)⁵¹

In a very similar local case, the father, as well as the mother were Hungarians who resided in Hungary. Even though there was no international element, the case shows unacceptable delays in legal processes, and clearly shows the problems of enforcing judgments/decisions effectively and in a timely manner.

In the case, after a divorce, the parties agreed that the father may visit his 7 years old son regularly. However, later the mother refused the father's right to meet the child, and authorities were unable to grant him his rights. In the procedure, the mother received several fines for her actions, but that was not a useful measure to enforce the father's rights. As a result, the father could not see his son between 1998 and 2004-2005. In the case, the ECHR found that "notwithstanding the margin of appreciation enjoyed by the competent authorities, the non-enforcement of the applicant's right of access constituted a breach of his right to respect for his family life under Article 8 of the Convention", and ordered the Hungarian state to pay EUR 20,000 for non-pecuniary damage.

4.10.8.3. Prizzia Case (Case 20255/12)⁵²

The courts again found in a case related to access rights that Hungarian authorities failed to enforce the law quickly and effectively; the foreign citizen father could not contact his child properly between 2004 and 2009. The mother returned the son to Hungary, and the parties made an arrangement that she will allow the husband to keep contact with the child. However, later she hid the child from the father.

It is important to note that the reasons for the delay in all of the abovementioned cases were complex. In all of the cases there were several authorities/courts who did not strictly enforce the law, or only partly enforced it and/or did not have the right to take effective measures. Beyond, allowing the parent to hide the child and not properly searching for the

⁴⁹ [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{ "fulltext": \["shaw"\], "documentcollectionid2": \["GRANDCHAMBER", "CHAMBER"\], "itemid": \["001-105758"\] }](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{).

⁵⁰ European Convention of Human Rights, Article 8, Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

⁵¹

⁵²

parent thoroughly was also a regular malfunction. Because of similar problems, in the case the Hungarian state was ordered to pay again EUR 12,500 in respect of non-pecuniary damage; and EUR 10,000 in respect of costs and expenses.

4.10.9. Commentary on the National System

4.10.9.1. Main Criticism

Before going into detailed criticism, it must be mentioned that fortunately most of the cases end without an enforcement procedure. Consequently, in most of the cases parties return the child or agree otherwise subsequent to the final judgment, and do not start the enforcement procedure (there were only four exceptions before the courts during 2010-2012). Consequently, the biggest problems are delays and the lack of proper enforcement during the processes (e.g., the lack of enforcing someone's right to meet his/her child). Such problems may also occur because of the lack of authorities' power to enforce the rules properly.

4.10.9.2. Delays

As we have seen before, there seems to be a delay in court procedures/enforcement in the Hungarian system.

The Report of the Supreme Court shows that most of the courts were delayed with the holding of the first public hearing; between 2010 and 2012, 6 out of 24 cases at the first instance level were decided with a delay, (i.e., not within the six week period laid down by the international rules in EU Regulation 2201/2003 and the Hague Child Abduction Convention 1980). In a number of cases the reason for delay was the regular summer holiday of judges. This problem was solved after 2011; now judges at the responsible court (PKKB, see above) are always on duty to ensure conformity with the strict deadlines.

The problems are more severe at the level of second instance cases. In such cases, the Code on Civil procedure does not contain special procedural rules, which automatically results into a delay of judgments. The reason for doing so is that in case of an appeal, applicants have 15 days to file the necessary documents. Thus, the courts at this level cannot adhere to the 6-week deadline, because the time remaining is too short for courts to adopt judgments.

Furthermore, in a number of cases, the courts found they had no jurisdiction to decide in access rights in abduction cases; a practice which was subsequently found to be unfounded and also highly problematic regarding the country's international obligations (see Shaw case mentioned above).

4.10.9.3. Enforcement Problems

The report of the Supreme Court highlights that there are some recurring problems in the system of handling child abduction cases in Hungary, and especially in enforcing rights of parties/children.

According to the earlier law, Guardianship Authorities had to make a home study before allowing the foreign authorities' access to the child, even if this study was unnecessary. As of 2012, this has now been amended

The return of the child falls within the jurisdiction of the authority of the Guardianship Authority responsible at the child's habitual residence. The choice of the responsible Authority delayed the procedure – this also was changed.

On the other hand (and also child support organizations approve this fact), the authorities (including the police, which helps to enforce the rights of the claimant) do not like to use coercive force in order to ensure the return of the child. A reason for doing so is that firstly, they believe child abduction cases are not criminal issues. Secondly, they state that they do

not have the necessary power to force the woman to stay, e.g., in a city or village. This resulted into situations in which judgments cannot be enforced properly, because all the authorities were afraid to proceed and introduce into cases strongly and effectively.

In certain instances the applicable rules are contradictory. For example, in theory, in certain cases the police could issue an international arrest warrant. However, in a majority of cases, the police does not have the right to detain the child or his/her parent in a child abduction case; the domestic rules on enforcement do not grant the police enough power to do so.

In several instances, the abducting parent moved to another country from Hungary. However, Hungarian authorities could not issue a European arrest warrant, because taking the minor away is generally subject to a prison sentence of less than one year, and a European arrest warrant can only be issued for more serious crimes.

Lower level authorities were also highly unsatisfied with the system of returning the child from abroad. They claim other, richer European countries do not give children back because they check the financial background of the parent who lives in their country, and if he/she earns substantially more than the other party in Hungary (as is usually the case in Europe), several Western-European authorities claim the child has better circumstances in their country.

Lower level authorities felt that most of the related authorities and police are not really active in enforcing the law, but only in maintaining a defensive approach, i.e., attempting not to make mistakes. However, in several instances this attitude is not proactive enough to enforce the letter of the law.

In this author's opinion, and beyond these observations, in several instances the rules are unclear, even for lawyers and practitioners. The rules of the Criminal Code are poorly drafted and imprecise, even for practitioners. A good example for this is the provision on the changing of the family status. According to the letter of the text, the elements of this crime are not clear. Even local lawyers are unaware in certain instances of what is to be considered as a crime and which legal action is regarded as proper.

Beyond practical guidelines cannot be used for the new Civil Code, which leaves several questions unanswered. For example we do not know at present time what is a "longer term" when a parent must ask for the other parent's consent to take the child abroad? Is half a year considered to be long enough to do so? What about three months? No court decisions are available in this field yet.

4.10.10. On-going reforms: the Constitutional Complaint in Family Matters

Beside the abovementioned Strasburg decisions, the practice of the Hungarian Constitutional Court also needs some attention. Beside a new Civil Code and a new Penal Code, a new Constitution (the Fundamental Law, hereinafter referred to as "Constitution")⁵³ was adopted in Hungary. The new Constitution abolished the former available *actio popularis* in Hungary. According to the former rules, everybody had the right to turn to the Constitutional Court if s/he found a constitutional problem to exist in the legal system.

⁵³ The law has no number, unlike other laws adopted by the Parliament. The Constitution was harshly criticized in domestic and international literature for using partly or completely antidemocratic solutions. Beyond, the Government also added provisions of laws into the constitution which were earlier abolished by the Constitutional Court because they were found to be unconstitutional. For its background see András Jakab, Pál Sonnevend 'Continuity with Deficiencies: The New Basic Law of Hungary' (2013) 9 *European Constitutional Law Review* 102-138.; *Constitution for a Disunited Nation – On Hungary's 2011 Fundamental Law* (Ed. Attila Gábor Tóth), CEU Press, 2012.; Balázs Majtényi, "Legislative Stupidities in the New Hungarian Constitution" *Pace diritti umani - Peace Human Rights* 2012 121-126.; *The Basic Law of Hungary: A First Commentary* (Eds. Lóránt Csink, Balázs Schanda, András Zs.Varga) Clarus Press, 2011.; Paul Blokker, *New Democracies in Crisis?* Rutledge, 2014.

In the new system only a certain group (including the Government, Ombudsman, President of the Supreme Court, etc.) may turn to the Constitutional Court after the adoption of a new law by the Hungarian Parliament. On the other hand, a new institution, the constitutional complaint, was introduced, which can be used in an individual case. This complaint was widely discussed (both in terms of negative criticism, as well as positive reinforcement) in Hungary.⁵⁴ The change from *actio popularis* to constitutional complaint can be seen as a serious step back in democratic rights. It resulted in a situation in which the Constitutional Court does not adjudicate upon the majority of questions, because it states that these complaints either do not contain constitutional issues or the applicants are not personally affected, even though in certain cases any reasonable man could tell these statements are not valid.

The same problem appears to be present in family matters as well. In theory, we could think a constitutional complaint could be a useful and effective tool to protect someone's right to his/her child, especially, if other courts/authorities do not fulfil their duties or violate fundamental rights. However, as an author⁵⁵ (a judge of the PKKB, the court which is responsible to decide in child abduction cases) highlights, the unsteadiness of this institution can also be seen in family matters, so this institution seems to work in a highly problematic way in defending family rights. Thus, complaints are rejected because of dubious grounds, while similar ones are accepted and investigated.

4.10.11. When Removal of a Child is not considered to be Abduction but the exercise of Rights of Free Movement and to Family Life

In Hungary, in conformity with international rules, the basic assumption is that if someone removes a child from the country of his/her residual residence, it is considered to be child abduction. There are no exceptions in this case; no law grants a parent the right to act neither against international rules nor against EU Regulation 2201/2003. The Hungarian laws neither permit staying abroad for a long period of time without the consent of the other parent, nor do they allow to move to another country without the permission of the other parent (for the general background see 3.6.3. Moving to a Foreign Country). According to Section 4:152 (5) of the new Civil Code, "the agreement of both parents is required for the child's residence abroad for any extended period of time for the purpose of studies or work, or other similar reason, either by him/herself or together with one of the parents." Beyond, the Act also expresses that "parental authorization is required for the child's moving to another country" (subsection (6) thereof).

Thus, the clue of such questions is not the legal background, but the practice, because in fact, especially when the child has been out of the country for twelve months, courts and authorities may find excuses why they are not forced to return the child. However, even in

⁵⁴ Only to mention a few of the articles, see Adél Köblös, A „régí típusú” alkotmányjogi panasz az új Abtv.-ben. [Old Style Constitutional Complaint In The New Constitution]. *Alkotmánybírószági Szemle* 2012/1.; Georgina Naszladi, Az alkotmányjogi panasz els fél éve [The first year of constitutional complaint]. *Közjogi Szemle* 2012/4.; Csaba Tordai: Az els év tapasztalatairól [On The Experience Of The First Year]. *Alkotmánybírószági Szemle* 2012/2. ; Bernadette Somody – Beatrix, Vissy, Citizens' Role in Constitutional Adjudication in Hungary: From the *Actio Popularis* to the Constitutional Complaint. *ANNALES Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae, Sectio Iuridica*, 2012; Beatrix Vissy, 'Az individuális alapjogvédelem kilátásai az alkotmánybíráskodásban. Merre mutat az alkotmányjogi panasz irányt je? [The Future Of Individual Defence Of Fundamental Rights – What Shall Be The Future Of Constitutional Complaint]' *Magyar Közigazgatás* 2012. 2. szám ; Gárdos-Orosz Fruzsina: A bírói döntések ellen benyújtott alkotmányjogi panaszok befogadhatósága II. – az Abtv. 27. §-a [The Acceptance of Constitutional Complaints Filed Against Court Decisions]. *Alkotmánybírószági Szemle*, 2013. 1. szám.

⁵⁵ Kozák Henriett, 'Utolsó remény?! Az alkotmányjogi panasz esetleges jöv je a jogellenesen elvitt gyermek visszavitele iránti eljárásokban [The Last Hope: The Future of Constitutional Complaint in Processes on Returning of Abducted Children]' *THEMIS* 2013. p. 274.
<http://epa.oszk.hu/02300/02363/00020/pdf/EPA02363_THEMIS_2013_dec_255_277.pdf> accessed on 1 July 2014.

most of such cases, courts/authorities accept that parental child abduction did occur. On the other hand, they refuse to return the child due to certain circumstances (see next point).

4.10.12. Justifications for refusing to return a child relocated to Hungary: Effectiveness of the Return Mechanism vs. "Best Interests of the Child"

Generally, Hungarian courts (including the Supreme Court, which has openly expressed this view)⁵⁶ accept that the best interest of the child is to recover the parental responsibility as quickly as possible. In this framework, it is the child's best interest to move him/her back into the country of his/her habitual residence.

As mentioned before, generally, the question whether courts should check the child's broader circumstances is only considered once twelve months have passed since the child's is in a new country of residence. Prior to the completion of twelve months, courts rarely examine merits and accept the return as the main interest. There were several factors that were taken into consideration, but the refusal to return is generally considered as an exception (even if its rate is relatively high). All of these factors are more-or-less related to the interests of the child. On the other hand, they are not the typical factors raised in proceedings dealing with the determination of the main place of residence of the child; the courts did not move into that direction. These factors were the following.

4.10.12.1. The Child Already Settled in His/Her New Environment

In some cases, the return was refused because the child was already settled in his/her new environment. In such cases, the environment must be investigated and a psychological report must be obtained, in conformity with Article 12 Hague Child Abduction Convention 1980). However, the simple fact that a child is already settled in his/her new environment will not automatically be sufficient for the courts to refuse the return, even if the change in the environment may cause complications for the child. Thus, this excuse is never used solely as a ground for denial of return.

4.10.12.2. Parent Had No Contact Earlier With The Child

In one case the parent who asked the return of the child had previously not maintained contact with the child, and he did not even have parental responsibility. On the other hand, theoretically speaking, if the other parent prohibited him/her to contact the child (for example the location of child was unknown to him), the Hungarian authorities will return the child if it is necessary, because not maintaining contact was not his/her fault.

4.10.12.3. The Interpretation of Permission To Leave The Jurisdiction

If a parent is granted permission to travel abroad, the fact that an approval was received for a shorter or a longer period of time is in and of itself not considered to be permission to emigrate. If a parent did not grant permission to move somewhere, allowing a simple trip cannot be considered as a permission to move away and leave a country permanently.

4.10.12.4. Endangering the child

In a number of cases, the return would cause the child damage or would be otherwise unbearable. However, interestingly, Hungarian courts rarely use this exception. Their main point is that they are unable to check whether the issues raised by a party are valid. In a

⁵⁶ EBH 2002.634, for a Hungarian version see <<http://www.kuria-birosag.hu/hu/elvhat/6342002-szamu-polgari-elvi-hatarozat>> accessed on 1 July 2014.

majority of cases parents tell courts that the other parent endangers the child with his/her attitude. In some of the cases, parents even state that the other parent has sexually harassed or even abused the child. However, especially if the other party is in another country, courts neither have the means nor the power to check the validity of such claims.

4.10.12.5. Proper Foreign Measures Granted

In connection with the danger a child must face, EU Regulation 2201/2003 does not allow the refusal of the return of the child if it is proven that foreign authorities could professionally maintain the protection of the child. In this regard it is the custom of Hungarian authorities to ask foreign authorities as to what they would do if the child would be in danger, how they would manage to help him/her, what measures they would take if a parent would act against his/her interests. On the other hand, the existence of available proper measures is not accepted automatically, they are checked on a case-by-case basis, also in connection with EU Member States.

4.10.12.6. Taking Into Account the Child's Intention to Stay

If the child requests the judge to allow him/her to stay, and he/she is mature enough to do so, the court may support such a solution. This is in conformity with international standards. On the other hand, even in such questions, all the relevant details must be verified in order to reach a proper judgment. In order to make such a statement, the child must be sufficiently mature in order to do so, which is obviously different in every situation.

4.10.12.7. Criminal Procedures in A Foreign Country For Child Abduction

The courts may also check whether a criminal procedure would/was started against the parent conducting abduction abroad. In such cases, there is a high chance in case of returning the child he/she could not keep contact with the parent who abducted him/her to Hungary. Consequently, if the foreign country has criminal sanctions against the parent who removed the child to Hungary, there is a chance that the child will not be returned because doing so would prohibit one parent from maintaining contact with the child.

The conformity of this interpretation to the rules laid down by domestic judges could be dubious with the Conventions or EU Regulation 2201/2003. This is especially interesting because Hungary also has several harsh laws against those who commit child related crimes.

4.10.13. On-going projects of future legislation on children

Beside the reforms mentioned above, it should also be highlighted that in order to align with Council of Europe guidelines,⁵⁷ the Hungarian Government has started to introduce a child-friendly justice programme. In the framework of this programme several special rooms were created at the courts and police stations that look like children's own rooms at home (at the courts one room was suited for younger children and another for older children). The friendlier environment could make a process, and especially an appearance at the court less harmful for children, because they do not have to make their testimonies in a rigid court room.

For the future, it seems no more general reforms shall take place. On the other hand, the Government plans to modify the laws on private procedure, which may have some effect on

⁵⁷ Guidelines on child friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010. Council of Europe Publishing, 2011. Available in different translations at http://www.coe.int/t/dghl/standardsetting/childjustice/publicationsavailable_en.asp.

the enforcement of judgments as well. However, at present time no deeper works are presented on the content of these changes, only a practice group was created to revise the present rules. The concept of the changes will be adopted by 2015. According to the plans, the proposal should be ready by 2016 and in 2017 the Parliament would adopt the law.

4.10.14. Concluding remarks

4.10.14.1. Recommendations on private international law issues

Regarding the rules on private international law and international procedural law, it would be necessary for the EU legislature to create clear rules on the concept of habitual residence, and codify them in all of the related EU instruments. This approach could make it clear what the term habitual residence means, how it can be determined and what circumstances exclude its determination. At present time (apart from the aforementioned new cases), we only have several judicial decisions on this topic.⁵⁸ However, it is a mistake to force practitioners to check the complete case law in such an important question. Beyond, it would be important to unify the application of this term in the Hague Conventions as well.

Furthermore, according to the present rules, based on a practice as set by the Borrás report,⁵⁹ we all tend to accept that a person may only have one habitual residence. However, in a globalized world this can be misleading: any person can have two "centers of life" and move between two countries.⁶⁰ EU law at present time does not give any help how to solve such problems.

In the field of child abduction, it is also possible that the one-year deadline for a quick return procedure as set in EU Regulation 2201/2003 should be extended. During this deadline, courts may not check the deeper merits of the case, but have to act automatically in connection with the return of the child. However, one year passes relatively quickly, and parents can very easily play for time. If they hide the child for one year (which is relatively easy), later they can use different arguments to convince the court why they do not want the return of the child, and the process moves into a pseudo-child-allocation trial.

Beyond, at the EU level, it would be important to highlight that no country's authority should use the realistic, but still immoral argument that a parent in a wealthier country earns more as in a poorer country, and as a result, the welfare of the child is better granted in the aforementioned country. As mentioned before, local authorities in Hungary regularly receive this claim from other European countries, and it is complicated to reply to such statements.

⁵⁸ Case 13/73. *Anciens Etablissements D. Angenieux fils aîné et Caisse primaire centrale d'assurance maladie de la région parisienne v Willy Hakenberg*. ECR 1973, 00935.; Case 76/76. *Silvana Di Paolo v Office national de l'emploi*. ECR 1977, 00315.; Case 284/87. *Oskar Schäflein v Commission of the European Communities*. ECR 1988, 04475.; Case C-216/89. *Reibold v Bundesanstalt für Arbeit*. ECR 1990, I-04163.; Case C-297/89. *Rigsadvokaten v Nicolai Christian Ryborg*. ECR 1991 I-01943.; Case C-102/91. *Doris Knoch v Bundesanstalt für Arbeit*. ECR 1992, I-04341.; Case C-452/93. *Pedro Magdalena Fernández v az European Commission*. EBHT 1994, I-04295.; Case C-90/97. *Robin Swaddling v Adjudication Officer*. ECR 1999, I-01075.; Case C-262/99. *Paraskevas Louloudakis v Elliniko Dimosio*. EBHT 2001, I-05547. Cf. Dilger, Jörg: Die Regelungen zur internationalen Zuständigkeit in Ehesachen in der Verordnung (EG) Nr. 2201/2003. Mohr Siebeck, Tübingen, 2004. 137-151.; Richez-Pons, Anne: Habitual Residence Considered as a European Harmonisation Factor in Family Law (Regarding Regulation Brussels II-bis). In: *Common Core and Better Law in European Family Law* (szerk.: Boele-Woelki, Katharina). Intersentia, Antwerp-Oxford, 2005. 355-360.; Rogerson, Pippa: Habitual Residence: The New Domicile? ICLQ, Vol. 49. (2000) 86-107.; Miklós Kengyel – Viktória Harsági: Európai polgári eljárásjog. Osiris, Budapest, 2006, 531-532.

⁵⁹ Habitual residence "the place, where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence." Explanatory Report of the Convention on Jurisdiction and Recognition and Enforcement of Judgements in Matrimonial matters. OJ C 221., 1998.07.16., 27-65.

⁶⁰ See eg. *Marinos v Marinos* [2007] EWHC 2047 (Fam) from the UK.

4.10.14.2. Recommendations On Substantive Issues

Most of the relevant international and European laws can be found in conventions/laws on private international law or international procedural law. This causes some problems in the field of substantive law as well, because the countries do not concentrate on this field. For example, the rules concerning the travel of a child to a foreign country are different from country to country, and (as we can see in the case of Hungary), they can be different even during the course of time. It would be easier for everybody to have unified rules on illegal removal and parents' rights regarding such journeys and travels. Moreover, there is a chance it could be necessary to implement certain rules on such basic issues into existing laws/agreements as well.

For local authorities, it would be a great advantage to receive clear guidelines: what rights they do have with regard to a parental child abductor? Are they within their rights to detain the child? Do they have any rights towards the parent? When is it necessary to use the force of police to enforce a decision?

Beyond, it would also be necessary to clear the criminal law background of such issues: what crime did the parent commit? It is somewhat strange that the same act is interpreted differently in different European countries, even though we have several Conventions for such problems. If this goal cannot be achieved, it would still be interesting to create a system such as the European arrest warrant for abducted children and abducting parents.

Interestingly, several authorities in Hungary and the Hungarian Supreme Court's report also highlighted that a performance could be improved if an independent actor, such as the police would have the power to strictly enforce the laws.⁶¹

⁶¹ Accomplished by Tamas Dezso Ziegler on 31 December 2014.

4.11. The Netherlands

Glossary of terms

Antokolskaia et al. (2008)	M.V. Antokolskaia, G.C.A.M. Ruitenbergh, Taken en functies van de Centrale Autoriteit bij de uitvoering van het Haags Kinderontvoeringsverdrag in Duitsland, Engeland & Wales, Frankrijk en Zweden, Amsterdam: WODC, 2008
Beaumont & McEleavy (1999)	P.R. Beaumont en P.E. McEleavy, The Hague Convention on International Child Abduction, Oxford University Press, 1999.
Centrum voor Internationale Kinderontvoering 2007	Centrum voor Internationale Kinderontvoering, Jaarverslag 2007, Hilversum: Studio 17
Dieren & Woltering (2003)	E. van Dieren & A. Woltering, 'Internationale kinderonvoering door een ouder', Tijdschrift voor SJD 2003, 4
Frohn (2012)	T. de Boer, F. Ibili, Personen - en familierecht, 2012
Iterson (2011)	D. van Iterson, Ouderlijke verantwoordelijkheid en Kinderbescherming, Apeldoorn-Antwerpen: Maklu, 2011
Kramer (1994)	D.T. Kramer, Legal Rights of Children, Colorado: McGraw Hill, 1994
Lenters (2006)	H. Lenters, 'Internationale kinderonvoering', FJR 2006, 90
Lowe en Ruitenbergh (2005)	N. Lowe en G. Ruitenbergh, Country Report Netherlands, Alexandria: National Center for Missing & Exploited Children, 2005
Pérez-Vera (1982)	E. Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, 's-Gravenhage: HCCH, 1982
Permanent Bureau (1979)	Permanent Bureau, Report of the Special Commission 1979, Actes et documents XIV, 's-Gravenhage, 1979
Permanent Bureau (1979a)	Permanent Bureau, Procès-verbal No 8, Actes et documents XIV, 's Gravenhage, 1979
Strikwerda (2000)	L. Strikwerda, 'De Haagse Conferentie voor IPR en de rechten van het kind: van conflictenrecht naar rechtshulp', FJR 2000, 6
Van Traa (2006)	A. van Traa, In het belang van het kind. Echt waar? Internationale kinderonvoering, Groningen: SGE bv 2006
Verwers e.a. (2006)	C.Verwers, e.a., Internationale Kinderontvoering. Onderzoek naar de uitvoering van het Haags Kinderontvoeringsverdrag

vanuit het Nederlands perspectief, 's-Gravenhage: WODC, 2006

Wolthuis e.a. (2000)

A. Wolthuis, e.a., Informatie over verdragen inzake internationale kinderontvoering, Amsterdam: defence for children international 2000

4.11.1. Statistical assessment

4.11.1.1. Key statistics overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	15428 (17.5%)	14684 (20.0%)	10637 (14.7%)	24033 (30.2%)
International divorces	5686 (16.4%)	5655 (18.2%)	5714 (17.9%)	n/a
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	26	26	40	n/a
Outgoing return requests made under the Hague Convention	n/a	45	50	n/a

*Marriage and divorce figures based on centrally-collected Eurostat data. Percentages indicate international marriages/divorces as a proportion of all marriages/divorce

4.11.1.2. Available national data

Year	Total number of marriages	Both partners born in Netherlands	One partner born in NL, born abroad	Both partners born in same foreign country	Partners born in different foreign countries
1996	78,590	67,791	10,217	5,696	1,436
1997	79,227	67,860	10,323	5,543	1,333
1998	80,550	68,555	11,022	5,848	1,531
1999	81,866	69,739	11,961	6,036	1,692
2000	79,526	67,697	12,249	6,468	1,660
2001	73,190	61,395	12,074	6,356	1,726
2002	76,393	64,142	13,199	6,627	1,840
2003	72,243	60,661	12,282	5,774	1,710
2004	66,847	56,748	11,024	4,603	1,336
2005	65,859	55,365	11,049	4,354	1,495
2006	66,102	55,563	11,230	4,163	1,413
2007	67,152	56,662	10,952	3,563	1,308
2008	69,971	59,154	11,003	3,938	1,343
2009	67,563	56,062	11,376	4,396	1,679
2010	67,051	55,543	12,134	5,492	2,230
2011	64,169	52,546	11,730	5,102	2,194
2012	63,196	51,668	11,680	4,899	2,068
2013	57,061	46,278	11,058	5,098	2,115

Source: CBS, 2014

The Central Bureau for Statistics in the Netherlands is the most authoritative source for statistical data in the Netherlands. These figures indicate that the number of marriages concluded in the Netherlands has steadily declined over the past few decades. However, attention should also be paid to the fact that since 1998, couples have the option of entering into a registered partnership instead of getting married. When these figures are also factored in, then the decrease in the number of couples opting to formalise their relationship with a marriage is not as dramatic as this table may at first indicate.

It is perhaps also interesting to note that the number of international marriages is steadily increasing, especially those cases in which both parties are both foreign citizens. These figures assist in reaching the conclusion that the number of international marriages in the Netherlands is on the rise, especially as a proportion of the total number of marriages.

The International Child Abduction Centre in the Netherlands provides information, advice and guidance to everyone who encounters (the threat of) international child abduction.¹ The latest data show that in 2012 the Central Authority received 166 (49 incoming and 117 outgoing) requests, which included a total of 239 children. Of those requests, 146 (47 incoming and 99 outgoing) involved international child abduction. It was later found that 10 requests did not involve a situation regarding child abduction. In total 214 children were involved in the child abductions.²

¹ [International Child Abduction Centre \(http://www.kinderontvoering.org/\)](http://www.kinderontvoering.org/).

² [International Child Abduction Centre annual report 2013 \(http://www.kinderontvoering.org/centrum/jaarverslag\)](http://www.kinderontvoering.org/centrum/jaarverslag).

4.11.2. National laws implementing the Hague Convention

The Netherlands signed the Hague Convention on Child Abduction on 11 November 1987 and subsequently ratified the Convention on 12 June 1990. The Hague Convention on Child Abduction came into force in the Netherlands on 1 September 1990. The implementing legislation accompanying the Convention was implemented at the same time. The International Child Abduction (Implementation) Act entered into force on 1 September 1990.³ This Act has subsequently been amended many times;⁴ the most recent amendments will enter into force on the 15 December 2014.⁵

The Netherlands is a State Party to the 1996 Hague Convention on Parental Responsibility. The Netherlands signed this Convention on 1 September 1997, with the Convention being ratified on 31 January 2011. The Convention entered into force on 1 May 2011. The Netherlands was also a contracting state to the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants.⁶ This Convention was signed on 30 November 1962, ratified on 20 July 1971. This Convention entered into force on 18 September 1971. The latter Convention still applies in the Netherlands, especially with respect to the relationships with Turkey.

Article 50, first sentence, of the 1996 Hague Convention on Parental Responsibility states that the Hague Convention on Child Abduction prevails when there is a case between contracting states. When a request is filed by a parent for the return of the child the 1996 Hague Convention on Parental Responsibility is the first international instrument that has to be used, despite ongoing procedures concerning custody. Only after the decision is made on the return of the child, may a case relating to the custody of the child be continued.

Nevertheless, Article 50(2) makes it clear that the 1996 Hague Convention on Parental Responsibility does not preclude a claim to return the child or to organise contact rights with the child. These instruments need to be coordinated in the same way as EU Regulation 2201/2003 and the Hague Convention on Child Abduction.⁷

In the Netherlands, the 1996 Hague Convention on Parental Responsibility is very rarely used to determine the jurisdiction of the Court. Due to the concurrent provisions in Article 61 sub a), EU Regulation 2201/2003 (which is the counterpart of Article 52 Hague Child Protection Convention), the courts in the Netherlands very rarely are able to resort to the provisions of the Hague Convention on Parental Responsibility in dealing with issues of jurisdiction. The only situation when resort will be made to this convention is when the child has his or her habitual residence in a Contracting State outside of the European Union, and a petition is filed with the Dutch courts.

When dealing with emergency measures, Dutch courts utilize the possibilities of Article 20 EU Regulation 2201/2003. Therefore, no reference is made to Article 11 or 12 of the Hague Convention on Parental Responsibility. This means, however, that emergency measures taken in the Netherlands on the basis of Article 20 of EU Regulation 2201/2003 may not have any extra-territorial application of such decisions.

Due to the universal or erga omnes application of the rules on the applicable law laid in Article 20 of the Hague Convention on Parental Responsibility, the Convention is virtually

³ Stb. 1990, 202.

⁴ Stb. 1993, 725 (entered into force on 1st April 1994), Stb. 1996, 328 (entered into force on 29th June 1996), Stb. 1997, 38 (entered into force on 1st July 1996), Stb. 1999, 30 (entered into force on 17th February 1999), Stb. 2001, 584 and Stb. 2001, 581 (entered into force on 1st January 2002), Stb. 2004, 215 (entered into force on 1st July 2004), Stb. 2004, 306 (entered into force on 1st January 2005), Stb. 2008, 100 (entered into force on 1st September 2008), Stb. 2011, 530 (entered into force on 1st January 2012), and Stb. 2012, 316 Stb. 2012, 313 and Stb. 2012, 200 (entered into force on 1st January 2013).

⁵ Stb. 2013, 560.

⁶ English translation as published in the United Nations Treaty Series, 1969, pp. 145 ff. available at http://www.hcch.net/index_en.php?act=conventions.text&cid=39.

⁷ Iterson (2011), p. 48-50.

always applied when dealing with the applicable law rules in cases involving disputes on parental responsibility. Issues have arisen due to the wording of Article 15 of the Convention, which states that a court that has jurisdiction on the basis of the Hague Convention on Parental Responsibility will apply its own law. This provision is silent on the issue of the applicable law rule to be applied when the jurisdiction of the judge is based on other sources, e.g., article 8 EU Regulation 2201/2003.

4.11.3. Characterisation of parental child abduction

4.11.3.1. Concept of Custody Rights

The Dutch courts interpret the concept of custody rights in Article 3, Hague Convention on Child Abduction extremely formalistically. In Dutch law, the concept refers to the question of whether a parent has been vested with custody, either in the form of parental authority (*ouderlijk gezag*) or guardianship (*voogdij*). In an outgoing child abduction case, the Dutch authorities may have been requested to provide an Article 15 Convention Declaration in accordance with the Hague Convention on Child Abduction. In this situation, the answer to the question will be based on substantive Dutch law, as contained in Book 1, Dutch Civil Code.

According to substantive Dutch law, the concept of custody comprises two different notions, namely parental authority and guardianship.⁸ Although the content of these two concepts are the same, the persons able to exercise these rights are different. A legal parent can be vested with parental authority, whereas a person who does not have a legal relationship with the child is able only to exercise guardianship. The only exception to this terminology is in the case that the legal parent vested with parental authority, wishes to jointly exercise this authority together with an individual who is not the legal parent of the child. In this case the non-legal parent is still referred to as having joint parental authority, despite not being a legal parent of the child.

4.11.3.2. Establishment of custody rights

Depending upon the marital status of the couple, the custody situation will vary. According to Dutch law, there are three ways in which a parent can be vested with parental authority: (a) by operation of law (*van rechtswege*), through registration in the Dutch Custody Register (*aantekening in het Gezagsregister*) or via judicial decision (*rechterlijke beslissing*).

According to Dutch family law, the parents of a child have to be involved in a variety of different formal or informal relationship forms; they may be married, involved in a registered partnership or cohabiting outside of a formal, family law relationship. Furthermore, Dutch law also all couples to enter into this variety of formal relationship forms; same-sex couples are permitted to marry, and different-sex couples are permitted to enter into a registered partnership. Accordingly, a host of different situations can arise with regards to the acquisition of parental authority. Article 1:251 Dutch Civil Code states that during a marriage the legal parents have the joint parental responsibility over the child. Accordingly if the parents are of different-sex, then they will be vested jointly with parental responsibility. Since 1 April 2014, it is also possible for two women to become the legal parents of a child born within the marriage.⁹ As a result, the couple will also exercise joint parental authority on the basis of this provision. Those involved in a registered

⁸ Article 1:245 Dutch Civil Code.

⁹ I. Curry-Sumner and M. Vonk, "Co-motherhood in 2014", in: B. Atkin (ed.), *International Survey of Family Law 2014*, Jordans, 2014.

partnership are also provided with the same legal status with regard to the children born during the registered partnership.¹⁰

If the parties are neither married, nor involved in a registered partnership, then parental responsibility is vested solely with the birth mother (Article 1:253b Dutch Civil Code).¹¹ The other parent then has the opportunity to recognise the child. Since 1 April 2014, this possibility is equally open to women, as well as men. Nonetheless, if a woman or a man recognises a child, this does not automatically vest this legal parent with parental authority. Instead, this legal parent must subsequently have their parental authority registered in the Dutch Custody Register. This registration requires the consent of the legal mother, but most importantly requires that the person who has recognized the child undertakes further action. This registration can take place on the basis of Article 1:252 Dutch Civil Code. As a result, there are also many legal fathers in the Netherlands who do not have parental authority according to Dutch law. This also, therefore means that they do not have the right to determine the place of residence of their children, and as a result will be regarded in Dutch law as not being affected in the rights of custody if the other legal parent unilaterally alters the place of residence of the child.

If the father (or other mother) has not recognized the child, then he or she may still be vested with parental authority by virtue of a judicial procedure. According to Article 1:253t Dutch Civil Code, if the legal mother (i.e., the birth mother) and the other person who is not the legal parent of the child, jointly request the court to be vested with parental authority and a number of conditions are satisfied, then they may be jointly vested with parental authority.

In conclusion, the situation with regards those vested with parental authority in the Netherlands is extremely complicated. A legal parent usually is vested with parental authority, but this is not necessarily the case. On the other hand, a person who is not a legal parent may also be vested with parental authority, despite not being a legal parent.

4.11.4. Procedure for child abduction cases

4.11.4.1. Return Proceedings in the Netherlands¹²

4.11.4.1.1. Introduction

A distinction needs to be drawn between the procedure to be applied in incoming cases, and the procedure applied in outgoing cases. Attention will first be paid to the incoming cases, as these are regarded as “abduction cases” within the context of the relevant particular instruments in this field. If the left-behind parent with custody rights believes his or her child to have been wrongfully removed or retained in the Netherlands, then he or she is entitled to contact the Central Authority of the State in which he or she is habitually resident, or may contact the Central Authority of the State to which the child has been wrongfully removed. This means that in the Netherlands, left-behind parents can contact the Dutch Central Authority either through the foreign Central Authority acting as an intermediary, or from the left-behind parent directly.

In short the Dutch Central Authority is the coordinating body when it comes to cases of international child abduction between the Netherlands and other countries. Left-behind parents can come into contact with the Central Authority to help bringing the child back to

¹⁰ Article 1:253aa Dutch Civil Code (if the other parent has recognised the child prior to the child’s birth), or Article 1:253sa Dutch Civil Code (if the other parent has not recognised the child prior to the child’s birth, so long as no other person has legal familial ties with the child).

¹¹ If the mother is a minor, then she does have the opportunity to have herself emancipated from the age of 16, in accordance with Article 1:253ha Dutch Civil Code.

¹² The following information has been taken from the leaflet issued by the Dutch Ministry of Security and Justice, Handreiking Stelsel Internationale Kinderontvoering. Centrale autoriteit internationale Kinderontvoering, The Hague, 2012.

the parent. Before 1 January 1 2012 the employees of the Central Authority had the qualification to represent the parties in court. Now the parties are assisted by a lawyer. In Paragraph 4.12.4.2 there will be given more insights on this change.

The Central Authority does not deal with individual cases. The Authority facilitates, redirects, and informs the partners involved in the cases of child abduction.

The Central Authority deals with cases described in article 3 Hague Convention on Child Abduction. Article 3 states that the child has been taken away wrongfully when this is performed contrary to the rules of custody. Since the Central Authority performs her tasks as stated in the Hague Convention on Child Abduction the procedures are carried out by civil law. Parents are free to initiate a criminal procedure alongside the civil procedure, but the Central Authority plays no role in the first procedure, which means that the Central Authority deals with parental child abduction instead of criminal kidnapping by others than the parent/partner.

The Central Authority has been given enough powers and recourses to deal with child abduction and cooperates and communicates with different disciplines (e.g. National Police, Council of Legal Aid) to achieve the goals that are set out for the Central Authority in article 7 of the Hague Convention on Child Abduction. The Central Authority makes use of general request forms and procedures also to ensure transparency.¹³

If the Dutch Central Authority receives a request, then the authority must determine whether they are in possession of all the necessary information. This process is commenced using a submission form, which can be collected from the Central Authority. As soon as this form has been received, the intake process can commence. The Central Authority issues a notification letter in which the announcement is released that a child has been wrongfully removed or retained by the other parent. The Central Authority at this stage simply requests the abducting parent to submit all the relevant details, such that a procedure is able to commence. Both parents are informed of the progress of the case and the conclusions of this intake phase. After the completion of the intake phase, the application is transferred to an attorney-at-law that has been chosen by the left-behind parent. Both parents are subsequently informed of the costs involved in such a dispute. The Central Authority is not permitted to act on behalf of the either one of the parents if a court proceeding ensues.

The advantages of mediation are also discussed at this stage, especially with respect to any children involved. In the conversation concerning the aspects to be taken into account in any possible mediation session, all steps are geared towards an increasing build-up of trust between the two parties once again. Mediation is stimulated through the Centre for International Child Abduction (Centrum IKO). If no mediation is able to take place, or if the results do not deal with everything, or the parties refuse to take place in such a trajectory, then the attorney-at-law will need to file a petition with the District Court in The Hague to commence the judicial proceedings for the return of the child.¹⁴ After the petition has been filed, an "organisational hearing" is scheduled. This hearing is solely aimed at ensuring that all the parties' arguments are clear and that all necessary documents are in the hands of the judges concerned. In principle, the organizational hearing is scheduled to take place two weeks after the submission of the petition. The actual hearing of the cases is scheduled to take place two weeks thereafter, with a decision being handed down two weeks after the actual hearing. Accordingly, the whole process normally takes six weeks from the moment the petition is filed with the court up until the court decision is granted.

After the decision has been granted, the parties only have two weeks in which an appeal may be submitted. Two weeks after the submission of the appeal petition, an oral hearing will take place within the Court of Appeal. In most cases, the principle to which all the staff adhere to is to attempt to ensure that within two weeks of the oral hearing, the parties

¹³ Article 11, International Child Abduction (Implementation) Act.

¹⁴ Article 11, International Child Abduction (Implementation) Act.

are sent a copy of the decision. Accordingly, in Dutch law, a distinction must be drawn between three different phases of the procedure.

Procedure	Organisation	Length of procedure
Intake	Central Authority	6 weeks
First instance	District Court, The Hague	6 weeks
Appeal	Court of Appeal, The Hague	4 weeks

4.11.4.1.2. Intake

When a request for the return of a child is received from a foreign Central Authority, the Dutch Central Authority will open a file. The Central Authority determines on the basis of the documents submitted whether there is a possible wrongful removal or retention. This is a marginal test and includes an assessment of the application with respect to completeness and reliability, a determination that the child is younger than 16, that a custody relationship has been proven, that it is clear that no permission had been granted for the move and that the child is in the Netherlands. The same criteria are equally applied if the child is from a non-Convention country.

The Central Authority requests the translation of the documentation for the marginal testing and requests an abstract of the Personal Records Database. If the location of the abducting parent and the child are not known, then the Central Authority can resort to utilizing the assistance of the Public Prosecutor. Once the location of the child and abducting parent has been determined, the Central Authority writes to the abducting parent with a "notification letter". The letter contains information on the alleged abduction and explains which steps will be taken if the parent refuses to return the child. The abducting parent normally has two-weeks to respond to this letter. The Dutch Central Authority informs the left-behind parent of the progress of this file by means of the foreign Central Authority. At this stage, the Central Authority informs the parents of the possibility of cross-border mediation. Attorneys-at-law are only appointed if a court case is imminent and the situation does not appear to be on the verge of changing. In practice the intake takes approximately six weeks in order to gather all the necessary documents.

4.11.4.1.3. Article 16, Hague Child Abduction Convention 1980

If the Central Authority learns of a custody hearing currently taking place in the Netherlands, then the Central Authority normally requests the court to suspend the proceedings on the grounds of Article 16 Hague Convention on Child Abduction in combination with Article 7(1) Hague Child Protection Convention 1996. A similar provision is also contained in Article 15 of the implementing legislation of the Hague Convention on Child Abduction.

4.11.4.1.4. Organisation Hearing

In principle, two weeks after the petition is submitted to the District Court in The Hague, an organisational hearing will take place. This is the first oral hearing of the case, in which the court outlines the main points of dispute between the parties and assesses the possibilities for mediation. In this hearing the judge can also establish contact arrangements and a discussion takes place with respect to the documents that need to be submitted to court.

4.11.4.1.5. Cross-border mediation

Mediation in cross-border child abduction cases is led by two specialised cross-border mediators, both of whom are attorneys-at-law specialized in international parental child abduction case and a psychologist. Cross-border mediation can take place in Dutch, English, French or any other language (with the assistance if an interpreter). The mediation

sessions are organised by the Mediation Bureau that is associated with the Centre for International Child Abduction. This means that the Central Authority doesn't lead the mediation sessions by its own. This process is voluntary and provides parents with the possibility to informally and confidentially attempt to solve their disputes outside of court. In principle, mediation sessions take place three times for 3 hours each. These sessions are normally spread across a period of two to four consecutive days, between which a weekend is always scheduled.

4.11.4.1.6. Identity of persons involved

In the intake-phase of the procedure, the Central Authority is permitted to investigate the Personal Records Database with respect to the abducting parent and the child, in order to determine whether this person is legally resident in the jurisdiction. On the basis of the Protection of Personal Information Act (Wet Bescherming Persoonsgegevens) the left-behind parent cannot be informed of the place of residence of the abducting parent. The District Court will consider is satisfactory is the Personal Identification Number of the abducting parent and/or the child is included in the petition, so that the identity of those involved can be controlled.

4.11.4.1.7. Translations

All documents included in the procedure must be translated into Dutch, unless this relates to relatively easy to understand documents such as birth certificates, which are available in English, French or German. The District Court does not permit informally translated documents, and will only accept translations if they have been translated by a sworn translator. Certain documents may be translated on the account of the Central Authority (i.e., the costs will be covered by the Central Authority) both for the abducting parents, as well as for the left-behind parent, namely (a) the application, (b) the action of the abducting parent to the notification letter, and (c) additional information requested by the Central Authority during the intake-phase.

4.11.4.1.8. Contact with foreign authorities

The Central Authority also facilitates the contact with foreign authorities during the procedure. The attorney-at-law sends the documents in English through the Central Authority, which organises transfer of the documents to the relevant foreign Central Authority. In the return procedure, the District Court may request an Article 15 Declaration to be submitted. In outgoing cases, the Central Authority is also the competent authority for the drafting of the Article 15 Declaration on the content of Dutch law. In this author's opinion, Dutch law does currently provide a sufficient basis for this duty to be performed by the courts. However, the courts have been unwilling to allow for this route to be opened, and have declared themselves to have no jurisdiction to issue an Article 15 Declaration; a position that has been vehemently criticised by this author.¹⁵

In all correspondence the importance and relevance of mediation is stressed by all involved. Cross-border mediation can also take place prior to a petition being submitted to the court or before the organisational hearing. Subsidised cross-border mediation is, however, only available once, either prior to the petition being filed, or after the organisational hearing.

¹⁵ District Court The Hague, 3 October 2012, ECLI:NL:RBSGR:2012:BX9411, JPF 2013/75, annotation Curry-Sumner.

4.11.4.2. Procedural Amendments of 2011

In 2011, the Netherlands enacted a number of measures with respect to the legal procedure in child abduction cases.¹⁶ These measures were aimed at making the procedure less biased, more efficient and more effective.

The first of these measures involved the centralisation of the jurisdiction of the courts. Prior to 2011, return order proceedings had to be commenced in the district court of the place where the child was present within the Netherlands. As a result, some courts only dealt with these sorts of cases on a highly infrequent basis. As a result, the effective application of the Hague Convention on Child Abduction has hindered. The proceedings took longer to process, and the possibility for disparate interpretations of the provisions of the Convention was high.

On 1 January 2012 jurisdiction in return order proceedings was centralised at the District Court in The Hague. As a result all incoming cases involving an application for the return of a child that is present within the Netherlands are now filed with the district court in The Hague. As a result of this centralisation of the court of first instance, this also means that all appeal cases are also centralized before the Court of Appeal in The Hague.

A second measure introduced aimed at reducing the delay in return order proceedings was the abolition of a second appeal to the Supreme Court of the Netherlands. Since the enactment of the amendments, Article 13(8) Child Abduction Implementation Act states that appeal to the Dutch Supreme Court is prohibited in return order cases. It is believed that this abolition does not affect the right of either parent to a fair trial under Article 6 ECHR. Both parties are provided two opportunities to have the cases heard in full (District Court in the Hague and Court of Appeal in The Hague). The fact that the courts have been centralised is believed to offset the reduction in instances, due to the increased specialization of the judges dealing with the cases. This rule is, however, subject to limitations. Firstly, it only applies to cases handed down by the Court of Appeal in The Hague since 1 January 2012. Obviously, this limitation is not so relevant any more, but this was an issue of contention at the time. Secondly, two possible routes to the Dutch Supreme Court were left open. The first opportunity is if a legal rule was applied incorrectly in the previous cases. As already stated, the possibility for this is drastically reduced as a result of the centralization of jurisdiction. The second possibility is that of Article 8 ECHR. The question has previously been posed whether Article 8 ECHR could lead to a setting aside of the prohibition of appeal to the Dutch Supreme Court. The Dutch Supreme Court has itself answered this question in the negative. On 13th July 2012, the Dutch Supreme Court stated that an alleged violation of Article 8 ECHR did not, in principle, provide sufficient grounds for setting aside the prohibition of appeal to the Dutch Supreme Court.¹⁷

The third amendment in 2012 related to the role of the Central Authority in the return order procedure. Prior to this date, the Central Authority represented the left-behind parent in court. Although this role provided the left-behind parent with much needed legal assistance, it also raised significant problems in terms of perceived bias. It was felt that the Central Authority, as a State organ in the Netherlands, should not represent one of the parties to the dispute. This gave the abducting parent the idea that the left-behind parent was granted an upper hand in the proceedings. Although this was not the case, the perceived bias was just as important to remove. Once again, a transitional problem did arise at the time, as the law came into force on 1st January 2012. The question was whether the Central Authority also lost its representative authority in those cases that were currently pending before the courts. On 26 April 2012, the Court of Appeal Leeuwarden

¹⁶ Stb. 2011, 530.

¹⁷ Dutch Supreme Court, 13 July 2012, ECLI:NL:HR:2012:BW7476. See further on the use of Article 8 ECHR in breaking through appeal prohibitions: Dutch Supreme Court, 22 January 1999, ECLI:NL:HR:1999:ZC2824.

determined that the Central Authority retained its procedural position with respect to pending cases.¹⁸

The final amendment to the procedure concerned the enforceability of the decision. According to Article 13(5), International Child Abduction (Implementation) Act, return orders are enforceable immediately. One of the problems that had arisen in the past related to whether the institution of appeal proceedings should be regarded as suspending the effect of first instance the judgment. For example, if the first instance judge had ordered that the child or children needed to be returned, and the other parent subsequently filed an appeal, the question arose whether the children could be returned on the basis of the decision in first instance. In a number of decisions, Dutch courts had already decided that the institution of appeal proceedings should be regarded as suspending the effect of the initial district court decision.¹⁹ This approach has subsequently also be codified in Article 13(5) Child Abduction Implementation Act. The effects of the hard rule of immediate effect has, therefore, been somewhat softened by virtue of the provisions allowing for the effect of the decision to be suspended.

These four amendments have been the result of evaluation, and it would appear that the aims of the legislation have been achieved.²⁰ The procedure has indeed become more efficient and effective. As far as this author is aware, the bias experienced by the parties has not been the subject of research and therefore it is difficult to determine whether the aims of removing legal representation by the Central Authority have been achieved.

4.11.4.3. Bureau Liaison Judge

The legal basis for the international co-operation between various courts is in Article 24, International Child Abduction (Implementation) Act. As a result of this provision, amongst others, the Netherlands has created a central reference point for all questions that require international co-operation between judges. The liaison judge ensures that contacts with foreign judges within the context of the Hague Child Protection Convention 1996, the EU Regulation 2201/2003 and the relevant implementation legislation are facilitated. The liaison judge offers a point of contact for judges in the Netherlands, but also for foreign judges.²¹

By decision of the Council for the Judiciary (Raad voor de Rechtspraak) dated 14 July 2005, the Chairman and Vice-Chairman of the Department of Juvenile and Family Law of the District Court of The Hague were appointed as liaison judges for international child protection. Due to changes in the structuring of the courts in the Netherlands, there has been a change in the appointment / title of the liaison judge. By decision of the Council for the Judiciary dated 20 November 2012 the President of the Family Law and International Child Protection Division of the District Court of The Hague and the senior judge in the Family Law and International Child Protection Division of the District Court of The Hague, both specialists in international family law, were appointed as liaison judges International child protection with effect from 1 January 2013.

In order to execute these tasks, the Department of Juvenile and Family law of the Court of The Hague has established an "Office Liaison Judge International Child Protection". This office also serves as a "help-desk" and a source of knowledge. The office will be staffed by five legal assistants (working in turns). The execution of the duties of the liaison judge will be carried out by mentioned President of the Family Law and International Child Protection

¹⁸ Court of Appeal Leeuwarden 26 April 2012, ECLI:NL:GHARL:2012:BW7562

¹⁹ Court of Appeal The Hague, 16 July 2008, ECLI:NL:GHSGR:2008:BG6755; Court of Appeal The Hague, 13 August 2008, ECLI:NL:GHSGR:2008:BE9360; District Court Utrecht, 10 December 2010, ECLI:NL:RBUTR:2010:BP1552.

²⁰ Letter from the Minister of Justice, 1 August 2013, Reference: 2013Z14093/2013D29403

²¹ M.C. Ritsema van Eck-van Drempt, "Uitdagingen en mogelijkheden Haags Kinderontvoeringsverdrag 1980 en HKV 1996", EB 2012/76, §4.

Division and senior judge in the Family Law and International Child Protection Division and two other family judges.

4.11.5. Existing criminal sanctions

Child abduction is penalised in Article 279 and 280 Dutch Criminal Code. Article 279, Dutch Criminal Code states that a person who intentionally removes a child from his parents, risks a prison sentence of a maximum six years or a fine with a maximum of €18,500. Different sanctions are used when either violence or threats are used, or when the child is younger than twelve years of age. In these cases, the prison sentence can range up to nine years or a fine with a maximum €74,000. Article 280, Dutch Criminal Code states that if a person knows of the whereabouts of the abducted child, he risks a prison sentence of a maximum three years or a fine with a maximum of € 18,500, if he or she does not inform the relevant authorities of this information. These provisions are not applied frequently in practice, as the official line is to prefer civil remedies above and beyond criminal sanctions.²² Nonetheless, the Dutch Supreme Court has already stated that minors should be given high priority, and the utmost should be done to ensure that inadequacies in the law should be solved.²³ In a recent case, the District Court held that article 279 Dutch Criminal Code had indeed been breached when a father took his three minor children to Syria without the permission of the legal mother with custody rights. He failed to inform her of their whereabouts, and therefore committed the crime listed in Article 279. As a result he was sentenced to 12 months in prison (of which 7 months conditional). This sentence was, however, determined in combination with the fact that the perpetrator had also abused his ex-wife by handcuffing her and limiting her freedom.²⁴ In this case he was also ordered to pay the sum of €2,632 in compensatory damages to his ex-wife.

On 20 December 2013, the Second Chamber of the Dutch Parliament requested the Minister of Security and Justice to provide a reaction to the private members bill that had been instigated on the 16 March 2006. The bill proposed to add a specific sentencing proposal with respect to Article 279 Dutch Criminal Code, ensuring that the sentence could be made more severe if the person who had removed the child from the legal custody of the other parent had taken the child outside of the country.²⁵ The Minister provided as answer to these questions on 13 January 2014.²⁶

A number of critical comments were mentioned as to how the aims of this proposal could be met. The proposals aimed to create grounds for ensuring increased severity in penalties if the abducting parent had prepared the abduction. However, in practice it has proven very difficult to prove the preparation of the abduction.²⁷ The bill also aimed to ensure that an abduction that takes place abroad by a person who does not possess Dutch nationality, would still be regarded as a criminal offence in the Netherlands if the abducting person had his or her place of residence or abode in the Netherlands. This extension of extra-territoriality has, however, recently been accepted in the context of other legislative amendments, and was therefore considered unnecessary as a specific addition in the context of child abduction.²⁸

²² Ministry of Security and Justice et al, Samenwerkingsprotocol gedwongen tenuitvoerlegging teruggeleidingsbeschikkingen in internationale kinderontvoeringszaken, The Hague, May 2014

²³ Dutch Supreme Court 21 April 1998, NJ 1998, 782, Dutch Supreme Court 20 November 2001, NJ 2003, 632, annotated R. de Lange.

²⁴ District Court Overijssel 20 December 2013, ECLI:NL:RBOVE:2013:3372.

²⁵ Parliamentary Proceedings, Second Chamber, 2006-2007, 30 491, nr. 2.

²⁶ Parliamentary Proceedings, Second Chamber, 2013-2014, 30 072, nr. 31.

²⁷ Parliamentary Proceedings, Second Chamber, 2006-2007, 30 491, nr. 4 en 5.

²⁸ Stb. 2013, 484. Act amending the rules concerning extraterritoriality in criminal cases (Wet herziening regels betreffende extraterritoriale rechtsmacht in strafzaken).

4.11.5.1. Details of civil law sanctions including the possibility of claiming damages

Alongside the possibilities through which the left-behind parent can commence proceedings before the Dutch courts, (utilising the Hague Convention on Child Abduction and the Dutch Criminal Code), the left-behind parent can also commence a civil law procedure to ensure the return of the abducted child.²⁹ In the civil and criminal procedures, the Central Authority is not involved. In this procedure the left-behind parent can also request for damages. This is, however, rarely done in practice, and as a result there is little known about how these claims would be applied in practice. Furthermore in child abduction cases, it is standard that the losing party is ordered to pay the costs of the other party.

4.11.5.2. Any authorities with responsibility for enforcing rules. Are there any problems at the stage of enforcement?

According to the rules laid down in the Dutch Criminal Code, child abduction is a criminal offence. In incoming cases, if the District Court has issued a return order, then the attorney-at-law of the left-behind parental and the attorney-at-law of the abducting parent will discuss details of the practical aspects of the return. If the abducting parent does not wish to cooperate with the return then the return order may need to be forcibly enforced. In this case, the use can be made of the police and the other forcible instruments available, such as the bailiff.

The best interests of the child are always paramount when dealing with a return order. Return from the Netherlands with the use of force is always done in a manner to ensure the least amount of impact on the child possible. The various organisations involved, i.e., the Public Prosecution Service, the National Police Service, the Child Protection Board, Juvenile Care Services, the National Bar Association and the ministry of Security and Justice have drafted a protocol to deal with the cooperation issues in child abduction cases.³⁰

The protocol contains a number of different sections. The first provides some basic information including the legal context in which international child abduction cases occur, as well as the organisations that are included. The main body of the text is divided into two sections. The first section deals with the aims and quality assurance of the procedure. It is stated that the aim of the return procedure is to ensure that return orders from the Netherlands that require force should be conducted as adequately as possible, so that the best interests of the child are protected as much as possible.³¹

The procedure itself is subsequently described in the second section of the protocol. It is made very clear that the civil remedies should always prevail above and beyond the criminal sanctions; this is of particular importance with respect to the cooperation between the police and the Public Prosecution Service.³² If a forcible return is required, the Public Prosecutor should communicate with the attorney-at-law involved; it is therefore the attorney who is regarded as the point of communication, rather than the abducting parents themselves. The Public Prosecutor is pre-warned of the complexity in these cases and that he or she should (as far as possible) refrain from taking civil law decisions, especially those of a private international law nature.

In the event a return order is granted and requires forcible measures to be taken, the protocol lays down a number of standard steps that should be taken:

- (1) The attorney-at-law for the left-behind parent would contact the public prosecutor in the district in which the child presumably is resident, or otherwise the District of The Hague (Article 9 International Child Abduction (Implementation) Act)

²⁹ Ministry of Security and Justice, *Handreiking Stelsel Internationale Kinderontvoering*, The Hague, 2012.

³⁰ Ministry of Security and justice et al, *Samenwerkingsprotocol gedwongen tenuitvoerlegging teruggeleidingsbeschikkingen in internationale kinderontvoeringszaken*, The Hague, May 2014.

³¹ *ibid*, p. 2.

³² This is also reiterated in the instructions from the Public Prosecutors for use in the National Schengen Information System.

- (2) The attorney-at-law of the left-behind parent should send the original of the return order to the relevant public prosecutor.
- (3) The public prosecutor should immediately deal with the case. If he or she requires further information, then he or she should contact the central contact point within the Public Prosecution Service. For general issues, contact should be made to the Central Authority.
- (4) The point of departure is that the public prosecutor should ensure that the child is returned as quickly as possible. This is ultimately the responsibility of the public prosecutor. However, the public prosecutor can in exceptional circumstances refuse to cooperate.³³
- (5) The public prosecutor subsequently needs to request the police in the respective region to locate the child.
- (6) The public prosecutor then contacts the Child Protection Board in The Hague. The situation is discussed and a child protection welfare officer is then appointed to the case. The officer then will discuss the best methods that can be used to ensure the safest and most effective return. The offices of the Child Protection Board in The Hague are responsible for ensuring that the local Child Protection Board is informed of the case. Under the responsibility of the public prosecutor, further arrangements are made with all those involved to ensure that the return proceeds smoothly.

4.11.6. Interaction between Article 10 EU Regulation 2201/2003 and Hague Child Convention 1980

A recent case involving the abduction of three children to Germany has caused a huge amount of case law and media attention in the Netherlands. The three minor children were born during the marriage of the husband and the wife in 2007, 2008 and 2009. All three children were born in the Netherlands. The parents had joint parental authority over the children. On 12 October 2009, Youth Care Services informed the Child Protection Services that an instable and unsafe situation has arisen with respect to the children. At that moment, all three children were living in the Netherlands. As a result of this warning, the Dutch Child Protection Board commenced an investigation. A few days after the investigation was commenced, the parents took the children to Germany. A number of legal procedures were subsequently started with respect to supervision order and emergency protection order leading to the children being removed from the home. The various child protection measures were renewed and extended, each time leading to an appeal and many times to a subsequent appeal to the Supreme Court. Once the Dutch protection orders were issued, the German authorities ensured that the Dutch orders were enforced and the children were returned to the Netherlands. During an accompanied contact visit, the parents jointly abducted the children and disappeared. It was for a relatively long period of time unclear whether the parents and the children were living in Germany or the Netherlands. Eventually, the location of the children was ascertained, and a return order was requested. The question was upon which basis the Dutch court could claim jurisdiction. In the end the Dutch courts determined that there was sufficient evidence to prove the "wrongful removal". Therefore, as less than one year had passed, the Dutch courts retained jurisdiction on the basis of Article 10 EU Regulation 2201/2003.

³³ For example if there is a clear and obvious legal mistake or if after the decision, it has come to light that circumstances have occurred whereby enforcement is no longer acceptable. In Dutch literature, discussion has taken place with respect to a similar situation that was presented before the ECHR in *Raw v. France*, 7 March 2013, EHRC 2013, No. 163, p; 1768, with annotation I. Curry-Sumner. Oftentimes if a serious mistake has indeed been made, then the judge in interlocutory proceedings may suspend the effect of the return order.

4.11.7. Use of exceptions in Hague Convention on Child Abduction in Dutch law

4.11.7.1. Introduction

The Netherlands applies the exceptions contained in the Convention in a very restrictive manner. In doing so, the Netherlands adopts a highly formalistic approach to the return order cases. Since the Neulinger decision, for example, albeit that a number of attempts were made to ensure a decision be taken on the best interests of the child, the Dutch courts maintained a standpoint that adhered to the principle the Hague Convention on Child Abduction is intended as jurisdiction selection instruments, rather than a merits instrument.

4.11.7.2. Article 12 (1): Settled in new environment

4.11.7.2.1. General comments

When can one speak of a child having settled into its new environment according to Dutch law? In 2009, a study was published in which Dutch case law from the previous ten years was analysed. According to this study, the term "settled in its new environment" was not just based on psychological and physical circumstances of the situation. Instead reference was also made to external factors such as the child's friends, school, sport and church. All of these factors have played a role in determining whether the child can be regarded as settled in its new environment in the Netherlands.³⁴ In the period 1994 up to and including 2008, it has been found that 20 cases made an explicit reference to the exception ground listed in Article 12(2) Hague Convention on Child Abduction.³⁵ From the case law of the Dutch Supreme Court, it would appear that no decision was granted in which the exception was successfully applied. In the lower case law (i.e., district court and courts of appeal), the exception was successfully applied in 40% of cases. It was, however, also clear that these cases in which the exception was successful are mainly from the earlier period of the research, namely prior to August 2006. A number of different issues have, however, arisen with respect to the application of this exception.

4.11.7.2.2. One-year time-period

According to Article 12(2), the exception cannot be applied if less than one year has elapsed from the moment of the wrongful removal or retention and the moment that the left-behind parent commences proceedings to have the child returned. According to De Boer the period of one year was chosen to ensure that the criteria of being settled also maintains an objective basis.³⁶ In his annotation to the Dutch Supreme Court decision of 28 September 2007,³⁷ he makes it clear that he is not in agreement with the moment at which this period should end. De Boer argues that this moment should instead end when the integration process for the child has finished, instead of the moment at which the petition is filed with the courts.³⁸ Dutch case law illustrates a consistent refusal to allow the Article 12(2) exception if the petition has been filed prior to the one-year period elapsing.³⁹ This period is also applied extremely formalistically, even if the child is seeking asylum in the Netherlands, periods shorter than one year will not activate the exception.⁴⁰

4.11.7.2.3. Grounds for refusal

Even if the child has lived for more than one year in the Netherlands, it will still need to be proven that the child has become settled in its new environment. On 28 September 2007,

³⁴ L. Frohn (2012), p. 2288.

³⁵ A. Nederveen, "Internationale kindervervoering" - Rechtsvergelijkend onderzoek tussen Nederland en Duitsland in het kader van de weigeringsgronden van het Haags Kinderontvoeringsverdrag 1980, Utrecht, 2008.

³⁶ Dutch Supreme Court 28 September 2007, NJ 2008, 549, annotation §3.

³⁷ Dutch Supreme Court 28 September 2007, NJ 2008, 549.

³⁸ Dutch Supreme Court 28 September 2007, NJ 2008, 549, annotation §3, second paragraph.

³⁹ District Court Alkmaar, 21 December 1994, NIPR 1995, 209; Court of Appeal Amsterdam, 11 February 1999, NIPR 2000, 263, §3.5 and District Court Rotterdam, 27 August 2004, Case number F2 RK 04-1483.

⁴⁰ Court of Appeal Leeuwarden, 24 March 1999, Case number 9900051, §10.

the Dutch Supreme Court issued a decision for the first time regarding the exact ambit of Article 12(2).⁴¹ The Supreme Court stated that the fact that the child, as a consequence of the abduction, had become settled in the new environment could be held to be sufficient in determining that the child should remain in the Netherlands.⁴² The Supreme Court made it clear that the application of Article 12(2) does not entail a best interests' analysis, and instead the Dutch court needs to examine whether the child is settled and if so, whether this should justify the refusal of the return order.⁴³ The District Court has also held that a child will not be appear to be settled in its new environment if the child does not attend school.⁴⁴

The District Court The Hague also determined that a child needed to be returned to Canada as the child was not settled in the Netherlands. The court held that despite the fact that the mother and the child had visibly become acquainted with the Netherlands, the mother had expressed her desire to remain and the child had also learnt Dutch, it could not be concluded that the child was settled in its new environment.⁴⁵ In May 2008, the Dutch Supreme Court also determined that a claim to Article 12(2) could not succeed if the Central Authority had not conducted sufficient investigations into the place of residence of the minor child. This adheres to the fact that the one-year period is applied formalistically. The one-year period is unaffected by the reasons for the delay in instigating a return petition. Therefore, even if the abducting parent has obstructed the left-behind parent from discovering the whereabouts of the child, the one-year period can still begin to run.⁴⁶

4.11.7.2.4. Criteria used for successful claim

However, in a recent case involving young children abducting from Bulgaria, the Dutch court held that the children had become settled in the Netherlands. Reference was made to the fact that the children were still very young, spoke Dutch, had family contacts in the Netherlands and were thoroughly integrated in Dutch society. As a result, the return was refused in the grounds of Article 12(2) Hague Convention on Child Abduction.⁴⁷

The District Court Roermond held in two cases that a successful claim could be made to Article 12(2). In these cases, it was felt that the children had already learnt Dutch, the family lived in the Netherlands and that the abducting father was extremely involved in the upbringing of the children that the children could be deemed to be settled in the Netherlands.⁴⁸ Another interesting case involves the Court of Appeal of 's-Hertogenbosch in 2006. In this case, the father had abducted the minor children almost two years prior to the filing of the return order petition.

The child was under the custody of the municipality in Milan, as the parents had had many difficulties in their marital break-up. The Italian judge has ordered that the child could not be removed from the jurisdiction. The father was sentenced in criminal proceedings to six years in prison for having abused the mother. The Court of Appeal determined that the exception ground laid down in Article 12(2) was satisfied in this case. It was felt that the child had established a sufficient physical and emotional bond in the Netherlands to deny the return order. As the father was likely to be sent to prison for six years if he had to return, it was felt to be in the best interests of the child for the child to remain. This is a particularly strange decision, as the prison sentence in this case was not necessarily related

⁴¹ Dutch Supreme Court 28 September 2007, NJ 2008, 548 and ECLI:NLRBSGR:2007:BB3193.

⁴² Dutch Supreme Court 28 September 2008, NJ 2008, 549, §3.4.

⁴³ Dutch Supreme Court 28 September 2007, NJ 2008, 548, §§3.2 and 3.5.1.

⁴⁴ District Court The Hague, 12 January 2005, Case numbers 232191 and 232051.

⁴⁵ District Court The Hague, 23 April 2008, ECLI:NLRBSGR:2008:BD0875.

⁴⁶ Dutch Supreme Court 23 May 2008, NIPR 2008, 161, conclusion A-G § 19, continuation of Court of Appeal The Hague, 25 October 2006, NIPR 2007, 6. See also District Court Rotterdam, 13 June 2008, unpublished.

⁴⁷ District Court the Hague, 31 January 2014, ECLI:NLRBDHA:2014:1424.

⁴⁸ District Court Roermond, 30 August 2006, ECLI:NL:RBROE:2006:AY7248.

to the child abduction itself, but was still utilised in order to justify the non-return of the child to Italy.⁴⁹

On 18 July 2008, the District Court The Hague reached a decision that also involved the non-return of the child. A decision, which is seldom reached by the Court of Appeal The Hague.⁵⁰ The Court took into account that this 8-year minor had lived 6 years of his life in France and had lived together with his mother and father in France. However, for the past three years, the child only really had contact with the mother and that the minor had now spent more than one and a half years in the Netherlands with his mother and half-brother. The Court felt that the child was comfortable in the Netherlands, could already speak Dutch and was therefore sufficiently settled in its new environment to justify the utilisation of the exception ground listed in Article 12(2).⁵¹ In this case, it was also held that when determining a petition for non-return on the basis of the child having settled in its new environment, it is not necessary to also prove that the return would be harmful to the child; this is an independent ground on the basis of Article 13(1)(b).

Alongside the references to the physical and psychological surroundings of the child, reference is also often made to the external relationships that a child has made, e.g. new school, new friends, associations and after-school clubs, sport, church etc. Language could also be regarded as being a factor in this decision.

4.11.7.3. Article 13(1)(a): No factual exercise of parental authority

Article 13(1)(a) is divided into two separate grounds upon which the return order can be refused. In Dutch case law, this distinction is also upheld. The first element referred to in Article 13(1)(a) refers to the actual exercise of parental authority by the left-behind parent. If the left-behind has not factually exercised his or her parental authority, then this can be regarded as a ground for the refusal to return the child. In the abovementioned statistical research into abduction cases over the period of 1994-2008, only 14% of cases ultimately ended up with a non-return order being granted on grounds of the non-factual exercise of custody rights.

In November 1991, the first ever case in which a Dutch court determined that there had been no factual exercise of custody was handed down.⁵² In another case, which perhaps could be regarded as being dated by the time period in which it was held, it was stated that because the abducting parent also worked full-time, he could not be regarded as exercising his custody rights effectively, despite the fact that he was vested with parental authority.⁵³

4.11.7.4. Article 13(1)(a): Acquiescence or permission

The statistical survey conducted in 2008 indicated that in 86% of cases, it was held that the left-behind parent had not acquiesced or granted permission for the abduction.⁵⁴ A recent case in the Netherlands has made it clear that if the left-behind parent provided permission prior to the removal, then there can be no question of wrongful removal. As a result, the jurisdiction in custody matters can still rest with the Dutch courts on the basis of Article 8 EU Regulation 2201/2003. As soon as it is proven that the left-behind parent did not provide permission at the moment of the removal, then (dependent upon the custody rights having been violated), there will be sufficient evidence for the initial holding of a wrongful removal. This means that the courts of the previous habitual residence are now no longer

⁴⁹ Court of Appeal 's-Hertogenbosch, 15 November 2006, ECLI:NL:GHSHE:2006:AZ6543, §4.7.1.

⁵⁰ Court of Appeal The Hague, 18 July 2008, ECLI: NL:GHSGR:2008:BD9009.

⁵¹ Ibid §§8 en 9.

⁵² District Court Leeuwarden, 13 November 1991, NIPR 1992, 83, 17 and Court of Appeal Leeuwarden, 20 December 1991, NIPR 1992, 177.

⁵³ District Court Utrecht, 13 November 1996, NIPR 1997, 89.

⁵⁴ A. Nederveen, 'Internationale kindertvoering' - Rechtsvergelijkend onderzoek tussen Nederland en Duitsland in het kader van de weigeringsgronden van het Haags Kinderontvoeringsverdrag 1980, Utrecht, 2008.

competent on the basis of Article 8, but instead on grounds of Article 10 (as a result of Article 8(2) EU Regulation 2201/2003).

According to Dutch literature, the presence of permission prior to removal or subsequent thereto, should not be accepted too hastily.⁵⁵ Both the permission and the acquiescence must rest on unequivocal declarations or statements that the left-behind parent has made.⁵⁶ In this context, the Court of Appeal's-Hertogenbosch determined that "acquiescence can only be determined with reference to all facts and circumstances of the case. Acquiescence can be inferred from the left-behind parent not undertaking steps, or alternatively through the active steps that he or she takes. In this case it is of importance that the left-behind parent conducts him or herself in such a manner that is inconsistent with the subsequent return order request. In terms of acquiescence, one must look into both the objective, as well as the subjective circumstances."⁵⁷ The Dutch Supreme Court has subsequently stated that a distinction must be drawn between the objective and the subjective element,⁵⁸ and that the objective elements are determinative for any conclusion reached as to whether the left-behind parent has accepted the new place of residence of the child in the state to which the child has been abducted.⁵⁹

According to Dutch case law, acquiescence is not proven if the left-behind parent does not immediately commence return order proceedings.⁶⁰ It is also not proven if the left-behind parent did not have contact with the child during the period of abduction.⁶¹ If the left-behind has filed for a change of the main place of residence, then it is also difficult to determine that the left-behind parent has consented to the removal.⁶² District Court Alkmaar has also decided that because the child was still registered at a school in Italy and in the local municipality, the left-behind parent could also not be held to have granted permission.⁶³ In a recent case it was also held that sending toys to the child in the country to which it has been abducted is not sufficient for a successful claim to Article 13(1). A visit to the new school that the child was attending has also been regarded as insufficient.⁶⁴ Even if the left-behind parent was aware of the possible abduction, does not in and of itself result in that parent having granted permission for the removal.⁶⁵ Even the presence of what's app messages in which it is clear that the left-behind parent presumed the child were to return have been used in this context.⁶⁶ The Dutch Supreme Court has also held that it is insufficient if the abducting parent has proven that the left-behind granted a form of permission; it must be proven that the permission was for a permanent stay.⁶⁷

In conclusion, it can be stated that both in terms of permission, as well as in terms of acquiescence, the determination must be based on the concrete circumstances of the such, in which case account must be taken of both the active and the passive role of the left-behind parent. Furthermore, this exception can only be proven if the permission or acquiescence can be proven on the basis of the unequivocal statements or declarations of the left-behind parent, such that the objective evidence supports the existence of this exception ground.

⁵⁵ Lenters (2006), p. 218.

⁵⁶ Court of Appeal Leeuwarden, 24 March 1999; Court of Appeal Amsterdam 2 December 1999, NIPR 2001, 90.

⁵⁷ Court of Appeal 's-Hertogenbosch, 15 June 2006, ECLI:HR:GHSHE:2006:BA0775, §4.7.4.

⁵⁸ Dutch Supreme Court 1 December 2006, NJ 2007, 385, §3.9.3.

⁵⁹ Dutch Supreme Court 1 December 2006, NJ 2007, 385, § 3.10.2.

⁶⁰ District Court Amsterdam, 27 September 1991; Court of Appeal 's-Hertogenbosch 26 November 1993, NIPR 1994, 361; District Court Breda, 6 February 2007, NIPR 2007, 276; District Court Middelburg, 5 October 2007, NIPR 2007, 289.

⁶¹ District Court Maastricht, 7 August 1995.

⁶² District Court Roermond, 27 August 2008, NIPR 2008, 279.

⁶³ District Court Alkmaar, 26 January 2005, NIPR 2005, 111.

⁶⁴ Court of Appeal The Hague 7 May 2014, ECLI:NL:GHDHA:2014:1589.

⁶⁵ Court of Appeal 's-Hertogenbosch, 13 December 2006, NIPR 2007, 187, §4.7.1.

⁶⁶ Court of Appeal The Hague 22 March 2013, ECLI:NL:GHDHA:2013:BZ7103.

⁶⁷ Dutch Supreme Court 14 July 2000, NJ 2001, 450, §3.3 and Dutch Supreme Court 18 October 2002, ECLI:NL:HR:2002:AE5804, AG conclusion §12.

4.11.7.5. Article 13(1)(b): Grave risk of harm

If a claim to Article 13(1)(b) is to be successful, then the abducting parent needs to prove that sending the child back to the country of origin would create there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. This provision has caused a great deal of discussion in foreign literature, and a great deal of case law in The Netherlands. In the period from 1994 to 2008, 95 published cases dealt directly with the issue of article 13(1)(b). In 25% of these cases, the exception ground was granted and the return order was refused. 24 of these cases were from lower district courts. It would appear that the courts have been even more reticent to apply the ground for exception since 2005. This would appear to be the result of the Dutch Supreme Court's decisions in the so-called Italy-case,⁶⁸ the Hawaii-case⁶⁹ and the Australia-case.⁷⁰ In all three of these cases, the Dutch Supreme Court determined that the children had to be returned to the country of origin, despite a claim having been made for the application of Article 13(1)(b). In the cases it is clear that no distinction is drawn between grave risk of harm, bodily harm and intolerable situation. Although in the foreign literature it is clear that these two elements are separate and have a different meaning, in the case law they would appear to have been dealt with simultaneously in the overwhelming majority of cases.

4.11.7.5.1. Restrictive interpretation

In the Italy-case, the Dutch Supreme Court held that Article 13(1)(b) must be interpreted restrictively and cannot lead to a custody or contact decision being given by the judge competent to hear the return order.⁷¹ Furthermore, the court held that it was not open to the court to determine that the child was "better off" in the Netherlands.⁷²

4.11.7.5.2. Grave risk of physical or psychological harm

The factual circumstances of the case are the predominant feature in determining whether Article 13(1)(b) has been proven.⁷³ Strikwerda explains that this ground can only be used in exceptional circumstances⁷⁴ The District Court Breda held that the phrase "harm" refers to physical or psychological harm, or violent (even criminal) circumstances.⁷⁵ A number of different aspects or possibilities have arisen with respect to this concept in recent years.

4.11.7.5.2.1. Risk created by the left-behind parent

In the vast majority of cases, this ground is pleaded but not proven.⁷⁶ The fact that the abducting parent is an alcoholic,⁷⁷ has never cared for the children properly due to his busy

⁶⁸ Italy-case: District Court Amsterdam, 2 February 2005, Case No. 04-2603 FA RK 305028; Court of Appeal Amsterdam, 19 May 2005, NIPR 2005, 215; Dutch Supreme Court 20 January 2006, ECLI:NL:HR:2006:AU4795; Court of Appeal 's-Gravenhage, 20 September 2006, ECLI:NL:GHSGR:2006:AZ4487; Court of Appeal 's-Gravenhage, 17 January 2007, ECLI:NL:GHSGR:2007:AZ7099; and Dutch Supreme Court 28 September 2008, NJ 2008, 549.

⁶⁹ Hawaii-case: District Court Amsterdam, 13 February 2006, Case No. 06-35/332666; Court of Appeal Amsterdam, 29 June 2006, ECLI:NL:GHAMS:2006:AY5294; Dutch Supreme Court 20 October 2006, NJ 2007, 383; Court of Appeal 's-Gravenhage, 7 February 2007, NIPR 2007, 103; and Dutch Supreme Court 28 September 2008, NJ 2008, 548.

⁷⁰ District Court Breda, 28 April 2006; Court of Appeal 's-Hertogenbosch, 15 June 2006, ECLI:NL:GHSHE:2006:BA0775 and Dutch Supreme Court 1 December 2006, NJ 2007, 385.

⁷¹ Dutch Supreme Court 20 January 2006, LJN: AU4695, conclusion 121. The Supreme Court referred to paragraph 34 from the Explanatory Notes.

⁷² Dutch Supreme Court 20 January 2006, ECLI:NL:HR:2006:AU4795, §5.3 (second paragraph).

⁷³ Frohn (2012), p. 2293.

⁷⁴ Dutch Supreme Court 20 January 2006, ECLI:NL:HR:2006:AU4795, AG conclusion §21 (first paragraph).

⁷⁵ District Court Breda, 2 February 2007, NIPR 2007, 276, §3.14.

⁷⁶ District Court Breda, 20 January 1995, NIPR 1995, 342; Court of Appeal 's-Hertogenbosch, 2 February 1995, NIPR 1996, 60; Court of Appeal Amsterdam, 6 June 1996, NIPR 1997, 295; Court of Appeal Amsterdam, 11 February 1999, NIPR 2000, 263; Court of Appeal Leeuwarden, 24 March 1999; Court of Appeal 's-Hertogenbosch, 2 February 2000, NIPR 2000, 179; Court of Appeal 's-Gravenhage, 12 December 2001, NIPR 2002, 84; District Court Rotterdam, 27 August 2004, Case No. 281246 FA RK 04-85; Court of

job,⁷⁸ used soft-drugs and had financial problems,⁷⁹ the child will be looked after by grandparents,⁸⁰ has his own business and so cannot look after the child full-time,⁸¹ are not sufficient to prove a successful article 13(1)(b) application. It has, however, been successful to prove that the left-behind parent has a full-time job and has no intention on caring the child upon return.⁸² The fact that the left-behind parent had been incarcerated would appear to have been dealt with differently by different courts.⁸³ Many cases involve the abducting parent claiming that the relationship between the parents is problematic. The Court of Appeal Amsterdam has stated this is on its own is insufficient.⁸⁴ Furthermore, if the situation has also been created by the abducting parent him or herself, then this will certainly not play a factor in the decision of the court.

4.11.7.5.2.2. Risk in the country of origin

It must be proven that the child is in direct risk of physical or mental injury due to the current circumstances, e.g., political.⁸⁵ This would for example be the case if the child would be faced with extreme hunger or physical threats.⁸⁶ The direct threat must be a present and real threat to the exact location where the child is being returned. General violence and threats are not sufficient.⁸⁷

4.11.7.5.2.3. Risk upon return

For the first time in 2001, a Dutch court held that the level of development of the minor child and the instable balance, in which the minor child found himself at that time, meant that it was not advisable to send the child back to its country of origin. The reports drafted by the child services indicated that the behavioural problems. Furthermore, many of these problems had been caused by the abducting parent.⁸⁸ The District Court Almelo also decided in a similar fashion when it has proven that the return of the child would lead to more irreparable damage.⁸⁹ Only in one known case was the return refused on the basis of a report from the Child Protection Board, in which it was evident that the parents had insufficient pedagogical capacity. The minor therefore remained in the Netherlands in a foster-care family.⁹⁰

4.11.7.5.2.4. Risk for the abducting parent

Dutch case law would appear to draw a distinction between those cases in which the abducting parent cannot return to the country of origin due to criminal prosecutions, and those cases in which the return of the child would lead indirectly in a separation of the child and the abducting parent. Analysis of Dutch case illustrates that there are no reported cases in which a Dutch court has returned a child and the abducting parent, despite the fact

Appeal 's-Hertogenbosch, 23 March 2005, ECLI:NL:GHSHE:2002:AT3979; District Court 's-Gravenhage, 3 April 2006, NIPR 2006, 113; Court of Appeal 's-Gravenhage, 25 October 2006, NIPR 2007, 6; District Court 's-Gravenhage, 26 June 2008, ECLI:NL:RBSGR:2008:BF8900.

⁷⁷ District Court 's-Hertogenbosch, 13 February 1991, NIPR 205, §8.

⁷⁸ District Court 's-Hertogenbosch, 18 December 1991, NIPR 1992, 82.

⁷⁹ District Court Almelo, 15 November 2002, Case No. 54165 FA RK 2002-682.

⁸⁰ Court of Appeal The Hague 10 November 2010, ECLI:NLGHSGR:2010:BP7889.

⁸¹ Court of Appeal Amsterdam, 3 November 2005, NIPR 2006, 97, §4.5.

⁸² District Court Utrecht, 13 November 1996, NIPR 1997, 89.

⁸³ For a case in which this was sufficient see District Court Utrecht, 23 October 1996, and for a case in which this was not sufficient see District Court Breda, 22 June 1994, Case No. 11100 FAK RK 94-957, §3.6.

⁸⁴ Court of Appeal Amsterdam, 2 December 1999, NIPR 2001, 90.

⁸⁵ Court of Appeal 's-Hertogenbosch 15 June 2006, ECLI:NLGHSHE:2006:BA0775, §4.8.2.

⁸⁶ Court of Appeal 's-Hertogenbosch, 23 March 2005, ECLI:NL:GHSHE:2005:AT3979, §4.15.1.

⁸⁷ District Court Haarlem, 2 December 2003, NIPR 2004, 124, §3.7 (general violence in Jerusalem), District Court 's-Gravenhage, 7 October 2008, ECLI:NL:RBSGR:2008:BG0578 (general unrest South Africa) and Court of Appeal The Hague 18 January 2012, ECLI:NL:GHSGR:2012:BV5608 (general unrest in Nigeria, despite Nigeria not being a Convention State)

⁸⁸ District Court 's-Gravenhage, 11 September 2001, Case No. 01-4959, §§11 - 15.

⁸⁹ District Court Alkmaar, 11 August 2007.

⁹⁰ Court of Appeal 's-Gravenhage, 7 January 2009, ECLI:NLGHSGR:2009:BH0366.

that the abducting parent is unable to return due to the risk of criminal prosecution.⁹¹ In a recent case the mother had abducted her children from Italy to the Netherlands. The mother was ordered to return the children, as the man was able according to Italian law to retract his official police complaint.

4.11.7.5.2.5. Separation of child and abducting parent

Also in this case there was a situation that one of the children was mature enough to have his opinion taken in consideration, and the other was not. This ruling was confirmed by the Court of Appeal The Hague.⁹² Nevertheless, not only the separation of siblings can suffice for an Article 13(1)(b) situation. In this case the child would be separated from his mother, since it was not possible for the mother to return to Suriname.⁹³ The District Court ruled that because of the young age of the child and being in a crucial phase of with regard to bonding with the mother, who is seen as the primary bonding figure in the life of the child, there would be a risk of being in an unbearable condition. In another case the District Court decided that the children would be in an unbearable condition returning to Morocco, due to the fact that the father abused them in an earlier stage in their life, one of the children needed specific medical treatment which could be given in the Netherlands and the mother would risk criminal charges once she would return to Morocco.⁹⁴ A case concerning a child abduction from Sudan, the District Court ruled that given the fact that the child would be separated from her sister and father, the very few financial possibilities to contact them from Sudan and the fact that the child does not speak Arabic, is enough for an Article 13(1)(b) situation.

Separation from a parent with whom the child is well bonded is a traumatic experience, and especially if the bond has not yet been developed with the other parent, this will play a role in the determination according to Article 13(1)(b).⁹⁵ The District Court Utrecht also determined that the separation of the mother and the child should be avoided as far as possible.⁹⁶ The impossibility for the abducting parent to return has sometimes played a role in determining that the child does not need to return (especially if the bond between the abducting parent and the child is a strong one).⁹⁷ District Court Almelo there again also decided that separation of child and abducting parent will not always lead to a successful claim on Article 13(1)(b). The court explained that the abducting parent had his or her free will in his or her own hands.⁹⁸

4.11.7.5.2.6. Separation from siblings

The District Court The Hague was faced with a case where the mother abducted the two children from Nigeria to the Netherlands.⁹⁹ The International Child Abduction (Implementation) Act states that the Convention should be applied analogously, since Nigeria is not a Convention State. Since the eldest of the two children was mature enough to his opinion taken in consideration about the situation as it is meant that Article 13(2) applied. The youngest was not heard, and thus the risk occurred that the children could be separated.

⁹¹ Court of Appeal Amsterdam, 29 June 2006, ECLI:NL:GHAMS:2006:AY5294, §4.7, Court of Appeal Amsterdam, 2 December 1999, NIPR 2001, 90; District Court Middelburg, 17 May 2001, NIPR 2002, 246; Court of Appeal 's-Gravenhage, 7 August 2002, LJN: AE8536; Court of Appeal 's-Gravenhage, 17 January 2007, ECLI:NL:GHSGR:2007:AZ7099.

⁹² Court of Appeal The Hague 24 July 2013, ECLI:NL:GHDHA:2013:3225.

⁹³ District Court The Hague 19 December 2013, ECLI:NL:RBDHA:2013:19047.

⁹⁴ District Court The Hague, 11 February 2014, ECLI:NL:RBDHA:2014:3537.

⁹⁵ District Court Breda, 23 August 1994, Case No. 10684 FA RK 94-780, §3.9; confirmed by Court of Appeal 's-Hertogenbosch, 23 December 1994, NIPR 1995, 208, §4.8.

⁹⁶ District Court Utrecht, 23 October 1996, Case no. 63188 FA RK 96-5027, confirmed by Court of Appeal Amsterdam, 27 November 1997, NIPR 1998, 172, §§3.3 en 3.4.

⁹⁷ Court of Appeal 's-Gravenhage, 7 February 2001, NIPR 2001, 98, §6. See also District Court Amsterdam, 2 February 2005, Case No. 04-2603 FA RK 305028, §12, Court of Appeal Amsterdam, 19 May 2005, NIPR 2005, 215, §4.5, Court of Appeal Amsterdam, 3 November 2005, NIPR 2006, 97.

⁹⁸ District Court Alkmaar, 21 December 1994, NIPR 1995, 209.

⁹⁹ District Court The Hague 1 December 2012, ECLI:NL:RBSGR:2011:BU7246.

Given the fact that the children have been living together their whole life and have been through a lot together, such as the divorce of their parents. The district court stated that the children would be placed in an intolerable situation. The District Court decided that the children would not return to Nigeria. In a similar case the District Court of The Hague also ruled that the children would be in an intolerable situation once they would be separated from each other.¹⁰⁰

In the period from 1994-2008, two cases dealt explicitly with these issues. Two children had been abducted to the Netherlands from Scotland. As one of the minors was suffering from serious physical and mental problems, the separation of the siblings could not be ordered. As a result, both children were able to remain in the Netherlands.¹⁰¹ In this case, reference was also made to the fact that the abducting parent did not have any source of income whatsoever if the children were returned to Scotland. In 2006, a more specific case about the rights of siblings was dealt with. The youngest child in question was not heard due to his very young age. Once again the District Court Amsterdam held that the child for whom the exceptional grounds had not been proven, in its own right, could still be prevented from having to return due to the violation of Article 13(1)(b) if the children were sent back to Poland.¹⁰²

4.11.7.5.3. Adequate protective measures

Within the context of the European Union, the exception ground listed in Article 13(1)(b) has been raised by Article 11 EU Regulation 2201/2003. At any rate, Article 13(1)(b) has since this date never been successfully pleaded within the context of a return order within the European Union solely on the grounds of Article 13(1)(b). Between 1994 and 2008, five cases were dealt with by Dutch courts dealing with this issue. The Court of Appeal Amsterdam determined in 1999, that the left-behind parent has indicated sufficient measures that were in place.¹⁰³ In another case, the court determined that it was the task of the attorneys-at-law to ensure that the abducting parent and the minor child were provided with sufficient and adequate housing upon arrival in Italy, and that the minor would receive the necessary counselling.¹⁰⁴

4.11.7.5.4. Article 13(2): Objections of the minor

In accordance with Article 13(2) Hague Convention on Child Abduction, a return order may be refused if the child objects to the return and he or she has attained an age and degree of maturity at which it is appropriate to take account of its views.¹⁰⁵ The Convention does not indicate any minimum age, and therefore provides a large discretionary freedom to the authorities to determine when they believe the minor to have reached a sufficient age and maturity to be able to voice his or her opinions.¹⁰⁶ On the basis of the case law, the Netherlands is relatively consistent in ensuring when the child is to be regarded as having acquired a sufficient age and maturity. The District Court Almelo determined that a child of 8 years old was too young.¹⁰⁷ The Court of Appeal of The Hague determined in a different case that the judge may not determine whether to take account of the opinions of the child earlier than the court has provided the child with the opportunity to voice his or her opinions, unless as appears from the physical or psychological state of the child that this is impossible.¹⁰⁸ The Court of 's-Hertogenbosch has, however, provided an exception to this general rule. If it is not in the child's best interests to be heard, then the court may

¹⁰⁰ District Court The Hague 7 June 2013, ECLI:NL:RBDHA:2013:CA2639.

¹⁰¹ Court of Appeal Amsterdam, 27 November 1997, NIPR 1998, 172, §3.3.

¹⁰² District Court Amsterdam, 5 January 2006, Case No. 05-2668 FA RK 329987.

¹⁰³ Court of Appeal Amsterdam, 2 December 1999, NIPR 2001, 90, §4.6.

¹⁰⁴ Court of Appeal 's-Gravenhage, 7 August 2002, ECLI:NL:GHSGR:2002:AE8536, §12.

¹⁰⁵ Frohn (2012), p. 2130.

¹⁰⁶ Frohn (2012), p. 2130-2131.

¹⁰⁷ District Court Almelo, 25 March 1992, NJ 1993, 241.

¹⁰⁸ Court of Appeal The Hague, 30 September 1994, NJ 1995, 356.

determine that the child need not be heard, if the hearing itself would be regarded as being too damaging.¹⁰⁹ A further exception has also since been granted if the child would be placed in a loyalty conflict between the parents.¹¹⁰

The second element of Article 13(2) is the objection of the minor child. The Court of Appeal The Hague has indicated what is meant with the term "objection".¹¹¹ The court stated "in the context of Article 13(2) Hague Convention on Child Abduction it is insufficient that the child indicates that he wishes to remain in the Netherlands. Objection must be directed at the return to the country of origin, which is very different than wishing to remain where he or she is."¹¹² The objections of the minor do not only need to be become apparent during the hearing of the child, but can only be evident on the basis of the documents that have been submitted to the court.¹¹³ The objections will, however, not be taken into account if it appears that the minor child has been influenced by the abducting parent, and on this basis wishes the status quo to remain.¹¹⁴

In summary, according to the decision of the Dutch Supreme Court, the courts are not obliged to hear children under the age of 12. It is, however, generally accepted that children between the ages of 8 and 12 could be heard, either with the intervention of a third party or by the judge him or herself. The objection to return must, nonetheless, be directed at the return to the country of origin.¹¹⁵

¹⁰⁹ Court of Appeal's-Hertogenbosch, 9 November 1995, NIPR 1996, 184. See also Court of Appeal Amsterdam, 23 March 1992, NIPR 1992, 174, District Court Rotterdam, 27 August 2004 and Court of Appeal 's-Gravenhage, 29 September 2004, NIPR 2005, 107.

¹¹⁰ District Court Roermond, 25 October 2006, 75656 FA RK 06-1359 and District Court Roermond, 27 August 2008, NIPR 2008, 279, §5.5.2.

¹¹¹ Court of Appeal 's-Gravenhage 11 February 2002, NIPR 2002, 236.

¹¹² Court of Appeal's-Gravenhage, 11 februari 2002, NIPR 2002, 236, § 4. See also, Court of Appeal's-Hertogenbosch, 13 December 2006, NIPR 2007, 187, §4.7.4.

¹¹³ Court of Appeal Amsterdam, 6 September 2007, ECLI:NL:GHAMS:2007:BC1468, §4.7.

¹¹⁴ District Court 's-Gravenhage, 10 July 2008, ECLI:NL:RBSGR:2008:BG0578.

¹¹⁵ Last updated on 10 January 2015.

4.12. Austria

Glossary of terms

OGH	Oberster Gerichtshof Austrian Highest Court in Civil and Penal Matters
ACC	österreichisches Allgemeines Bürgerliches Gesetzbuch 1811 Austrian Civil Code

4.12.1. Statistical Assessment

4.12.1.1. Key statistics overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	7996 (20.4%)	12392 (32.2%)	8295 (23.0%)	8931 (23.1%)
International divorces	2591 (13.3%)	3228 (16.5%)	5111 (24.9%)	4294 (25.3%)
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	9	12	28	n/a
Outgoing return requests made under the Hague Convention	n/a	11	15	n/a

*Marriage and divorce figures based on centrally-collected Eurostat data and may not correspond exactly to data provided to us directly by the relevant national statistical authority. Percentages indicate international marriages/divorces as a proportion of all marriages/divorce

4.12.1.2. Available national data

Marriages since 1970 according to nationality¹

year	total	Both partners Austrian	One partner not Austrian	Both partners not Austrian	Both partners Austrian	One partner not Austrian	Both partners not Austrian
		Absolute figures			percentage		
1970	52'773	49'583	2'849	341	94.0	5.4	0.6
1971	48'166	45'312	2'522	332	94.1	5.2	0.7
1972	57'372	53'365	3'468	539	93.0	6.0	0.9
1973	49'430	45'617	3'135	678	92.3	6.3	1.4
1974	49'296	45'186	3'226	884	91.7	6.5	1.8
1975	46'542	42'769	3'255	518	91.9	7.0	1.1
1976	45'767	42'220	3'148	399	92.2	6.9	0.9
1977	45'378	42'198	2'752	428	93.0	6.1	0.9
1978	44'573	41'334	2'762	477	92.7	6.2	1.1
1979	45'445	42'077	2'854	514	92.6	6.3	1.1
1980	46'435	43'037	2'812	586	92.7	6.1	1.3
1981	47'768	43'652	3'140	976	91.4	6.6	2.0
1982	47'643	42'947	3'415	1'281	90.1	7.2	2.7
1983	56'171	51'745	3'690	736	92.1	6.6	1.3
1984	45'823	42'187	2'800	836	92.1	6.1	1.8
1985	44'867	41'250	2'787	830	91.9	6.2	1.8
1986	45'821	41'871	2'961	989	91.4	6.5	2.2
1987	76'205	70'907	3'877	1'421	93.0	5.1	1.9
1988	35'361	30'911	3'280	1'170	87.4	9.3	3.3
1989	42'523	36'670	4'651	1'202	86.2	10.9	2.8
1990	45'212	38'734	5'008	1'470	85.7	11.1	3.3
1991	44'106	37'260	5'243	1'603	84.5	11.9	3.6
1992	45'701	37'323	6'273	2'105	81.7	13.7	4.6
1993	45'014	36'072	6'436	2'506	80.1	14.3	5.6
1994	43'284	35'137	5'776	2'371	81.2	13.3	5.5
1995	42'946	35'070	5'507	2'369	81.7	12.8	5.5
1996	42'298	34'778	5'383	2'137	82.2	12.7	5.1
1997	41'394	33'966	5'505	1'923	82.1	13.3	4.6
1998	39'143	32'030	5'449	1'664	81.8	13.9	4.3
1999	39'485	31'816	5'950	1'719	80.6	15.1	4.4
2000	39'228	31'226	6'379	1'623	79.6	16.3	4.1
2001	34'213	25'622	7'145	1'446	74.9	20.9	4.2
2002	36'570	26'299	8'717	1'554	71.9	23.8	4.2
2003	37'195	25'713	9'943	1'539	69.1	26.7	4.1
2004	38'528	26'124	10'699	1'705	67.8	27.8	4.4
2005	39'153	27'245	10'075	1'833	69.6	25.7	4.7
2006	36'923	27'677	7'500	1'746	75.0	20.3	4.7
2007	35'996	27'689	6'549	1'758	76.9	18.2	4.9
2008	35'223	27'075	6'353	1'795	76.9	18.0	5.1
2009	35'469	27'245	6'344	1'880	76.8	17.9	5.3
2010	37'545	28'722	6'880	1'943	76.5	18.3	5.2
2011	36'426	27'491	6'872	2'063	75.5	18.9	5.7
2012	38'592	29'661	6'825	2'106	76.9	17.7	5.5

¹ Source: STATISTIK AUSTRIA, date 22 May 2013. www.statcube.at (all links as for March or December 2014).

Divorces since 2002 (including number of children out of divorced marriage)

criteria	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Divorce in total	19'918	19'066	19'590	19'453	20'336	20'516	19'701	18'806	17'442	17'295	17'006
Total percentage of divorces	45.2	44.0	46.1	46.4	48.9	49.5	47.8	46.0	43.0	43.0	42.5
Children out of div. marr.											
In total	22'992	21'441	21'048	20'188	20'787	21'061	21'020	20'619	19'574	19'451	19'334
under 14 years	13'762	12'596	12'185	11'290	11'475	11'338	11'142	10'855	10'340	9'978	10'080
under 18 years	17'361	16'038	15'607	14'740	15'024	15'031	14'812	14'480	13'657	13'347	13'278

Divorce according to nationality

Reporting year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	
Kind of file	Divorce	Divorce	Divorce	Divorce	Divorce	Divorce	Divorce	Divorce	Divorce	Divorce	Divorce	
Nationality of partner												
Both partners are Austrian nationals		17,405	16,390	16,351	15,476	15,647	15,390	14,886	14,378	13,485	13,153	12,634
Man or RP1 is Austrian, woman or RP2 foreigner		820	982	1,184	1,429	1,719	1,951	1,901	1,713	1,475	1,590	1,635
Woman or RP2 is Austrian, man or RP1 foreigner		1,183	1,229	1,596	2,059	2,397	2,547	2,182	1,931	1,721	1,660	1,713
Both partners are foreigners		510	465	459	489	573	628	732	784	761	892	1,024

Divorce according to nationality (in percentage)

Reporting year	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Kind of file	Divorce	Divorce	Divorce	Divorce	Divorce	Divorce	Divorce	Divorce	Divorce	Divorce	Divorce
Nationality of partner											
Both partners are Austrian nationals	87.38%	85.97%	83.47%	79.56%	76.94%	75.02%	75.56%	76.45%	77.31%	76.05%	74.29%
Man or RP1 is Austrian, woman or RP2 foreigner	4.12%	5.15%	6.04%	7.35%	8.45%	9.51%	9.65%	9.11%	8.46%	9.19%	9.61%
Woman or RP2 is Austrian, man or RP1 foreigner	5.94%	6.45%	8.15%	10.58%	11.79%	12.42%	11.08%	10.27%	9.87%	9.60%	10.07%
Both partners are foreigners	2.56%	2.44%	2.34%	2.51%	2.82%	3.06%	3.72%	4.17%	4.36%	5.16%	6.02%

The combination of divorce, nationality and number of children (so called "cross-tabulation") is not allowed according to the Austrian statistic authority.

Concerning child abduction, Lowe's 2011 Statistical Analysis records for Austria in 2003 a total of 23 requests from abroad (12 Incoming Return Requests and 11 Incoming Access Requests).

For the year 2008, Lowe's 2011 Statistical Analysis shows a number of 28 received (incoming) applications and 15 outgoing applications. There were two incoming access applications and three outgoing access applications.

Further information for Austria (including application forms for return in different languages) may be found on the site of the Austrian Central Authority.²

For the year 2009, there is some statistical material for Austria available in a report of the Ministry of Justice for the Austrian Parliament³ showing a total figure of 19 incoming requests. Only four requests were made by mothers abroad. 15 requests were made by fathers abroad. This indicates that the overwhelming number of abductions to Austria (15) were effected by mothers (79 %) (available in German only):

² <http://www.justiz.gv.at/web2013/html/default/2c94848a4768d17701477d5710960395.de.html>

³ http://www.parlament.gv.at/PAKT/VHG/XXIV/AB/AB_04924/fnameorig_187821.html (May 2010).

From abroad to Austria in 2009			
Country	Total number	Requests filed by Fathers	Requests filed by Mothers
Belgium	1	1	0
Bulgaria	1	1	0
Denmark	2	2	0
Germany	3	2	1
France	2	2	0
Ireland	1	1	0
Italy	2	1	1
New Zealand	1	1	0
Switzerland	3	1	2
Serbia	1	1	0
Czech Republic	1	1	0
Hungary	1	1	0
Total	19	15	4

Editor's elaboration from the data published on 26.05.2010 (see the reference supra note 3)

The same report of the Austrian Ministry of justice shows 27 outgoing requests from Austria in 2009. Ten outgoing requests were made by mothers in Austria. In these ten cases, the abductor is probably the father. In 17 cases the outgoing request was made by the father in Austria. This should indicate that for the abductions from Austria to another country most abductors (17, i.e. 63 %) are again mothers (only available in German):

From Austria to abroad in 2009			
Country	Total number	Requests filed by Fathers	Requests filed by Mothers
Bosnia Herzegovina	1	0	1
Canada	1	1	0
Germany	10	6	4
Georgia	1	1	0
Italy	1	1	0
Kosovo	1	0	1
Poland	1	1	0
Romania	2	0	2
Serbia	3	3	0
Slovakia	1	0	1
Spain	1	1	0
Turkey	2	2	0
USA	2	1	1
Total	27	17	10

Editor's elaboration from the data published on 26.05.2010 (see the reference supra note 3)

According to another report (dating from May 2011) of the Austrian Ministry of Justice, commissioned by a number of Members of the Austrian Parliament, there are approximately 20 to 30 incoming requests for judicial orders each year.⁴ There are no further details on these very rough figures since the provision of statistics was not the goal of the relevant report for Parliament. It is understood that this round number refers to return requests only (and not to access requests), however the precise formulation of the report, available only in German, is not entirely clear on this question.⁵

Upon specific request, the Austrian central authority stated that further statistics (for 2012 and 2013) would be available as from 10th January 2015. It is understood that, at the time of writing, there are no further statistics available and/or that such statistics are at the moment not accessible for the public in general.

⁴ BMJ-Pr7000/0073-Pr 1/2011, 13 May 2011, 7838/AB XXIV. GP Anfragebeantwortung.

⁵ „Durch diese Spezialisierung soll vor allem sichergestellt werden, dass über Rückstellungsanträge nach dem HKÜ möglichst rasch entschieden wird, weil sich – trotz der nicht allzu hohen Anzahl von Anträgen aus dem Ausland pro Jahr (ca. 20 bis 30) – bei den befassten Richtern Erfahrungen mit der Anwendung des HKÜ sammeln lassen“ (loc. cit. p. 2).

4.12.2. National laws implementing the Hague Convention

The text of the Hague Convention on Child Abduction has been transposed as such to Austrian law by national legislation.⁶

In the course of this implementation into national legislation, the Austrian legislature enacted some additional executive provisions to the Hague Convention on Child Abduction. These provisions provide for some additional, internal matters (e.g., nomination of the central authority, internal jurisdiction, costs for translations, internal transfer of incoming and outgoing requests, etc.).⁷

Some procedural rules on the enforcement of return orders and the contact between parent and child are contained in the Außerstreitgesetz⁸ (Act on Special Procedures in Civil Matters of a Non-Litigious Nature). § 111a of this Act stipulates that the provisions of section seven (relating to custody and personal contact⁹) have to be applied to procedures according to the Hague Convention on Child Abduction.¹⁰

Only one division (namely the sixth division) within the Austrian Highest Court (OGH) has jurisdiction to deal with cases according to the Hague Convention on Child Abduction.¹¹ This rather new rule was implemented to increase uniformity of judgments. In the years after 2011, there was quite a lot of new Austrian case law concerning the application of the Hague Convention on Child Abduction.

4.12.3. Characterisation of parental Child Abduction

4.12.3.1. Legal rules: The New Austrian Law

Since 1 February 2013, there are new provisions dealing with legal requirements for joint custody and the relocation of a child.¹² The relocation (abroad) is the subject of a specific provision.

Sect. 1 of § 162 Austrian Civil Code (ACC) stipulates that, insofar as is necessary for the care and education of the child, the parent having sole custody of the child may determine its place of residence.

Sect. 2 of § 162 ACC provides that if parents who are vested with joint custody agree or a court has determined which of the parents has the largest share of care of the child in his or her own household (so called "resident parent"), such a parent may also solely decide upon the place of residence of the child. According to the clear wording in the explanatory

⁶ The articles of the Hague Convention on Child Abduction remained unchanged in this transformation. For the text see: ÜBEREINKOMMEN ÜBER DIE ZIVILRECHTLICHEN ASPEKTE INTERNATIONALER KINDESENTFÜHRUNG. Original version of 14 September 1988, BGBl. Nr. 512/1988 (Legislative materials: National Parliament: GP XVII RV 485 AB 611 S. 65. Federal Chamber: AB 3507 S. 503.). The text of the law in German language can be found under the following link: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002877> (as for February 2014).

⁷ See: Federal Act of 9 June 1988, original version BGBl. Nr. 513/1988 (NR: GP XVII RV 471 AB 612 S. 65. BR: AB 3508 S. 503.) Latest amendments 11 January 2013 by BGBl. I Nr. 15/2013 (NR: GP XXIV RV 2004 AB 2087 S. 184. BR: AB 8845 S. 816). The text in German language can be found on the following link: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002878> (as for February 2014).

⁸ Federal Act (Außerstreitgesetz - AußStrG), Original version: BGBl. I Nr. 111/2003.

⁹ § 104 to 111 AußStrG.

¹⁰ § 111a AußStrG provides: „Die Bestimmungen dieses Abschnitts sind sinngemäß auch auf Verfahren nach dem Haager Übereinkommen vom 25. Oktober 1980 über die zivilrechtlichen Aspekte internationaler Kindesentführung, BGBl. Nr. 512, anzuwenden“.

¹¹ See <http://ogh.gv.at/de/ogh/geschaeftsverteilung#6senat> (as for February 2014).

¹² § 162 ACC (ABGB) in its version after the Kindschafts- und Namensrechts-Änderungsgesetz 2013 – KindNamRÄG 2013, BGBl. I Nr. 15/2013.

report of the Austrian legislature, this rule in sect. 2 also applies for relocation abroad.¹³ This means that if the parents have joint custody, the resident parent (overwhelmingly mothers) is able to relocate with the child abroad without the consent of the other parent.¹⁴ Seen from the perspective of the Hague Convention on Child Abduction, this is a rather radical solution under national custody/relocation law since it deprives the non-resident parent with joint custody of any right in respect of relocation abroad.

Sect. 3 of § 162 ACC contains a particular rule on cross-border relocation in cases of joint custody, if there was no decision or agreement which of the parents is regarded as having the greatest share of the care (i.e., no determination of a resident parent). In such a case, relocation abroad is a matter for the agreement of both parents, i.e., relocation abroad requires the prior consent of the other parent¹⁵ or an authorisation by a court decision. The court has, in rendering such a decision, to consider the child's wellbeing, as well as the right of the parents to be protected against violence, freedom of movement and professional activity. Cross-border relocation of the child without paying respect to these requirements would be wrongful according to Austrian custody law. A consequence of such a wrongful removal might be, within Austrian law, a change in the custody arrangement between the parents, national returning orders, and change of visiting rights or even claims for damages.¹⁶

For the time being, there is dispute concerning the new provision of sect. 2. The Legal Committee of the Austrian National Parliament declared that the explanatory report of the national legislature should be amended on this point. It should be clarified that the resident parent has to inform and to request the other parent (with joint custody) for its consent for the relocation abroad.¹⁷ If the non-resident parent refuses to grant his or her consent, the resident parent would have to reconsider the relocation abroad, if it is in the best interests of the child to remain in Austria.¹⁸ For some authors, even enlarging the scope of the legal committee's opinion, a simple objection of the other partner with joint custody should be sufficient to prevent the relocation abroad.¹⁹ There is much debate about this statement of the Legal Committee, its appropriateness and effects.

4.12.3.2. The New Law and the Convention

The consequences of this new Austrian relocation-regime on the Hague Convention on Child Abduction have been discussed in Austrian legal writings²⁰ and in the media²¹. Fucik/Miklau state that there exists a sort of dynamic interaction between § 162 sect. 2 and 3 ACC and the Hague Convention on Child Abduction.²² The first step in legal practice would be to verify if the relocation was justified under § 162 sect. 3 ACC, which could be shown by the written consent or a copy of a court decision. If such a justification is present, the Hague Convention on Child Abduction would not be applicable. If such a justification is not available, the wrongfulness should be verified specifically according to the Hague Convention on Child Abduction (and not simply according to Austrian law). In doing so,

¹³ 2004, der Beilagen XXIV. GP, Regierungsvorlage, Vorblatt und Erläuterungen, p. 23: „Wenn und sobald die Eltern eine Vereinbarung getroffen haben, welcher Elternteil das Kind in seinem Haushalt hauptsächlich betreut oder das Gericht die Betreuung des Kindes im Haushalt eines Elternteils festgelegt hat, soll diesem Elternteil nach § 162 Abs. 2 des Entwurfs das alleinige Wohnortbestimmungsrecht zukommen. Dies gilt auch für eine Verlegung des Wohnorts in das Ausland“.

¹⁴ In this sense clearly Beclin, Zusammenspiel von Obsorge und Informationspflicht, in: EF-Spezial (ed.: Gitschthaler), Kindschafts- und Namensrechtsänderungsgesetz 2013, p. 207. Beclin highlights this remark with an exclamation mark (there at footnote 30) which is quite understandable.

¹⁵ § 137 ACC: principle of accordance between the parents.

¹⁶ So expressly Fucik/Miklau, Aufenthaltsbestimmung, Wohnortwechsel und HKÜ, iFamZ 2013, 31, 32.

¹⁷ According to § 137 sect. 2 last sentence (new version) Austrian Civil Code.

¹⁸ On the latter aspect § 189 sect. 1 and 5 (new version) Austrian Civil Code.

¹⁹ E.g. Deixler-Hübner/Fucik/Huber, Das neue Kindschaftsrecht, Zak Spezial, 2013, p. 67, point 3.

²⁰ E.g. Fucik/Miklau, Aufenthaltsbestimmung, Wohnortwechsel und HKÜ, iFamZ 2013, 31. Beclin, Die wichtigsten materiellrechtlichen Änderungen des KindNamRÄG 2013, Zak 2013/7.

²¹ Kommenda, Gesetz unklar, wann Kindesentführung vorliegt, Die Presse, Rechtspanorama, 2013/43/01.

²² Fucik/Miklau (loc.cit.).

three different situations should be examined. Firstly, if the other parent was informed in good time and did not react, the relocation shall be justified according to Austrian law and the Hague Convention on Child Abduction shall “not be activated”.²³ Secondly, if it was not possible or not appropriate to inform the other parent, there is also no issue of wrongfulness according to Austrian law. Thirdly, the remaining cases comprise of the following categories: there was no (but there should have been) prior information of the other parent or the arguments of the other parent against the relocation would have prevailed in the interest of the child but were neglected by the parent relocating the child. For these cases it is said that there is no automatic wrongfulness according to the Hague Convention on Child Abduction, but such wrongfulness requires the breach of particular custody rights of the other parent. The other parent is only protected by the Hague Convention on Child Abduction if he or she had particular custody rights and actually exercised these rights. If the other parent only had rights on information, expression of his opinion and mere contact rights, such positions are said not to be sufficient to be afforded protection under the Hague Convention on Child Abduction. The breach of a particular right to joint custody is regarded as a necessary condition to activate the return procedure. In the case of a resident parent, the other party would still have such joint custody rights and the resident partner would commit abduction, also under the new law.

The consequence of such view would harmonise the regime of the Hague Convention on Child Abduction and Austrian law in respect to the potential coverage of wrongfulness and joint custody rights would be protected.²⁴ However, such view concentrate on the protection of joint custody positions, whilst the Austrian Oberster Gerichtshof (OGH) itself concentrates on the right to locate a child.²⁵ If such a position would be supported, there would be a substantive difference between incoming and outgoing cases. For the incoming cases, joint custody would not be protected when it is not supported by the right to locate the child. For the outgoing cases, Austrian joint custody would be protected, even without the right to locate the child.

However, other Austrian authors prefer to analyse the situation according to the different custody and relocation alternatives. It is undisputed that a parent with sole custody may relocate with the child (sect 1 of § 162 ACC). However, the other parent also in this alternative has the right to information. If in such a situation the other parent (without custody rights) has obtained a valid court order forbidding the relocation abroad²⁶ such relocation would be wrongful according to Austrian law. The situation is also clear if the parents have joint custody without a resident parent (consent or prior court order necessary, sect. 3 of § 162 ACC, new version)

The problematic case is when the parents have joint custody with a resident parent (which can often be the case when the parents already lived separated and were both willing and able to take care of the child).²⁷ According to the simple wording of the new Austrian law, relocation abroad in such cases could be achieved by the resident parent without the consent of the other parent. There is only a right to information and expression of an opinion of the other parent. Beclin takes this view.²⁸

²³ Fucik/Miklau (loc.cit.). From the background of Austrian legal terminology it seems that such term (“not activated”) means a sort of non-application. But this is not a clear term commonly used in Austria.

²⁴ Fucik/Miklau, Aufenthaltsbestimmung, Wohnortwechsel und HKÜ, iFamZ 2013, 31; Deixler-Hübner/Fucik/Huber, Das neue Kindschaftsrecht, Zak Spezial, 2013, p. 67, third point in the summary: relocation by the domiciling parent wrongful according to Convention “if there was no information or an objection of the other parent”. Such objection would not be sufficient in all cases to constitute wrongfulness according to § 162 sect. 2 (new version) ACC.

²⁵ See below to “Case Law on Foreign Custody Rights”.

²⁶ According to § 107 sect. 3 nr. 4 Ausserstreitgesetz : particular judicial order not to relocate a child abroad.

²⁷ § 180 sect. 2 ACC.

²⁸ Beclin, Zusammenspiel von Obsorge und Informationspflicht, in: EF-Spezial (ed.: Gitschthaler), Kindschafts- und Namensrechtsänderungsgesetz 2013, p. 207, 208: The other, non-domiciling parent only has a right to information and expressions of its view, but cannot simply by objection hinder the domiciling partner to relocate the child. Such hindrance would take a court order.

Beclin states clearly (and probably convincingly) that a resident parent according to sect. 2 of § 162 ACC cannot be a child abductor in the sense of the Hague Convention on Child Abduction. The main reason is that the law accords this part or piece of the custody only to the resident parent. Beclin states that the legal committee of parliament has been the victim of a misunderstanding and, from a methodological point of view, such a comment of the legal committee based on an error in the so called “materials” to the law cannot be binding to courts. The right to information and expression according to § 189 ACC is, according to the Hague Convention on Child Abduction, no “custody-right” but a mere parent’s right. A violation of such a right is not covered by the convention. The domiciling parent would only be stopped to execute the relocation abroad if there is a valid court order not to relocate the child abroad.²⁹

To follow the opinion of Beclin would result in the determination of wrongfulness according to Austrian law and the possible scope of the Hague Convention on Child Abduction. Moreover, there would be a deviation between joint custody and the right to locate. The potential scope of wrongfulness under the Hague Convention on Child Abduction would not be entirely exploited by Austrian law. This could render child abduction from Austria much less frequent in the foreseeable future.

At present,³⁰ there are no published Austrian court decisions after January 2013 that would apply the new § 162 ACC.³¹ It seems open which view on the new law of 2013 will be shared by legal practice in Austria. However, the more interesting question would be if there are foreign decisions applying the rule of § 162 ACC in the context of a child abduction. The Austrian media has stated that a UK court has been confronted with the application of § 162 ACC. It is also said that such an application of Austrian law by, e.g. the English High Court, would be problematic since the text of the Austrian law holds something different than the materials and comments of the Legal Committee of National Parliament.³²

4.12.3.3. Case Law on Foreign Custody Rights

General Remarks and Introduction

For the determination of the wrongfulness of child abduction according to the Hague Convention on Child Abduction the Austrian courts regularly state that for the question of the existence of a right or co-right of custody Article 3 Hague Convention on Child Abduction refers to the point in time which is immediately before the transport or holding back of the child.³³ This is regarded as *Gesamtverweisung* (*renvoi*), i.e. the foreign rules of private international law should be examined and applied. Nevertheless, the question if there was a right to custody (or joint custody) is regularly decided according to foreign law without investigation into the rules of private international law.³⁴

The interplay between foreign custody, joint custody and location rights is currently debated. One legal writer states that the right to determine the location of a child is a mere

²⁹ Beclin, *Zusammenspiel von Obsorge und Informationspflicht*, in: EF-Spezial (ed.: Gitschthaler), *Kindschafts- und Namensrechtsänderungsgesetz 2013*, p. 210, summarizes her view as follows: „Aufgrund der in § 162 neue Fassung klar dem Domizilelternteil zugewiesenen Entscheidungszuständigkeit für einen Wohnortwechsel ins Ausland, stellt ein Umzug, selbst gegen den erklärten Willen des anderen Elternteils, keinen Sorgerechtsbruch im Sinne des HKÜ dar. Auch eine verspätete Verständigung gemäss § 189 ABGB neue Fassung oder ein bereits eingebrachter Antrag des anderen Elternteils auf Beschränkung der Obsorge gemäss § 181 ABGB neue Fassung machen den Umzug nicht zum widerrechtlichen Verbringen“.

³⁰ I.e. January 2014.

³¹ See RS0119948 in the RIS (Rechtsinformations-System, law information system, ris.bka.gv.at).

³² *Kommenda, Gesetz unklar, wann Kindesentführung vorliegt*, *Die Presse, Rechtspanorama*, 2013/43/01, citing a oral remark of Judge Gitschthaler of the OGH (the president of the senate treating child abduction cases). According to Gitschthaler the High Court is treating a case of child abduction from Austria to England. The judge criticizes the “rare behavior” of the Austrian legislator to contradict the text of the law in its own explanations.

³³ E.g. OGH 11 May 2005, 3Ob89/05t, JBI 2005,793 (to custody rights according to Italian law).

³⁴ However, probably the 1996 Convention has solved this problem.

indication if there is a custody right. A custody right in the sense of the Hague Convention on Child Abduction could also exist if there is no right to determine the location of the child but other sufficient elements. Joint custody would be protected, also without the right to locate the child.³⁵

Gitschthaler (Judge of the OGH) is of a different opinion, as are the overwhelming majority of judgments and authors. They state that, amongst parents with joint custody, the only decisive element is the right to locate the child. Mere joint custody would be not protected if not supported with the right to locate. Gitschthaler claims that any different view would be irreconcilable with the Hague Convention on Child Abduction.³⁶

A rather heated debate took place in Austria on the question if a parent with joint custody factually exercises his custody rights if the child does not live overwhelmingly in his home, but in the other parent's home. According to the view of the OGH, a parent only factually exercises joint custody if the child lives with him or her. Gitschthaler strongly supports this view.³⁷ However, according to Schütz the Hague Convention on Child Abduction only demands a weak proof of such factual exercise of rights and would presume factual exercise of these rights. The abducting parent would have to prove the contrary.³⁸ We would say that the latter view seems to be very close to the text and the explanatory report of the Hague Convention on Child Abduction. Also Nademleinsky has rather strongly criticized the view of the OGH.³⁹ In the recent past, the OGH seems to have left its long-line of case and would appear to have weakened (or even abolished) the requirement of factual exercise.⁴⁰

Particular Cases

In the following we provide examples how Austrian courts apply foreign law for the following jurisdictions: England & Wales, Canada, Switzerland, Spain, France, Portugal, Italy, Germany and Slovakia (in chronological order).

In the case of 11 July 1990,⁴¹ a married mother left with her child for the USA. The father asked for the help of the Austrian courts to have his child returned to Austria. The Austrian Highest Court (OGH) stated that although the mother exercised her custody rights, nevertheless the relocation of the child was wrongful according to the Hague Convention on Child Abduction and the father was permitted to request the assistance of Austrian courts. This is an oft-cited case in Austria, hence it should be mentioned. However, it is an outgoing case which is of rather little interest here. It is not to our knowledge how the courts in the USA decided the case.

In the decision of 5 February 1992,⁴² a mother left with the child from England for Austria. According to an English court order, the mother was not allowed to leave the country without the written consent of the father. The Austrian OGH stated that such a right to consent accorded to the father is a right to determine the location of a child and can be considered as a right to joint custody. The relocation was thus wrongful.

³⁵ E.g. Schütz in Burgstaller/Neumayr/Geroldinger/Schmaranzer, Internationales Zivilverfahrensrecht, chapter 54, HKÜ, nr 7 in fn 17 (unfortunately only in a footnote and therefore, it seems, often overlooked). Nademleinsky, Internationales Familienrecht, 09.06.

³⁶ Gitschthaler, Schwimann, ABGB, 4ed, § 146b nr. 13 at fn 66.

³⁷ Gitschthaler, Schwimann, ABGB, 4ed, § 146b nr. 15: it would be no case of abduction if the factual contact of the child with the other parent with co-custody (in the foreign country) would only amount to a „classical weekend and holiday visiting right“.

³⁸ Schütz in Burgstaller/Neumayr/Geroldinger/Schmaranzer, Internationales Zivilverfahrensrecht, chapter 54, HKÜ, nr 7 in fn 19 (again only in a footnote and therefore probably often overlooked).

³⁹ Nademleinsky, Internationales Familienrecht, 09.07 in fn 24.

⁴⁰ 6 Ob 36/13g, EF-Z 2013/155 with note Nademleinsky, Das HKÜ und die tatsächliche Ausübung des Sorgerechts: The question what is a „classical weekend and holiday visiting right“ would make the practitioner „shiver“.

⁴¹ 1 Ob 614/90, SZ 63/131.

⁴² 2 Ob 596/91.

In a decision of 12 February 1997,⁴³ the Austrian OGH stated that a precondition for the application of Article 3 Hague Convention on Child Abduction is a right to custody or joint custody. In this particular case, there was an order of a court in Quebec that both parents are not allowed to leave Quebec with the child. According to the Austrian OGH, such an order does not suffice for protection under The Hague Child Abduction Convention. It was only an order in the court proceedings for custody and not a decision on custody itself. The mother taking the child was not restricted in her custody rights by the court order. Hence, the father had no right against the mother to decide on the residence of the child. The actions of the mother were against the court order, but not wrongful in the sense of Article 3 of the Hague Convention on Child Abduction.

An interesting case is Austrian OGH of 30 September 2008.⁴⁴ A mother left Switzerland with her two children and moved to Austria. She lived separately from the father who remained in Switzerland. The reason for the relocation was the better and much cheaper child day-care institutions in Austria and the presence of the family of the mother in Austria. The applicable custody law was Swiss law. According to Swiss law both parents had custody, but the mother had the sole right to determine the location of the children (so-called *Obhut*). The Swiss Federal Office of Justice (the Swiss Central Authority) issued a written determination to the father that his Swiss rights of custody had been breached and the relocation abroad was wrongful according to Swiss law.⁴⁵ The mother claimed that there was case law of the Highest Court in Switzerland (Bundesgericht) that she was, according to Swiss law, allowed to relocate the children abroad.⁴⁶ The Austrian OGH examined the German language judgments of the highest court and confirmed the view of the mother. The determination of the Swiss Federal Office of Justice was held to be incorrect, against the view of the Highest Court in Switzerland and was therefore untrustworthy.⁴⁷ The question if the relocation was wrongful had to be decided by the Austrian courts, thus the OGH. Only the mother was entitled to "custody" according to art. 5(a) Hague Convention on Child Abduction. Article 5 refers to the right to locate the child, not to joint custody. The relocation of the child was hence not wrongful according to the Hague Convention on Child Abduction.⁴⁸ In relation to Switzerland, the OGH seems not to protect the concept of joint custody from Switzerland.

Nademleinsky was the first to criticize this decision, by stating that the decision of the OGH is right in the specific case, but cannot be generalized on its point to the right to location. Such a right would not be the only element of Art. 5 Hague Convention on Child Abduction. The main point would remain custody. It would have to be determined in every single case if the parent only has "minimum rights of custody" according to the applicable law. If so, the subsequent question would be if such minimum rights comprise the right to location or at least to prevent location abroad. But if the parent would have more than minimum custody rights (i.e. extended rights), such custody rights should also be protected by the Hague Convention on Child Abduction if the extended rights do not contain the right to locate the child (or to restrict its location).⁴⁹ In the case of 30 September 2008, Nademleinsky argues that the father had only "minimum rights".

⁴³ 7 Ob 35/97s, SZ 70/27.

⁴⁴ 10b167/08b, Zak 2008/716, see also in iFamZ 2009/52, p. 50 (with note of Pesendorfer) and in EF-Z 2009/62, p. 71 (with note of Nademleinsky). For another case on Switzerland, decided in the same lines: OGH 25 January 2011, 10b219/10b, Zak 2011/271.

⁴⁵ Art. 15 of the 1980 Convention.

⁴⁶ E.g. BG 26 November 2004, 5 C 207/2004; BG 23 February 2004, 5 P 14/2004.

⁴⁷ On particularly this point Pesendorfer, iFamZ 2009/52, p. 50: it would be absolutely correct not to trust foreign determinations by foreign central authorities and the Austrian court did perfectly right to verify the foreign law itself.

⁴⁸ The OGH added: Since there were good reasons for the relocation, the mother was not abusing her legal position (no so called *Rechtsmissbrauch*).

⁴⁹ Nademleinsky in EF-Z 2009/62: „Im Übrigen darf aber nicht übersehen werden, dass Art 3 lit a HKÜ im Normalfall an die Obsorge und nicht an das Aufenthaltsbestimmungsrecht anknüpft, weshalb Kindesentführung schon auch dann vorliegt, wenn das Kind einem Elternteil entzogen wird, der zwar nicht über den Aufenthalt des Kindes, aber beispielsweise über andere Aspekte der Obsorge (mit-)entscheiden

The discussion for Switzerland will be changed by the new Swiss law on custody and relocation abroad. According to the new art 301a Swiss CC (in force as of 1.7.2014) every parent with joint custody has also the right to determine the main place of residence of the child. From the Austrian perspective this will mean that children will have to be returned to Switzerland.

A comparable regime like under Swiss law seems to exist in Spanish law. Both separated parents have custody, but the parent where the child lives overwhelmingly has "guarda". However, according to the view of the Austrian OGH in its decision of 24 September 2009, there is no comparable case law, such as in Switzerland, for the Spanish courts that would restrict the rights of the parent who has joint custody. In this particular case, the parents had a written agreement that extended the rights of the father in respect of care and decision-making. Such an agreement had to be respected and the Austrian OGH explicitly stated that there was no inconsistency⁵⁰ in reference to the above-mentioned decision concerning Switzerland.⁵¹ From the perspective of wrongfulness, the child would have had to be returned, but return was rejected for other reasons.

In respect to the wrongfulness, this is also the result of the decision of 29 March 2011⁵² concerning Spanish custody law. The mother had a court decision vesting her with „guarda y custodia“, however, both parents had custody („patria potestad“). According to the Austrian OGH, the mother had no right to determine the location of the child on her own. Therefore, the child had to be returned.

However, in the decision of 12 May 2009,⁵³ the OGH followed in obiter dictum a much broader concept. According to the court's statement, the relocation of a child is wrongful in terms of the convention if a common right to custody is violated or the visiting right of the other parent has been made factually impossible by the relocation. This point was, however, not relevant in the particular case (obiter dictum).

In the decision of 13 October 2009,⁵⁴ the OGH stated that the question of wrongfulness was not one of the national applicable law, but of the Convention itself. From the perspective of the Convention, the relocation of a child would be wrongful, if there is joint custody and the other parent did not consent to relocation. It is according to the OGH irrelevant if such consent was not necessary according to national law. Hence, there would be no wrongfulness according to national law, but a specific international wrongfulness. That such consent was not necessary according to Art. 372-2 French CC, was irrelevant for the decision on the return application under the Hague Convention on Child Abduction, according to the OGH. It was only relevant if the remaining parent (i.e. father in France) had a right or co-right to determine the residence of the children, which was clearly the case for the aforementioned French provision. Hence, the relocation of the child by the mother to Austria was wrongful. In relation to France, the Austrian OGH seems to protect mere joint custody.

However, in the case of 19 July 2010⁵⁵ the Austrian OGH decided on another case concerning French joint custody. In this case, the OGH concluded that the custody right according to the Convention was only held by the parent with whom the child factually lives. Furthermore, this should also apply in cases of joint custody.⁵⁶ Only such a parent

kann“. Critical to older case law also Neumayr/Nademleinsky, Internationales Familienrecht, 2007, nr. 09.06: Austrian jurisprudence would be too restrictive interpreting foreign custody provisions. The consequence would be that there is only one option for the foreign courts and authorities, namely in advance not to award to an Austrian parent custody according to their national law (there in footnote 22).

⁵⁰ However, it is rather clear that this view of the Austrian OGH could be disputed.

⁵¹ 24 September 2009, 1 Ob 163/09s, Zak 2009/661.

⁵² 5 Ob 227/10h, iFamZ 2011/182.

⁵³ OGH, 5 Ob 47/09m, SZ 2009/64, with reference to ECHR, Neulinger and Shuruk against Switzerland, 8. January 2009 complaint nr. 41.615/07.

⁵⁴ 1 Ob 176/09b, iFamZ 2010/39.

⁵⁵ 6 Ob 139/10z, iFamZ 2010/247.

⁵⁶ The OGH stated: In case of separation of the parents, this condition is regularly only fulfilled by the parent where the child lives. The OGH declared this view also explicitly applicable in the decision 6 Ob 135/03a on

would factually exercise joint custody rights. This would lead to a result where joint custody remains mostly unprotected.

In the decision of 18 July 2011⁵⁷ the OGH made a statement with respect to Danish law. The parents lived in Denmark and were separated. The Austrian mother had sole custody. The Danish father filed for joint custody at the Danish court. The mother left Denmark for Austria with the child. In the meantime the Danish father obtained sole custody from a Danish authority. The father attempted to have this decision recognised in Austria. The Austrian OGH stated that the child would not have been returned if the father had filed for a return according to the Hague Child Abduction Convention 1980. The reason was the alleged lack of a breach of the custody rights of the father.⁵⁸ The Austrian OGH stated in obiter dictum that according to Danish law (§ 18 Act on Parental Responsibility), there is an obligation for a parent moving abroad with a child to inform the other parent. However, according to the “grammatical and teleological interpretation” of the Danish rules done by the Austrian OGH this duty to inform would only apply to cases of joint custody. Such an interpretation is far from natural, convincing and is not in accordance with Danish legal literature where it is clearly stated that the obligation to inform the other parent stems from § 18 Danish Act on Parental Responsibility, and applies to all parents, even those with sole custody.⁵⁹ However, it is also stated in Danish literature that the violation of such an obligation to inform has no specific sanction. The violation is (only) taken into account if the other parent files for a change in the custody relationship. Hence, in the particular case the father had indeed no right to jointly determine the residence of the child and the mother, having sole custody, was allowed to take the child abroad according to Danish law.⁶⁰ The legal position of the father was probably too weak to be protected according to the Hague Convention on Child Abduction.⁶¹

In a similar case of 19 December 2012⁶² the OGH confirms the view that only the parent where the child lived had “factual” custody in the sense of the Convention; the joint custody was ignored with the argument that the parent did not factually exercise his joint custody other than by telephone calls.

In the decision of 19 April 2012,⁶³ the parents were divorced in Portugal. The father only had visiting rights according to Portuguese law. The mother had sole custody and left for Austria with the child for employment reasons. According to the judgment, the mere visiting rights of the father were not sufficient for a return of the child to Portugal.

a case of joint custody and has confirmed its view in 1 Ob 163/09s (published in Zak 2009/661)”. It seems that 1 Ob 163/09s was decided, in respect to wrongfulness, on the fact that there was a particular agreement between the parents. This tendency began already with OGH, 12 February 1997, 7 Ob 35/97s, SZ 70/27, see above in the text and the disputed RIS-RS0106625).

⁵⁷ 6Ob103/11g, SZ 2011/93.

⁵⁸ Point 3.4 of the decision.

⁵⁹ See Lars Thøgersen, in Dansk Karnov, Forældreansvarslov, § 18, note 39: “Pligten til at varsle den anden forælder gælder en forælder, der har del i den fælles forældremyndighed, en forælder, der har forældremyndigheden alene, og en forælder, der ikke har del i forældremyndigheden, men som har samvær med barnet”.

⁶⁰ But that is a consequence out of § 25 of the Act on parental responsibility. See Thøgersen, loc. Cit., § 25, note 65: “En forælder, der har forældremyndigheden alene over barnet, kan udrejse af landet uden den anden forælders samtykke; ved etablering af bopæl i udlandet for barnet skal der dog varsles efter § 18”.

⁶¹ The further developments in this case are rather dramatic: the Austrian courts denied recognition of the Danish decisions on custody. The Austrian OGH confirmed that the mother has singular custody according to Austrian law because the child has his regular residence in Austria (19 December 2012, 6Ob217/12y, JBl 2013, 190). Two days later a Danish court decided that the mother’s request for return of the child to Austria according to the 1980 Convention was denied because the child had regular residence in Denmark and the brutal kidnapping of the child by the father from Austria was a legal exercise of his custody right under Danish law (Østre Landsrets 19. Afdeling, 21. December 2012, j.nr. 19. afd. B-3436-12). Now every parent has sole custody in his jurisdiction, which is a clear case of conflicting decisions.

⁶² 6Ob230/12k, iFamZ 2013/79: It was left open if the convention would apply for an applicant from the Ukraine (a non-contracting state to the 1980 Convention).

⁶³ 6 Ob 73/12x, iFamZ 2012/160.

In the decision of 14 March 2013,⁶⁴ the OGH stated that the (simple) breach of a right to determine the residence of a child in case of joint custody according to German law was sufficient under the Hague Convention on Child Abduction. The OGH stated implicitly that there was no need to examine the factual exercise of the joint custody. Hence, German joint custody seems to be protected.

In a note to this decision Nademleinsky⁶⁵ analyses inconsistencies between the different decisions of the OGH. He criticises the OGH for restricting, in his opinion, the right to determine the residence of the child. The right to joint custody would also have to be considered because it would be the right that reaches further than a mere right to determine the residence of the child. The view of the OGH could lead to even more manifest inconsistencies in the future, according to Nademleinsky.

In the decision of 20 March 2013,⁶⁶ the OGH seems to distinguish its previous line of case law on the factual exercise of custody. The OGH states that refusing factual exercise would be incorrect since the father had exercised his right to joint custody (according to Italian law) to the agreed extent, he had profited from more than minimum contact rights and in the relevant time period there were no custody decisions indicating that the father had exercised such rights (§6.2.) The OGH reiterates its view from the decision of 14 March 2013 that the breach of the right to determine the child's residence is sufficient (and necessary) for the application of the Hague Convention on Child Abduction.

In the decision of 22 April 2013,⁶⁷ the view was confirmed that even if the mother had sole custody for the son, the mother was only entitled to relocate the child abroad if either the father or a court consented beforehand (according to § 35 of the Slovakian Family Act Nr. 36/2005). Since these conditions were not fulfilled the mother had wrongfully removed the child to Austria and the child had to be returned. Here it becomes very clear that the OGH does not protect joint custody, but the right to determine the child's residence or relocate the child.

In conclusion, one could say that the Austrian case law is taking on a new direction recently. The tendency being that in the recent past, the only relevant element was the right to determine or jointly determine the residence of the child. As such, it is not as relevant if the parties have joint custody. The Austrian legislature seems to react to the fact that specific national rules in foreign countries on relocation are on the increase.

4.12.4. Judicial and non-judicial tools available to the parties, including mediation

The so-called *Ausserstreitgesetz* (Act on non-litigious procedures in civil matters⁶⁸) contains rules on the enforcement of return orders. In this respect there are some administrative or procedural measures provided for in legislation.

According to § 104 a *Ausserstreitgesetz*, the child gets particular procedural support by the so-called child's legal guardian (*Kinderbeistand*). The child's legal guardian is not a representative or a legal counsel of the child. Its role is to give a voice to the child in the procedure. The child's legal guardian has to be appointed if the child is under 14 years of age, or if the particular circumstances demand so, if the child is under 16. The child's legal guardian is overseen by a particular service organisation of the courts. The parties have to pay a small fee within the procedure.

A further procedural measure is the family court assistance (*Familiengerichtshilfe*) regulated in §106 a *Ausserstreitgesetz*. This institution is intended to provide assistance to

⁶⁴ 6 Ob 36/13g, EF-Z 2013/155.

⁶⁵ Nademleinsky in EF-Z 2013/155, p. 238.

⁶⁶ 6 Ob 39/13y, EF-Z 2013/189.

⁶⁷ 6 Ob 75/13t, iFamZ 2013/120.

⁶⁸ Federal Act (*Außerstreitgesetz - AußStrG*), Original version: BGBl. I Nr. 111/2003.

the court. Its collaborators are psychologists and sociologists. Its role is to reduce the length of procedures, to avoid conflicts between the courts and other participants in the procedure and to increase the quality of the solutions and measures taken by the court. It can also act as a supervisor to enable contact rights of parents. In addition, the family court assistance can prepare and support a solution between the conflicting parties of the procedure (i.e. preparation for mediation).⁶⁹

A party making a demand for the return of a child to Austria may make a demand for so-called psycho-social procedural company by a professional assistant.⁷⁰

A party making a demand for the return of a child from Austria is provided free legal aid and free legal assistance by a local practicing lawyer. The free legal aid does not depend on the party's income or patrimony.⁷¹

The local court has to report to the Ministry of Justice (i.e. the national Central Authority) on all measures taken and not taken in connection with a demand for return of a child.⁷²

In Austria every district has several municipal courts. To determine the local competence for the decision on incoming requests, the Austrian law stipulates that the municipal court at the place of the district court has local competence. I.e., not every municipal court is locally competent. There is a concentration of procedures at the place of the district courts. The goal of this measure is to concentrate such proceedings at a particular place since they are rather infrequent.⁷³

Within the Austrian Highest Court, there is only one (namely the sixth) chamber competent for cases according to the Hague Convention on Child Abduction. The goal is to concentrate the experience with the Convention in one department of the court.

As far as mediation is concerned, there are no specific Austrian rules governing mediation in cross border child abduction cases. However, if one refers to Switzerland and Germany, it could be said that there is sufficient scope for mediation to be considered in accordance with the Act on Special Procedures in Civil Matters of a Non-Litigious Nature (§§ 13 sect. 3, §§ 29 and 30: referring parties to find an agreed solution; possibility to pause proceedings). If the wellbeing of the child requires so (and no other interests are at stake), the court has to order the participation of the parties in an initial mediation or conciliation meeting (§ 107 sect. 3 nr. 2). However, the mediation would not (unlike the case in Germany) be organized by the central authority before a court hearing had taken place. The Austrian central authority may only give advice and information on mediation to the parties. Nevertheless, it is noted that at present (Dec 2014), there has not been a single actual case in Austria where mediation would have prevented or suspended court proceedings in a case of international child abduction.⁷⁴

4.12.5. Existing criminal sanctions

According to §195 of the Austrian Criminal Code (StGB⁷⁵) it is punishable to deprive a person of his/her child. The deprived person has to have the right to care and educate the child. The child has to be younger than 16 years old. Punishable is the deprivation, keeping hidden, the seduction of a child to hide and the assistance in any of such acts. The

⁶⁹ § 106a sect. 1 Ausserstreitgesetz (text of the law: „Anbahnung einer gütlichen Einigung“, preparing an amicable agreement).

⁷⁰ § 3 sect. 2 Executing Act to the 1980 Convention.

⁷¹ § 5 sect. 2 Executing Act to the 1980 Convention.

⁷² § 5 sect 5 Executing Act to the 1980 Convention.

⁷³ Gitschthaler in Schwimann, ABGB, 4ed, § 146b nr 17.

⁷⁴ For all see Fucik (Head of the Austrian central authority), Mediation in grenzüberschreitenden Familienkonflikten, insbesondere im Entführungsfall, to be published in iFamZ 2014/edition December, that I wish to thank for sending the manuscript before publication.

⁷⁵ BGBl. Nr. 60/1974, in the version of the last amendment by BGBl. I Nr. 93/2007.

punishment is a prison sentence of up to one year. This punishment is increased to three years if the child is under 14 years of age. The perpetrator is only punishable if the person having the right to educate authorises the criminal authorities. In addition, the authorisation of the public child welfare organization is needed if the child is older than 14 years of age. The wrongdoer may not be punished if she/he had reasonable grounds to believe that without his/her acting the child's physical or psychological wellbeing was endangered and the wrongdoer informs the parents or any competent authority without undue delay of the child's stay. A wrongdoer who is under 16 years of age shall not be punished.

The aim of this criminal law rule is the protection of the civil rights of the parent to determine the residence of the child according to §162 ACC.⁷⁶ Its practical importance is rather small.⁷⁷

In cases of international child abduction according to the Hague Convention on Child Abduction, the abductor is regularly one parent with or without custody or a right (or a joint right) to determine the residence of the child.

According to a judgment of the Austrian Highest Court (OGH) from 23 January 1978,⁷⁸ the deprivation has to embrace all persons entitled to joint care. That is to say, there must be a total deprivation of care. From this follows that if the person who abducts the child is himself/herself entitled to joint custody, there would be no total deprivation and §195 Austrian Criminal Code would not be applicable. In other words, the wrongdoer according to §195 Austrian Criminal Code can only be someone who has no right at all to care or to determine the residence of the child. The overwhelming majority of legal authors seem to share this view.⁷⁹ However, there is one prominent objection from Kienapfel and Schmoller.⁸⁰ In their view, such a perception cannot be derived from §195 Austrian Penal Code. There would also be a deprivation if a parent with joint custody travels with the child abroad without any warning. For the correctness of this opinion, these authors refer to (amongst others) some judgments and the overwhelming view in Germany.⁸¹

An interesting case is the above-mentioned Danish/Austrian case.⁸² According to Danish law the father had sole custody. According to Austrian law, the mother had sole custody. The Austrian courts did not recognize the Danish decisions on custody. The father had removed the child from Austria in front of the child's school and brought the child back to Denmark. In October 2013, the father was convicted for deprivation of a child (§ 195 StGB) by the OLG Graz (Austria). The punishment for the father was six months of prison (suspended sentence) and a €7,200 fine.⁸³

4.12.6. Compensation for the parent left behind and other civil law sanctions including the possibility of claiming damages

In the decision of the Austrian Highest Court of 12 April 2011, the court had to decide the following case. A 12 year-old boy refused to have contact with his father. The parents were divorced. The father blamed the mother for manipulating the son in a malicious manner.

⁷⁶ Ramsauer in Triffterer/Rosbaud/Hinterhofer, Salzburger Kommentar zum StGB, 2008, § 195 nr. 7 (to § 146b ACC, the predecessor of § 162).

⁷⁷ Ramsauer, loc. Cit., nr. 17: eight convictions in 2006 according to the criminal statistics.

⁷⁸ 13 Os 157/77, SSSt 49/6, JBI 1978,269, RS0095046.

⁷⁹ Markel in Wiener Kommentar zum StGB, 12. Erglfr. July 2011, § 195 nr. 13; Ramsauer, loc. Cit., 25.

⁸⁰ Kienapfel/Schmoller, Strafrecht, BT III, 2009, p. 107; with a reference to the 1999 edition of the same book, § 195-196 nr. 10.

⁸¹ BGH NJW 1999, 1344 : Nach § 235 dStGB (German StGB) macht sich auch der allein sorgeberechtigte Elternteil strafbar, der dem umgangsberechtigten Elternteil das Kind entzieht.

⁸² See above to II.2., case law, OGH 18 July 2011, 6Ob103/11g, SZ 2011/93.

⁸³ <http://derstandard.at/1379293592419/Fall-Oliver-Geldstrafe-und-sechs-Monate-bedingt-fuer-Vater> (January 2014)

The father claimed financial compensation for his psychological disorder that was a consequence of his position as a neglected father. The Austrian Highest Court decided that every parent has to prevent endangering the other parent's contact with the child. If the mother maliciously violated her duty, the father would be entitled to compensation in form of damages. According to the law, the mother would be obliged towards the child to promote its well-being. This rule would also protect the position of the father. The function of tort law would not only be to compensate damages already occurred, but also to prevent further disadvantage. According to the court, Austrian legal writing is unanimous in holding that a father may claim economic loss in such cases. Furthermore, compensation for bodily injury (i.e. non-economic loss) is not excluded, if the suffering of the father amounts to a sickness with a medically measurable condition. The father did not claim damages for mere pain and suffering (as for example in cases of death of close relatives). He also claimed for his own real bodily injury that required medical treatment. Accordingly, the health care costs also had to be covered. Moreover, he requested compensation for the pain and suffering that resulted from the bodily injury. The only argument against such a claim would be that there could be a negative spiral of damages that would not be fruitful for the well-being of the child. However, the OGH held that such an argument was not sufficiently convincing to refuse claims for damages as a whole.

This decision of the OGH was, overwhelmingly, commented on in a positive way in Austrian legal writings. The result was regarded as correct⁸⁴ and as a reasonable intrusion of tort law into family law. Some authors see the main reason for such a development in the lack of reimbursement of costs in the family law procedure on execution of visiting rights; the father would be forced to make an application for a visiting order, the mother is not obliged to reimburse any costs, finally the mother frustrates the visiting right and the costs for the father were in vain; such costs were compensated in tort.⁸⁵

One legal writer states that a claim for damages should even be possible if there was no bodily injury which would be measurable; if the law protects lost enjoyment of holidays then it should also protect lost enjoyment of fatherhood; a medical disease would not be necessary. Moreover mere pain and suffering should be compensated.⁸⁶ However, other authors state that there would be a danger for the abuse of tort law claims. Tort law would be the wrong way to indirectly enforce contact rights.⁸⁷

In Austrian legal literature, it has been stated recently that the same principles (damages for non-economic loss in case of violation of contact rights) would also apply for the wrongful relocation of a child abroad. It would be possible and logical to apply the same principles in cases of cross border child abduction.⁸⁸

There is indeed a case of child relocation between Austria and Denmark that received widespread media attention. The child was first brought to Austria by the mother, and then literally kidnapped by the father in Austria and was returned to Denmark (after the Austrian court refused the return of the child⁸⁹). In October 2013, an Austrian criminal court condemned the father for depriving the mother of the child (§ 195 StGB). In this criminal case, the mother claimed civil law damages of €183,000. The mother stated that since the kidnapping of the child by the father, she is unable to work anymore. The criminal judge stated that the mother had not worked before the kidnapping, and for that reason there was no damage for this particular claimant. For other damage, such as legal costs, the court awarded €1,000 in damages to the mother. However this case seems only to have

⁸⁴ E.g., Reischauer, Schmerzengeld wegen Beeinträchtigung der Eltern-Kind-Beziehung, ehewidrigen Verhaltens und Sachbeschädigung, EF-Z 2011/83;

⁸⁵ Nademleinsky, Besuchsrecht und Schadenersatz: Kommt der Bumerang zurück? Rechtspanorama (Die Presse 2011/21/02), 23 May 2011.

⁸⁶ Karner, Besuchsrechtsvereitelung und Schadenersatz - ein Paradigmenwechsel? ÖJZ 2011, 572.

⁸⁷ Thoma-Twaroch, Schadenersatzpflicht des obsorgeberechtigten Elternteils wegen Vereitelung von Besuchskontakten, iFamZ 2011/136.

⁸⁸ So explicitly Fucik/Miklau, Aufenthaltsbestimmung, Wohnortwechsel und HKÜ, iFamZ 2013, 32.

⁸⁹ See above part II, II.1., 2 to the case law, OGH 6 Ob 103/11g, SZ 2011/93.

been reported in the daily press,⁹⁰ not in any legal journal. However, after the overwhelmingly negative decision of the criminal court, the mother would have the possibility to bring her civil claim in front of a civil court.⁹¹

It seems that such claims for damages are also relevant in cases of wrongful relocation of a child abroad according to § 162 ACC. In case of § 162 sect 2, the resident parent is allowed to relocate with the child abroad. The mere violation of the obligation to inform the other parent (with joint custody) should not lead to claims for damages. In case of § 162 sect 3, the relocating parent needs the consent of the other parent. If such consent is absent, the relocation would be wrongful according to Austrian law and a claim for compensation would be possible.

Another consequence for a child abductor is as follows. A decision of the Austrian OGH stated that if the mother, after divorce, constantly and without any reason, prevents the father from seeing the child, the mother violates her post-marriage duties and loses her own right to spousal maintenance after divorce from the father.⁹²

4.12.7. Enforcement methods

In brief it can be said that there are no particular authorities in the enforcement of return orders in Austria. There are only some legal particularities to be considered in the enforcement.

Enforcement according to the general law on the enforcement of orders and judgments (Austrian Act on Enforcement⁹³) is explicitly excluded. The enforcement of returning orders of children is regulated in the Ausserstreitgesetz (Act on non-litigious procedures in civil matters). The court has to order appropriate measures on its own initiative or the request of one of the parties. Amongst them are fines, imprisonment or the privation of documents.⁹⁴ The court may abstain from the enforcement of the return order only, if and insofar the wellbeing of the child would be endangered.⁹⁵ The court may ask the local youth welfare authority to assist in the execution of a return order.⁹⁶ However, direct force may only be used by the organs of the court (bailiff). They may call for the assistance of the public security service (police).⁹⁷

Indeed, for the enforcement of return orders according to the Hague Convention on Child Abduction, it is possible to exercise force and violence. However, such force may only be exercised in a particular cautious manner. To secure the child it can be ordered that the child has to be handed over to the Austrian child welfare authority and that this authority has to cooperate with the relevant foreign authority.⁹⁸

Concerning the enforcement of return orders, the Austrian OGH rendered an interesting decision on 22 April 2013.⁹⁹ The question for the court was if it was possible to connect in one decision the rendering of a return order and measures for enforcement of such an order. Normally, this would be two different procedures according to Austrian law (i.e. title production and enforcement). According to the OGH it was possible to merge the two procedures because there is a duty to accelerate the procedure and the court that produces

⁹⁰ <http://derstandard.at/1379293592419/Fall-Oliver-Geldstrafe-und-sechs-Monate-bedingt-fuer-Vater> (January 2014).

⁹¹ § 366 sect. 2 Austrian Act on Criminal Procedure (BGBl 1975/631, StPO).

⁹² 2 Ob 578/95, SZ 68/243, RS0078152.

⁹³ So called "Exekutionsordnung" (EO).

⁹⁴ § 110 sect 2 AusstrG.

⁹⁵ § 110 sct 3 AusstrG.

⁹⁶ § 5 sect. 4 Executing Act to the 1980 Convention. § 110 sect 4 AusstrG.

⁹⁷ § 110 sect 4 AusstrG.

⁹⁸ OGH 17 February 2010, 2 Ob 8/10f, iFamZ 2010/134.

⁹⁹ 6 Ob 75/13t, EF-Z 2013/126.

the decision and the one that enforces the decision could be the same. Such direct enforcement measures are especially possible if the other party has already made some explanations that she/he would flee with the child or would never ever return the child. Henceforth, every court of first instance can combine its return order with orders regarding measures of enforcement (e.g. ordering the participation of the youth welfare authorities and bailiffs, or ordering third persons to hand over the child¹⁰⁰). As a consequence, the production of a return order and its enforcement take place in one procedure, which is quite different to the regular procedures in Austria.

4.12.8. Sensitive issues featured in national case law since 2012

4.12.8.1. Factual Exercise of Custody Right

Recent case law concerning foreign (non-Austrian) custody rights has already been reported above.¹⁰¹

On 14 March 2013¹⁰² the OGH had to decide on its prior policy that only such parent factually exercised custody rights according to the Hague Convention on Child Abduction, who in fact lived with the child. The non-resident parent did not factually exercise his custody-rights, i.e. the prior policy in legal practice. In its decision of 14 March 2013 the OGH seems not to maintain this position. The parents had joint custody in accordance with German law, the daughter lived overwhelmingly with the father who moved to Austria with the child for professional reasons. The mother claimed that the child should be returned to Germany. It seems that it was sufficient that the parent with joint custody also had a (limited) right to determine the child's residence. No special requirements for the factual exercise of such right were imposed.¹⁰³ However, this decision only brings Austrian case law into line with the generally accepted view under the Hague Convention on Child Abduction. It seems that it only abolished an Austrian particularity in the application of the Convention.

4.12.8.2. Habitual Residence

On 24 October 2013¹⁰⁴ the Austrian Highest Court (OGH) had to decide a case where both parents had agreed that the mother should live in Austria with the children in 2012 for professional reasons. It was agreed between the parents that the mother and the children would return to their country of habitual residence (The Netherlands) at the beginning of 2013. However, the Austrian mother and the children remained in Austria and the father filed for a return of the children to the Netherlands. The OGH refused such a return. The final purpose of the Hague Convention on Child Abduction would be to return a child after it had been brought to a new place that would not be its habitual residence. However, in the present case the children had their new place of habitual residence in Austria as from the beginning of 2012. Therefore, the purpose of the Hague Convention on Child Abduction would not be of importance in this case since the children were more than a year in Austria and socially integrated. The authorities in the other country would no longer be internationally competent to make any decisions.¹⁰⁵ To found a habitual residence in Austria, a stay for at least six months is in normal cases sufficient. Since the father had agreed that the children should live in Austria for a year, he "necessarily" agreed, so the OGH, that the children established their new habitual residence in Austria. Apart from the fact that the children have their habitual residence in Austria, a return would be against the well-being of the children since they are socially integrated in Austria. The well-being would

¹⁰⁰ So Fucik in iFamZ 2013/120 to this decision.

¹⁰¹ II.2. above.

¹⁰² 6 Ob 36/13g, EF-Z 2013/155 with note Nademleinsky.

¹⁰³ Nademleinsky, loc. Cit.

¹⁰⁴ 6 Ob 180/13h.

¹⁰⁵ Since 1998 there is a long list of judgments of the OGH taking this view, see RS0109515.

always have priority over the return measures according to the Hague Convention on Child Abduction.¹⁰⁶ It seems that the court did not at all examine the possibility that the children were wrongfully "retained" in the meaning of the Hague Convention on Child Abduction.

In another case the Austrian OGH¹⁰⁷ decided on the following facts. A mother had sole custody according to German law. She moved with the child to Austria. In Austria the child was in hospital. The hospital gave a warning to the child welfare authority, which issued an intermediate order not to return the child to the mother and to place the child in a welfare institution in Austria. The mother returned to Germany and demanded return of the child according to the Hague Convention on Child Abduction. The OGH stated that the child had its habitual residence in Austria although the mother returned to Germany again and therefore the child would not be returned to her. It stayed in the welfare institution

4.12.8.3. Habitual residence in cases falling outside Regulation 2201/2003's scope

On 19 December 2012 the Austrian OGH¹⁰⁸ rendered a decision on the case of abductions between Denmark and Austria. First, the Austrian mother with sole custody (according to Danish law) left Denmark with the child without giving any prior warning to the Danish father. The Danish father was accorded sole custody by Danish courts. The father attempted to have the child returned, but did not succeed in front of the Austrian courts; for the Austrian courts the relocation from Denmark was not wrongful since the mother had sole custody. The father literally kidnapped the child in Austria and brought it back to Denmark. The Danish courts refused to return the child to Austria. In Austria, the mother filed for a confirmation that she had sole custody according to Austrian law. The father was heard and objected to such a confirmation because he had sole custody according to Danish law. The OGH stated that Austrian courts would have international jurisdiction according to Article 8 EU Regulation 2201/2003, as the child still has his habitual residence in Austria (even after having been brought to Denmark). Since Denmark is not a Member State to the EU Regulation 2201/2003, the request of the father for custody in Denmark could not block the Austrian jurisdiction (Article 19(2) EU Regulation 2201/2003); neither could the relocation from Denmark to Austria (which was not wrongful according to the OGH) by the means of Article 10. The child was kidnapped by the father in Austria on 3 April 2012. On 20 April 2012 the mother filed for the certificate proving her sole custody. Within these very few days, the child did not establish a habitual residence in Denmark; hence the habitual residence would be still in Austria. If during the procedure the child would have established habitual residence in Denmark, the 1996 Hague Convention on Parental Responsibility¹⁰⁹ would have applied, since Denmark is not a Member State to the EU Regulation 2201/2003 but is a Contracting State to the Hague Convention on Parental Responsibility.¹¹⁰ In such a case the Austrian international jurisdiction would continue to exist according to Article 7 of the 1996 Hague Convention. According to Article 7(2) of the Hague Convention on Parental Responsibility and according to Article 3 Hague Convention on Child Abduction the removal of the child from Austria to Denmark was wrongful (since the custody decision of the Danish courts was not recognized in Austria). According to the applicable Austrian law the mother had sole custody, as stated by the OGH. Against the view of the Danish father, the removal of the child from Austria to Denmark was wrongful. Therefore, Austrian courts still had international jurisdiction.

¹⁰⁶ In the same case, the Austrian OGH had to decide two months earlier (29 August 2013) on the question of child support. The father denied the competence of the Austrian courts because the family would have its habitual residence still in the Netherlands. The OGH stated that the question if the relocation of the children was wrongful would be of no decisive relevance for the claims on child support. The same would be true for the opposite will of the left behind parent. For the procedure on child support the habitual residence is decisive (Art. 3 lit b EU-Regulation on child support) which would be in Austria. See 1 Ob 136/13a, Zak 2013/688.

¹⁰⁷ 16.2.2012, 6 Ob 26/12k, Zak 2012/290.

¹⁰⁸ 6 Ob 217/12y, JBI 2013, 190, iFamZ 2013/78 with note Fucik.

¹⁰⁹ In Austria in force since 1 April 2011.

¹¹⁰ Art 61 lit a EU Regulation 2201/2003.

According to a legal writer the problem with this case would be that the Hague Convention on Parental Responsibility entered into force during the case and only applied to parts of the case. If the Hague Convention on Parental Responsibility would have applied from the commencement of the case, there would have been a fair chance for the coordination of procedures between Denmark and Austria. In the future, the Hague Convention on Parental Responsibility should prevent such problems.¹¹¹

4.12.8.4. Lack of Enforcement

On 13 September 2012¹¹² the Austrian OGH decided a case in the aftermath of the CJEU case *Povse/Alpago*.¹¹³ The Austrian lower courts did not enforce an Austrian return order because the Italian father did not present proof of accommodation opportunities for the child and the mother in Italy (as foreseen by an Italian decision). The Italian father continued to demand return of the child and presented a new Italian decision for return (without conditions) supported by a certificate according to Article 42 EU Regulation 2201/2003. The mother denied that the Italian courts would have been allowed to render such a certificate. The lower Austrian courts continued to deny enforcement because the father had not presented the mentioned proof of accommodation for the mother and child in Italy. The OGH stated that the approval of enforcement from 2010 was legally binding. The new Italian decision did not state the need of a proof of accommodation for the Austrian mother in Italy. There were no possibilities to question a certificate according to Article 42 EU Regulation 2201/2003 in the state of abduction. All questions in connection with such a certificate have to be treated in the state of origin of the certificate, including the justification for its issuance. The only possibility for the Austrian mother would be the Italian courts and the ECHR.¹¹⁴

Indeed, the mother brought a claim against Austria in front of the ECHR. The ECHR decided on 18 June 2013.¹¹⁵ The mother's complaint was unsuccessful. Although the mother's rights had indeed been infringed, such an infringement could be justified by Article 42 EU Regulation 2201/2003. By rendering and enforcing a return decision, Austria had only obeyed its obligations according to the EU Regulation 2201/2003. It would be open to the mother to invoke "change of circumstances"¹¹⁶ in Italy or to bring a complaint against Italy in front of the ECHR.¹¹⁷ According to a legal writer from Austria,¹¹⁸ this ECHR-case demonstrates a sufficient degree of respect to the concept of the Hague Convention on Child Abduction. There would be no more room for any disagreement between the CJEU and the ECHR (as might have been according to the cases *Neulinger/Shuruk* and *Sneersone/Kampanella*).

4.12.8.5. Prerequisites of Certificates

On 20 March 2013¹¹⁹ the OGH decided another case on relocation from Italy to Austria. According to a decision of an Italian court from April 2011, the parents had joint custody, the children had to live with the mother, and the father had visiting rights that were mentioned in full detail by the Italian decision. In September 2012, the mother left with the children for Austria. In October 2012, the Italian court confirmed its decision from April 2011 (adding that the mother had to live with the children in Italy) and rendered

¹¹¹ Fucik, loc. cit.

¹¹² 6 Ob 172/12f, iFamZ 2012/238 with note Fucik.

¹¹³ C-211/10, PPU.

¹¹⁴ Fucik, loc. cit.

¹¹⁵ Case Nr. 3890/11, *Povse v. Austria*.

¹¹⁶ Art 742 Italian Code of Civil Procedure.

¹¹⁷ Nr. 86. With a reference to the ECHR-case *Sneersone/Kampanella*, 12 June 2011, Case nr. 14737/09.

¹¹⁸ Fucik, iFamZ 2013, 204. The author informs that there is also a pending complaint of the father against Austria in front of the ECHR. On 15 January 2015 the ECHR condemned Austria for violation of art. 8 EConvHR at the father's request. See ECHR, case of *m.a. v. Austria* (Application no. 4097/13) (Editor's note).

¹¹⁹ 6 Ob 39/13y, iFamZ 2013/117 with note Fucik.

certificates according to Articles 39 and 47 EU Regulation 2201/2003 (not according to Article 42) with the date of November 2012 and ordered a return of the children to Italy. The documents and certificates of the Italian courts did not seem to fulfil a very high standard of diligence. Nevertheless, the Italian father demanded immediate enforcement of the Italian decision in Austria. The question was whether the Austrian courts had to directly enforce the return order of the Italian court or whether they had to examine the conditions for a return themselves, in accordance with the Hague Convention on Child Abduction. The Austrian OGH stated that according to Article 40 EU Regulation 2201/2003 only decisions according to Article 11(8) EU Regulation 2201/2003 would be immediately enforceable in other Member States. The latter provision would require there to be a negative return decision in the State of abduction. In the present case, no such negative return decision had been granted in Austria. Therefore, despite the fact that the Italian court did not have international jurisdiction to make a return order, they nevertheless ordered the return.¹²⁰ According to the OGH, it must be possible for a court in Austria to verify if there was a legal basis for the court in Italy to render a return order, even though the certificate may not be controlled or questioned in the other state. As a consequence, the certificate rendered in Italy was regarded as irrelevant in Austria and the Austrian court had to examine the preconditions for a return according to the Hague Convention on Child Abduction. The lower courts in Austria had not yet examined in how far the objections of the children against the return were relevant and based on the mature reasoning of the children (i.e. twelve and fifteen years old). In this perspective it would have been important that the Italian courts had in the meantime ordered that the children had to live with the father. The children had clearly and strongly expressed that they did not wish to return to live with the father in Italy, according to the OGH.

4.12.8.6. Undertakings and Enforcement

On 28 August 2013¹²¹ the OGH decided a case on relocation between France and Austria. Already in 2009, there was a court order of the OGH to return the children to France. However, it would appear that it was never factually possible to enforce this order. The father finally demanded enforcement of the judicial order. The mother claimed that it would not be in the best interests of the children to be returned after such a long time in Austria. She claimed that the French father was violent and would separate the children from the mother, which would cause them psychological harm. The OGH stated that the obligation to ensure an accelerated procedure would also be valid for the enforcement procedure. It would also be possible to commence the enforcement ex-officio. However, it would be relevant if there was a change of circumstances after the rendering of the decision until the factual enforcement. In the present case the children had been in Austria for almost four years and had therefore become accustomed to their environment. To separate the children from their mother at this stage would cause to them serious harm within the meaning of Article 13(1) (b) Hague Convention on Child Abduction. Additionally it had to be seen, according to the OGH that in France only the father would have custody and guardianship. The father was violent towards the mother, but never towards the children. Nevertheless, this could cause serious damage to the children as well. It would not be appropriate to continue the enforcement of the 2009 judgment without any consideration of the circumstances. According to the EU Regulation 2201/2003 it would be necessary to take appropriate steps to protect the children in the state of origin. The father would have to take all steps that the children can be placed in a special institution and not in his own accommodation. The French authorities would have to confirm that the relevant institutions could also offer accommodation for the mother. All these questions would have to be treated in the continued procedure of enforcement by the lower courts in Austria, so the OGH.¹²²

¹²⁰ Very critical on the mutual trust doctrine Fucik, loc. Cit.

¹²¹ 6 Ob 134/13v, Zak 2013/609.

¹²² For the time being it seems open, if the children were ever in fact returned to France.

4.12.8.7. Interim measures

An Austrian mother lived with her children overwhelmingly in Austria, but also up to half a year in Luxembourg with the Belgian father. During the mother's parental leave, the whole family lived in Luxembourg with the father. After this leave, the mother returned with the children to Austria where she worked. It was planned that the father should visit the family in Austria at the weekends. During the mother's stay in hospital, the father took the children with him to Luxembourg and to his family in Belgium. The mother, against the father's will, subsequently took the children back to Austria and filed in Austria for sole custody as an interim measure. In Luxembourg, the father filed for the return of the children according to the Hague Convention on Child Abduction, but retracted his request later on after an agreement on visiting rights. The question was whether the Austrian courts had international jurisdiction for interim measures (Article 20 EU Regulation 2201/2003). The Austrian OGH¹²³ stated that first it has to be examined if there was jurisdiction according to Articles 8 et seq EU Regulation 2201/2003 before interim measures in a child abduction case could be ordered. According to the father, the children had been abducted from Luxembourg to Austria (although he had retracted his request for return of the children). If an abduction would have taken place, according to the OGH, the jurisdiction had to be examined according to Article 10 EU Regulation 2201/2003. The OGH referred to C-403/09 (PPU, *Deti ek/Sgueglia*) and stated that Article 20 EU Regulation 2201/2003 could not be interpreted in such a way that the mother could petition for interim measures after abduction to Austria. The rule on interim measures may not give support to an abductor. In addition, the rule would only apply if all persons concerned would be present in one state, namely where the measures should be taken (following the view of the CJEU¹²⁴) and the rule would only cover such interim measures that were necessary due to the mere presence of the child (e.g. medical treatment¹²⁵). For these reasons, in a child abduction case, it was necessary first to determine the courts with jurisdiction for the main proceedings (a question left open by the lower courts). Nademleinsky states that in this case there were not even real proceedings for a return after abduction; indeed, the parties had agreed upon visiting rights and in the course of events the father had retracted his request for return of the children. It seems that according to the Austrian OGH the mere suspicion of abduction is enough to trigger the effects of the *Deti ek* case law of the CJEU.¹²⁶

4.12.8.8. Child support during wrongful retention

On 27 June 2013¹²⁷ the OGH decided a case on child support after relocation from Spain to Austria. In 2010, the OGH had already ordered the return of the child to Spain. However, the return was in fact never enforced. The child claimed child support in Austria. The OGH stated that according to the EU Regulation 2201/2003, it was not relevant if the relocation or the detention in Austria was wrongful or not. In all cases the child had its new habitual residence in Austria and could bring a claim for child support in Austria.

4.12.9. Existing critique and comments on the legal rules in force

4.12.9.1. Overview of the sources

The amount of Austrian legal writing on the Hague Convention on Child Abduction and its national implementation is rather modest, compared with larger jurisdictions such as Germany or France. Very often Austrian commentaries simply refer globally to German

¹²³ 2 Ob 228/11k, EvBl 2012/146 with note Garber, EF-Z 2013/70 with note Nademleinsky.

¹²⁴ Very critical on this aspect Garber (loc. cit.): if so, art 20 EU Regulation 2201/2003 would be without any practical meaning.

¹²⁵ Garber (loc. cit.) states that in this aspect the OGH seems to establish one additional requirement compared with the CJEU in the *Deti ek*-case.

¹²⁶ Nademleinsky, loc. cit, p. 91.

¹²⁷ 1 Ob 91/13h, EF-Z 2013/187 with note Nademleinsky. See also 1 Ob 136/13a, Zak 2013/688.

literature. There seem to be only two contributions that deal with the Hague Convention on Child Abduction in a more general fashion and both of them seem a bit outdated (from 2006¹²⁸ and 2007¹²⁹), since the overwhelming majority of Austrian cases reported above¹³⁰ are more recent (i.e., after 2011). The most recent contribution on the Hague Convention on Child Abduction in Austrian legal literature is from 2011. However, this publication only deals with the main aspects of the Hague Convention on Child Abduction.¹³¹ Nevertheless there are also some rather critical voices in smaller or specialised contributions.

4.12.9.2. Gender issues

A rather strong critique of the Hague Convention on Child Abduction and the EU Regulation 2201/2003 is formulated by Miklau.¹³² She argues that the Convention and the Regulation (together with a strong trend towards joint custody regimes in national law) would have the effect that (mostly) mothers would regrettably need the consent of the father to move to another country with the child. When the Hague Convention on Child Abduction was drafted it was expected that the overwhelming cases would be abducting fathers who only had visiting rights and would not return the child after a visit. So the real purpose and perspective of the Convention was to assist mothers in these cases. In reality, it now transpires that the overwhelming number of abductions involve cases of mothers fleeing with the child from a violent husband or non-loving father. However, this reality would not be the main perspective of the Hague Convention on Child Abduction. The Convention would lead to a result that mothers would have to return their (sometimes very small) children, which was actually never intended by the producers of the Hague Convention on Child Abduction.

Since small children cannot be left alone, the mother would be factually (not legally) forced to return to a violent husband and/or poor father. The mothers would have to face high risks to their bodily and psychological health. This would be a price too high to reach the goals of the Convention (i.e. an immediate return). Such a result would not sufficiently consider the fundamental rights of mothers. Cases such as the ECHR of *Mattenklott*¹³³ illustrate the "double dilemma" for mothers. The return decisions only relate to the children, but the courts reach their judgments on the clear presumption that the mother will surely return with the child. Without such a presumption, the courts would not be able to pronounce a return of the child because it would be clearly against the well-being of the child to leave without the mother. The fundamental rights of the mothers are not examined, because the return of the mother would be a mere consequence of the return of the children. As a first measure to prevent such deplorable situations, the living conditions of the mother in the country of origin would have to be considered within the context of Article 13 Hague Convention on Child Abduction. If the father was violent towards the mother, the threat towards the mother would also have an impact on the child, which could create a situation that falls within the scope of Article 13. On a more general note, the best interests of the child not to be relocated has to be subordinate to the interest of the mother not to be subject to physical or mental harm. Undertakings as foreseen by the Regulation can only safeguard the external well-being of the child, not the internal well-being and the security of the mother. Returns would also have to be refused if the internal well-being of the child would be at stake or the mother is not comfortable with the return. In the so-called sibling cases (only one of several children has to be returned) it would be

¹²⁸ Burgstaller/Neumayr/Geroldinger/Schmaranzer, *Internationales Zivilverfahrensrecht*, 16. delivery in the version of December 2013. The part on the 1980 Convention is still in the version of Schütz, 6. Delivery as for March 2006.

¹²⁹ Nademleinsky/Neumayr, *Internationales Familienrecht*, 2007.

¹³⁰ For these recent judgments there are often rather small case notes to the particular issue at stake in legal journals. These case notes have already been mentioned in the text above at the relevant cases.

¹³¹ Gitschthaler in Schwimann/Kodek, *ABGB*, 4ed, 2011, § 146b nr. 11 et seqs. But in parts already outdated by the new § 162 *ABGB*.

¹³² She is a collaborator in the Austrian Ministry of Justice. Miklau, *Nicht ohne meine Tochter – Mitten in Europa – oder die Wiedereinführung der väterlichen Gewalt durch die Hintertür*, *iFamZ* 2010, 133.

¹³³ 11 December 2006, nr 41092/06, *Mattenklott v. Germany*, *FamRZ* 2007, 1527.

sufficient that an exception is applicable to one child to be valid against all sisters and brothers.

The rule in Article 11(8) EU Regulation 2201/2003 would be highly problematic, according to Miklau. The mere formal requirements in Article 42 EU Regulation 2201/2003 would lead to a race to the bottom of procedural rights of the children. The claim of the Regulation for mutual trust of the courts and the reality of making decisions deviate markedly. Modern tendencies in the law of custody would favour joint custody solutions which make it even harder for mothers to leave with their children and would violate the fundamental rights of the mothers. According to the Principles of European Family Law (PEFL) of the CEFL (Commission on European Family Law) it would be necessary not only to examine on the situation as it relates to the child, but also to the relation of the parents and (both) their fundamental rights.¹³⁴ As a consequence, in cases of violence and psychological pressure against the mother it would not be appropriate to force her factually to live in the state of origin. Without the mother, the child should never be returned. In cases without any violence against mother or children, a return might be possible, but all the costs of the return must be borne by the father (e.g., housing for the mother, living costs etc.). By protecting the fundamental rights of the mothers, the internal well-being of the child would be protected. The necessity to have the consent of the father for a removal leads to a reintroduction of the “*patria potestas*” in Europe, according to Miklau.

Indeed there exists some noteworthy Austrian critique to Miklau’s rather feminist position. Gitschthaler (judge in the OGH¹³⁵) replied in 2011 with some remarkable words; the view that (under the old law) Austria would have been a “mother’s prison” has to be placed in perspective with regard to the (former) case law of the OGH on the factual exercise of joint custody rights, which strongly favoured Austrian mothers returning to Austria from abroad with a child.¹³⁶ However, Gitschthaler expressly states that it is also necessary to note that a woman should think about “the consequences of her actions” before she has a child in a foreign cultural environment with a man from such a region. If such a child is born, the mother has to understand, according to Gitschthaler, that it would not only be “her” child alone and that she cannot move with the child wherever and whenever she wants. It would be the child of both parents that lives in a foreign cultural environment. The same principle would be true when a child with some foreign background is born in Austria to an Austrian mother. No Austrian mother would in such a case support the idea that a foreign father may simply leave to his country of origin without any requirements. Why then should such be possible for Austrian mothers abroad or for foreign mothers in Austria?

However, the Austrian legislature seems to have recently reacted to Miklau’s views. The new § 162 sect 2 ACC provides that the resident parent (it seems fair to say that this is mostly mothers) may leave to another country without the consent of the other parent (mostly fathers). This solution clearly grants priority to the free movement of women over and above the family rights of fathers.

§ 162 sect 3 ACC provides that if there is joint custody and no resident parent, the consent of the other parent is needed if the child is to be removed abroad. This consent may, however, be substituted by a court decision. The court in rendering such a decision has to consider the well-being of the child, as well as the rights of the parents to be protected from violence and the rights of free movement and freedom to exercise a profession, so explicitly the text of the new law.

In doing so, the Austrian legislature has limited the effects of the Hague Convention on Child Abduction for abduction from Austria to a rather large extent. It could be said that Austria favours international feminism (and thus sacrificing nationalism).

¹³⁴ Art. 3 :21 PEFL.

¹³⁵ Gitschthaler in Schwimann/Kodek, Praxiskommentar-ABGB, 4ed, 2011, § 146b nr 15.

¹³⁶ The OGH decided regularly that only such parent has a custody right according to the Convention who lives together with the child. However, this line of decisions was left in 2013 (see recent case law, II.4.). This change should have brought a protection for foreign joint custody rights.

4.12.10. Justifications for refusing to return a child relocated to Austria

In legal literature and case law it is said that caution is necessary in the assumption of a danger for the child (as an objection against return, Article 13(1)(b) Hague Convention on Child Abduction), because it would undermine the system of the Hague Convention on Child Abduction. Only real danger can be taken into consideration. The return regime seems to be applied rather strictly.¹³⁷ There is no general experience that the return to the country of origin or the separation from the mother would cause damage to the child.¹³⁸

In judgments, the effectiveness of the return mechanism is regarded as very important. It seems that this is mainly discussed in connection with the enforcement of return orders. According to Austrian law,¹³⁹ the enforcement could be stopped if it would endanger the (mere) well-being of the child. However, only such circumstances may be considered which occurred after the making of the decision and until enforcement. Objections to the original procedure may not be raised in the enforcement procedure, as this would otherwise hinder the effectiveness of the return mechanism.

However, if objections occur later in the procedure, prior to enforcement, it would in principle be possible to prevent the enforcement for the well-being of the child. Austrian case law and legal writers say that also such a halt is only possible under the requirements of a "real danger" for the child¹⁴⁰ (approaching to the requirements in accordance with Article 13 Hague Convention on Child Abduction).

Nowadays, Austrian case law applies Article 11(4) EU Regulation 2201/2003 (undertakings) to render the Convention effective. Such undertakings can also be that the father or the authorities in the other country have to ensure that the mother is able to obtain accommodation (on her own) in the other country. This is an important factor. If it is not taken care of, return will not take place, according to recent case law.¹⁴¹ Other factors also seem to be more important and taken into account.

However, there seems to be a further situation where the Austrian courts do not give priority to the return mechanism. In the case of the Austrian OGH of 24 February 2011,¹⁴² a child would have had to be returned to Greece. The return order dated from 2009; in 2010 the Greek courts awarded the mother (first provisional, and subsequently final) sole custody. Nevertheless, the father in Greece insisted on return of the child based on the Austrian return order of 2009. The OGH decided that in 2011 the relocation from 2009 was no longer wrongful and therefore it was no longer necessary to render the Convention effective. The return order was not regarded as a goal on its own.

4.12.11. Criteria to assess the "best interest of the child"

The best interest of the child would appear to be seldom discussed in connection with the Hague Convention on Child Abduction. From an Austrian perspective, this should really be a topic for the decision on custody,¹⁴³ rather than a decision on return.

A criticism of the Hague Convention on Child Abduction and the EU Regulation 2201/2003 is formulated by Silvia Rass-Schell.¹⁴⁴ The aspect of the well-being of the child is reduced

¹³⁷ Deixler-Hübner in Rechberger, Kommentar zum Ausserstreitgesetz, 2ed, 2012, § 111a nr. 2. Gitschthaler in Schwimann, ABGB, 4ed., § 146b nr. 21.

¹³⁸ Schütz in Neumayr, Internationales Zivilverfahrensrecht, 6. Del., March 2006, HKÜ, nr. 22.

¹³⁹ § 110 sect 3 Ausserstreitgesetz.

¹⁴⁰ Höllwerth in Burgstaller/Neumayr/Geroldinger/Schmaranzer, Internationales Zivilverfahrensrecht, 16th del., December 2013, art 47 nr 14.

¹⁴¹ OGH, 28 August 2013, 6 Ob 134/13v, Zak 2013/609.

¹⁴² 6Ob27/11f, EF-Z 2011/79.

¹⁴³ Schütz in Neumayr, Internationales Zivilverfahrensrecht, 6. Del., March 2006, HKÜ, nr. 23.

by the EU Regulation 2201/2003 in relation to the Hague Convention on Child Abduction. In respect to the undertakings and the hearing of the child, the Regulation treats the child more as an object than a subject. The question is posed if this is a step backwards. The Hague Convention on Child Abduction, as well as the EU Regulation 2201/2003, do not contemplate all possible practical cases. They overlook the case where a woman flees from a violent husband together with the child to her country of origin. The question is posed if Article 3 Hague Convention on Child Abduction should be amended to deal with this problem. The relocation should not be wrongful if a woman proves that the country of habitual residence did not offer a sufficient degree of protection against violence in families. Austria should make respective proposals.

A further critique of Miklau states that in the aftermath of the decision of the ECHR in *Sneersone and Kampanella*¹⁴⁵ against Italy it would also be necessary for Austrian courts to consider the (substantive) best interests of the child in every instance of the procedures. The Austrian case law that a child is sent back to the state of origin (and not to the father) could not be upheld.¹⁴⁶

A Swiss author has provided comments on the *Neulinger*-case in an Austrian legal journal.¹⁴⁷ The author states that the *Neulinger* case does not fit well with the system of the Hague Convention on Child Abduction. The only rule in the Hague Convention on Child Abduction dealing with the well-being of the child is Article 13(1)(b). However, this rule only forbids the return in cases of grave risk for the health of the child. The ECHR would jump over this problem by a reference that it would not apply art 13 by itself, but would only control the application of art 13 by the national courts in order to preserve art 8 of the ECHR. The well-being of the child as an overriding principle the ECHR creates by other international rules. However, it is strange that the ECHR did not cite Article 11 UN Convention on the Rights of the Child, a rule which refers to the Hague Convention on Child Abduction. The considerations of the ECHR in the *Neulinger*-case should have led to a substantive examination on the attribution of custody. However, this should not be the task of the courts dealing with a return order under the Hague Convention on Child Abduction. The considerations of the ECHR actually cause more confusion than clarity. However, the core problem is not Article 13, but the very far-reaching concept of protected custody rights under the Hague Convention on Child Abduction. The only possibility would be to reform the Hague Convention on Child Abduction.

From the perspective of the ECHR, a change may be coming as a result of the decision of 26 November 2013 (*X v. Latvia*¹⁴⁸). The ECHR stated that the well-being of the child has to be examined, albeit within the limits of Article 12 etc. of the Hague Convention on Child Abduction. The ECHR searched and found a harmonious interpretation of the ECHR and the Hague Convention on Child Abduction. The ECHR only imposes a special procedural duty on the national courts. The material reasons for a refusal to return are limited to the exceptions contained in the Hague Convention on Child Abduction. In Austrian legal writings, this decision is regarded as ensuring that the Hague Convention on Child Abduction prevails. However, the opinions of a dissenting judge (9:8 votes for a violation) are also mentioned as noteworthy.¹⁴⁹

¹⁴⁴ Überlegungen zum Kindeswohl, dem Haager Kindesentführungsübereinkommen sowie der Verordnung (EH) Nr 2201/2003, *Der österreichische Amtsvormund* 2005, 77.

¹⁴⁵ ECHR, 12 July 2011, 14737/09.

¹⁴⁶ Miklau, Wandel der EGMR-Judikatur in Kindesentführungssachen, *iFamZ* 2012/2.

¹⁴⁷ Möckli, Zum Kindeswohl als Leitmaxime bei Rückführungsanordnungen, *Besprechung zu EGMR* 6.7.2010, Nr. 41615/07, *Neulinger und Shuruk gegen Schweiz*, *iFamZ* 2011, 124.

¹⁴⁸ Complaint Nr 27853/09.

¹⁴⁹ Sigmund/Fucik, note to *X. v. Latvia*, *iFamZ* 2014, 4. I.e. vote of judge Pinto de Albuquerque.

4.12.12. The current debate on Child Abduction rules in force

For calls of reform, see the abovementioned points under §1 (Miklau and her strong criticism against the separation of the child from the abducting mother) and §3 (Möckli).

A thesis from the University of Vienna (Glawatz)¹⁵⁰ deals with the interesting question of different national court's judgments on art. 13 of the Hague Convention on Child Abduction. The author highlights the difference of interpretation from one court to the other. There would be no unity of case law, not on the international, not even on the national level. However, the courts would always try to reach a fair and reasonable result for the particular case and by doing so the Hague Convention on Child Abduction would produce satisfying results. From the perspective of this contribution of the University of Vienna, no reform would be recommended.

The Austrian Ministry of Justice showed some interest in changing the Hague Convention on Child Abduction or the EU Regulation 2201/2003 in respect to cases of child abduction involving violence against children or mothers.¹⁵¹

Fucik states that it has to be decided in the European Council if the Hague Convention on Child Abduction and the EU Regulation 2201/2003 comprise sufficient protection against violence and would be compatible with the freedom of movement. Possible legal deficits of EU Regulation 2201/2003 should not lead to the national courts being reluctant towards returning children.¹⁵²

Fucik/Miklau formulate a further rather strong criticism¹⁵³ against the confirmation according to art 42 of the EU Regulation 2201/2003. There were some problems in Austria with a confirmation issued by Spanish courts. On this occasion, the Austrian Ministry of Justice investigated the different language versions of the form (annex IV) and found an astonishing mismatch. Question 10 of the form asks in German, English, French and Portuguese, if the judgment is enforceable in the Member State of origin. The same question asks in Spanish, Italian and Dutch, if the decision can be appealed against in the Member state of origin. A "yes" in these versions has definitively the opposite meaning than in the other ones. Since the confirmation has far reaching consequences, such translation mistakes would be very regrettable and should be subject to reform. The European Commission allegedly showed no interest in reparation of the translation mistake.

In a recent article,¹⁵⁴ the custody right concept of the Hague Convention on Child Abduction has been criticized and the introduction of a new international relocation rule in EU Regulation 2201/2003 has been suggested.¹⁵⁵ This new approach should create a unified procedure for the relocation within the Member States of the Regulation. The approach is based on a European obligation of the relocating parent to inform the other parent in a reasonable time (e.g., 6 weeks) prior to relocation to another Member State. In the waiting time after having provided the information, the other parent (without custody) would have the possibility to apply for having the custody rights amended in the country of origin or obtain a court order forbidding relocation (if there is joint custody). If the other parent has sole custody, he or she simply has to object relocation. If none of these options are utilized in time by the other parent, the relocation would be allowed by virtue of tacit consent. If a parent leaves with the child without informing the other parent, the relocation would be wrongful and a decision of the courts of origin should be directly enforceable in all other Member States. This system would render it more likely that the dispute concerning the relocation is settled in front of the courts of the country of origin (before the abduction

¹⁵⁰ Luise Glawatz, *Die internationale Rechtsprechung zu Art. 13 Haager Kindesentführungsübereinkommen*, Wien 2008, p. 151.

¹⁵¹ BMJ-Pr7000/0073-Pr 1/2011, 13. Mai 2011, 7838/AB XXIV. GP Anfragebeantwortung, point 14, p. 8.

¹⁵² Fucik, *Kindesentführung: Letztes Wort zum letzten Wort des Ursprungsstaats*, Zak 2010/467.

¹⁵³ „Die Bestätigung gem Art. 42 VO Brüssel II bis oder das doppelte Formblatt“, iFamZ 2013/60

¹⁵⁴ A. Fötschl, *Sorgerecht und internationale Kindesentführung*, EF-Z 2014/67, p. 100

¹⁵⁵ Ibid.

takes place and a practically difficult return becomes necessary). In addition, one could reflect about a rule that, in cases of violence against the partner or children, the information about the relocation would not be given to the violent partner directly, but to the relevant national authority (in the state of origin before relocation). The national authority would have to inform the other parent and, if possible and necessary, takes measures to prevent further violence.¹⁵⁶

¹⁵⁶ Report completed by A. Fötschl in December 2014. The author would like to thank the head of the central authority in Vienna, Dr. Martin Adensamer and Dr. Robert Fucik, for their help in providing statistics.

4.13. Poland

4.13.1. Statistical Assessment

4.13.1.1. Key statistical overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	n/a	n/a	4045 (1.6%)	3891 (1.9%)
International divorces	n/a	n/a	n/a	341 (0.5%)
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	n/a	18	67	76
Outgoing return requests made under the Hague Convention	n/a	16	74	77

* Marriage and divorce figures based on centrally-collected Eurostat data. Percentages indicate international marriages/divorces as a proportion of all marriages/divorces.

4.13.1.2. Data on international marriages

Poland is administratively divided into 16 regions.¹ Consequently, data on international marriages² and dissolutions of marriages in each region are collected by the regional Registry Office (Urząd Stanu Cywilnego) and the Regional Court (sąd okręgowy). They are then sent to GUS (Główny Urząd Statystyczny) - the Central Statistical Office in Warsaw.³ The Demographic Yearbook of Poland contains databases for the years 2007-2013.⁴ There are three Tables that pertain to data on international marriages:

1. Table 24 (75) presents marriages entered into by foreigners in Poland by age of bridegrooms and brides in 2012;
2. Table 25 (76) presents marriages entered into by foreigners by age of bridegrooms and brides and country of residence before marriage in 2012;
3. Table 26 (77) presents marriages in Poland in 2012 according to country of citizenship of spouses.⁵

Further statistical information on international marriages celebrated in Poland in the years 2002-2013 can be found on the Central Statistical Office website in the Demographics

¹ Ustawa z dnia 5 czerwca 1998 r. o samorządzie województwa, Dz.U. 1998 nr 91 poz. 576; full text can be found at: <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19980910576> (29.07.2014).

² Understood as a marriage of a Polish citizen with a citizen of a foreign country.

³ www.stat.gov.pl (29.07.2014).

⁴ <http://stat.gov.pl/obszary-tematyczne/roczniki-statystyczne/roczniki-statystyczne/rocznik-demograficzny-2013,3,7.html> (29.07.2014).

⁵ See Archives (Archiwum) for the previous years.

section, under the heading Marriages (Mał e stwa) in Tables 23-25 and 27-29.⁶ The database contains statistics for the whole State and for each of the 16 regions.

Electronic databases do not exist at the level of regional Registry Offices. The example of Wrocław will serve as an illustration on how data is collected regionally. Wrocław is the capital city of the Lower Silesian region. It has a population of 631,188 people making it the 4th largest city in Poland.⁷ Data on international marriages are manually recorded at the Registry Office, in a registrar kept since 1998,⁸ as shown in Table 1 below. The data is graphically presented in Table 2.

Table 1: Total number of international marriages which took place in Wrocław, Poland in the years 1998-16 June 2014

Year	Total number of international marriages which took place in Wrocław, Poland
1998	130
1999	139
2000	122
2001	101
2002	119
2003	125
2004	126
2005	115
2006	99
2007	123
2008	130
2009	161
2010	149
2011	139
2012	156
2013	135
as of 16.06.2014	54

⁶ <http://demografia.stat.gov.pl/bazademografia/Tables.aspx> (29.07.2014).

⁷ <http://stat.gov.pl/statystyka-regionalna/rankingi-statystyczne/miasta-o-najwiekszej-liczbie-ludnosci-3018/> (29.07.2014).

⁸ Data made available by the courtesy of Mrs. Danuta Buła, Deputy Registrar of the Registry Office in Wrocław.

Table 2:

The only other statistics that exist for Wrocław have been prepared by the Registry Office at the request of the Border Guard Department in Strachowice. This data covers the year 2013 and concerns: 1) international marriages which took place **outside the territory of the Republic of Poland (RP)** and which have been entered in the Wrocław Registry Office for the period of 01 January until 30 June 2013 and 2) international marriages which took place **within the territory of the Republic of Poland (RP)** and which have been entered in the Wrocław Registry Office for the period of 1 July 2013 until 31 December 2013.

4.13.1.2. Data on international dissolutions of marriages

Statistics relating to international dissolutions of marriages are more limited compared to the existing statistics of international marriages. The condensed information for the years 2002-2013 (for the whole State and for each of the 16 regions) can be found on the Central Statistical Office website in the Demographics section under the heading Divorces (*Rozwody*).⁹ Table 35 presents divorces ruled by a court in Poland grouped according to the country of residence of the person filing for divorce from abroad. Databases on international dissolutions of marriages which involve children are not available. Such data would have to be collected by an arduous, manual analysis of all divorce case files kept in courts.

4.13.1.3. Data on registered parental abduction

Data on registered parental abduction can be extracted from the number of incoming and outgoing return and access requests¹⁰ received by the Central Authorities of the EU

⁹ <http://demografia.stat.gov.pl/bazademografia/Tables.aspx> (29.07.2014).

¹⁰ The model of a Request for return (EN version) can be found at: http://www.bip.ms.gov.pl/Da-ta/Files/_public/bip/konw_haska/zwrotdz_form/ang.pdf (29.07.2014).

Member States.¹¹ The National Report for Poland covers the year 2003. According to this Report, the Central Authority for Poland received a total of 26 incoming applications: 18 incoming return and 8 incoming access applications in 2003. The ratio of incoming return applications to access applications is 69% to 31% and differs from the global average which is 84% to 16%. The Central Authority made 12 outgoing return applications and 4 outgoing access applications in 2003. Altogether, the Central Authority handled 42 new applications in 2003. The overall ratio of incoming to outgoing applications was 62% to 38%.¹²

Further statistical data on the applications received under the Hague Convention on Child Abduction for the years 2008-2013 can be found on the Ministry of Foreign Affairs website.¹³ These statistics refer to applications sent to and from Poland. The analysis of the data shows that the number of applications sent to Poland is usually larger (average of 73) than the number of applications sent from Poland (average of 68), except for the years 2010 and 2012. The data follows a random growth rate. The biggest number of applications sent to Poland was 87 (2009) and the smallest was 53 (2010). The biggest number of applications sent from Poland was 77 (2012) and the smallest was 56 (again in 2010).

4.13.2. National laws implementing the Hague Convention

The Polish national legal framework on child abduction consists of: International conventions which have been granted autonomous legal value (Hague Convention on Child Abduction and 1996 Hague Convention on Parental Responsibility) and implementing national legislation, Additional legislation which relates to international child abduction, National legislation.

The Hague Convention¹⁴ entered into force in Poland on 1st November 1992. In accordance with Articles 87 (1), 91 (1) and 241 (1) of the Constitution of the Republic of Poland, the Convention constitutes part of the domestic legal order and shall be applied directly.¹⁵ The Hague Convention on Child Abduction was implemented by the governmental statement of 17 May 1995 concerning the accession of Poland to The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.¹⁶ Furthermore, the provisions set forth in the 1980 Convention have been granted autonomous value in the Polish legal system by the order of the Supreme Court of 16 January 1998.¹⁷ The Convention is directly applicable, with due regard to the UN Convention on the Rights of the Child.¹⁸

¹¹ A statistical analysis of applications made in 2003 under the Hague Convention on Child Abduction. National Reports, 2007 update (Prel. Doc. No 3, Part II, of September 2008) http://www.hcch.net/index_en.php?act=publications.details&pid=4866&dtid=32 (29.07.2014).

¹² Full text can be found at: http://www.hcch.net/upload/wop/abd_pd03ef2007.pdf (29.07.2014), p. 343-352.

¹³ <http://bip.ms.gov.pl/pl/ministerstwo/wspolpraca-miedzynarodowa/konwencja-haska-dot-uprowadzenia-dziecka/> (29.07.2014).

¹⁴ Published in the Journal of Laws of the Republic of Poland (Dziennik Ustaw) Dz.U.1995.108.528.

¹⁵ The Constitution of the Republic of Poland of 2nd April, 1997, as published in Dziennik Ustaw No. 78, item 483.

¹⁶ O wiadczenie rz dowe z dnia 17 maja 1995 r.w sprawie przyst pienia Rzeczypospolitej Polskiej do Konwencji dotycz cej cywilnych aspektów uprowadzenia dziecka za granic , sporz dzonej w Hadze dnia 25 pa dziernika 1980 r. Dz.U.1995.108.529; <http://www.abc.com.pl/du-akt/-/akt/dz-u-1995-108-529> (29.07.2014).

¹⁷ Postanowienie SN z dnia 16 stycznia 1998 r. II KKN 855/97: Postanowienia Konwencji dotycz cej cywilnych aspektów uprowadzenia dziecka za granic sporz dzonej w Hadze 25 pa dziernika 1980 r. (Dz. U. 1995 r. Nr 108 poz. 528) stanowi cz krajowego porz dku prawnego i s stosowane w Rzeczypospolitej Polskiej bezpo rednio, z uwzgl dnieniem wi cej Polsk Konwencji o prawach dziecka przyj tej przez Zgromadzenie Ogólne Narodów Zjednoczonych 20 listopada 1989 r. (Dz. U. 1991 r. Nr 120 poz. 526).

¹⁸ Konwencja o Prawach Dziecka, przyj ta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r., Dz.U.1991.120.526.

The 1996 Hague Convention on Parental Responsibility entered into force in Poland on 1 November 2010.¹⁹ The Polish national legislation implementing the Convention is as follows:

- Governmental statement of 23 August 2010 concerning the binding force of the Hague Convention on Parental Responsibility,²⁰
- Act of 22 January 2010 on the ratification of the Hague Convention on Parental Responsibility.²¹

Additional legislation which relates to international child abduction:

- 1980 European Convention on Custody of Children;
- EU Regulation 2201/2003;
- Council Regulation (EC) No 2116/2004 of 2 December 2004 amending Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as regards treaties with the Holy See;²²
- Polish legislation amending Council Regulation (EC) No 2201/2003;²³
- Report of 15 April 2014 from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000;²⁴

The third pillar of current legal regulation of international child abductions applicable in Poland is the Constitution, national procedural law - the Code of Civil Procedure,²⁵ and substantive law - the Family and Guardianship Code.²⁶ References to relevant articles will be made and examined in detail in further parts of the report.

¹⁹ Dz.U.2010.172.1158.

²⁰ O wiadczenie rz dowe z dnia 23 sierpnia 2010 r.w sprawie mocy obowi zuj cej Konwencji o jurysdykcji, prawie wla ciwym, uznawaniu, wykonywaniu i wspólracy w zakresie odpowiedzialno ci rodzicielskiej oraz rodków ochrony dzieci, sporz dzonej w Hadze dnia 19 pa dziernika 1996 r. Dz.U.2010.172.1159; <http://www.lex.pl/du-akt/-/akt/dz-u-2010-172-1159> (29.07.2014).

²¹ Ustawa z dnia 22 stycznia 2010 r.o ratyfikacji Konwencji o jurysdykcji, prawie wla ciwym, uznawaniu, wykonywaniu i wspólracy w zakresie odpowiedzialno ci rodzicielskiej oraz rodków ochrony dzieci, sporz dzonej w Hadze dnia 19 pa dziernika 1996 r. Dz.U.2010.40.225; <http://www.abc.com.pl/du-akt/-/akt/dz-u-2010-40-225> (29.07.2014).

²² OJ L 367 of 14.12.2004.

²³ Amendments introduced by: 1. Rozporz dzenie Rady (WE) nr 2116/2004 z dnia 2 grudnia 2004 r.zmieniaj ce rozporz dzenie (WE) nr 2201/2003 dotycz ce jurysdykcji oraz uznawania i wykonywania orzecze w sprawach mał e skich oraz w sprawach dotycz cych odpowiedzialno ci rodzicielskiej, uchylaj ce rozporz dzenie (WE) nr 1347/2000, w zakresie umów ze Stolic Apostolsk ;2. Sprostowanie do rozporz dzenia Rady (WE) nr 2201/2003 z dnia 27 listopada 2003 r. dotycz cego jurysdykcji oraz uznawania i wykonywania orzecze w sprawach mał e skich oraz w sprawach dotycz cych odpowiedzialno ci rodzicielskiej, uchylaj cego rozporz dzenie (WE) nr 1347/2000 (Dziennik Urz dowy Unii Europejskiej L 338 z dnia 23 grudnia 2003 r.). Dates of amendments: 7 July 2007 (Dz.UrzUEL.2007.179.56), 14 March 2009 (Dz.UrzUEL.2009.70.19) and 24 December 2009 (Dz.UrzUEL.2009.347.32).

²⁴ COM(2014) 225 final; http://ec.europa.eu/justice/civil/files/matrimonial_act_part1_v3_en.pdf (29.07.2014).

²⁵ Ustawa z dnia 17 listopada 1964 r. Kodeks post powania cywilnego (Code of Civil Procedure).

²⁶ Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opieku czy (Family and Guardianship Code).

4.13.3. Characterisation of parental child abduction

Pursuant to Article 3 of the Hague Convention on Child Abduction, the removal or the retention of a child is considered unlawful when both the legal and factual dimension are present:

a) "it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention (legal dimension);

and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention (factual dimension).

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."²⁷

Furthermore, the Hague Convention on Child Abduction is applicable when two conditions are met: the child is under 16 and when the child was habitually resident in a Contracting State immediately before any breach of custody or access rights.²⁸ Article 5 a) of the Convention defines "custody rights" as the rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.²⁹ The phrase "in particular" suggests that "custody rights" connotes a wider scope of activities than merely deciding on the place of residence.

In summary, unlawful parental child abduction occurs when the rights of custody are breached under the law of the State in which the child was habitually resident. Consequently, in order to determine what constitutes unlawful parental child abduction according to the Polish legal system, it is necessary to examine a) the provisions relating to custody laid down in the Polish Family and Guardianship Code and b) the notion of habitual residence.

a) Custody rights

The Family and Guardianship Code distinguishes between parental authority (*władza rodzicielska*) and custody rights understood as the rights relating to care (*piecza*)³⁰. Under Polish law, parental authority refers to all rights and obligations to take care of the child and its assets, and the rights and obligations linked to the upbringing of a child with due respect to its dignity and rights.³¹ Parental authority is a broader concept which contains in its definition the element of custody (care). Consequently, the notion of "parental authority" seems to correspond most closely to the concept of "custody rights" as defined by the Hague Convention on Child Abduction because both concepts involve the element of care but also cover a wider scope of activities (such as determining the place of residence).

²⁷ http://www.hcch.net/index_en.php?act=conventions.text&cid=24 (29.07.2014).

²⁸ *Idem*, Article 4.

²⁹ Art. 5 a) 1980 Hague Convention.

³⁰ Art. 96 Family and Guardianship Code § 1. Rodzice wychowują dziecko pozostające pod ich władzą rodzicielską i kierują nim. Obowiązani są troszczyć się o fizyczny i duchowy rozwój dziecka i przygotować je należycie do pracy dla dobra społeczeństwa odpowiednio do jego uzdolnień. § 2. Rodzice, którzy nie mają pełnej zdolności do czynności prawnych uczestniczą w sprawowaniu bezpośredniej pieczy nad osobą dziecka i w jego wychowaniu, chyba że z opieki czy ze względu na dobro dziecka postanowi inaczej.

³¹ Art. 95 § 1 Family and Guardianship Code.

The Polish system of family law distinguishes four types of parental authority:

1. Full parental authority,
2. Limited parental authority,
3. Suspended parental authority,
4. Terminated parental authority.

As a general rule, both parents enjoy full parental authority and each is obliged and authorized to exercise it.³² In important matters, the parents are obliged to jointly make decisions. Joint decision-making should be harmonious and efficient. If one parent lives abroad and has his/her centre of existence there, joint decision-making is considered as an illusion.³³

Both parents may still maintain full parental authority even if they are divorced or separated, provided they can reach agreement on important matters concerning the child.³⁴ The court may decide to limit, suspend or terminate one or both parents' parental authority when the best interests of the child³⁵ are threatened.³⁶ Following the divorce or separation, the parents need to decide how to exercise their parental authority. In case they cannot reach a mutually acceptable agreement, the matter is resolved by the court.³⁷ The court decides who will have custody rights over the child. Both parents may be granted custody (joint custody) or only one of them may be granted custody (single custody).³⁸

³² In Polish law, custody (understood as an element of parental authority) is granted to:

- The mother of the child (Art. 93 § 1 Family and Guardianship Code) and to her husband who is the presumed father of the child (Art. 62 Family and Guardianship Code in relation to Art. 93 § 1 Family and Guardianship Code), as well as the man who adopted the child (Art. 72 Family and Guardianship Code in relation to Art. 93 §2 sentence 1 Family and Guardianship Code);
- The guardian of a minor nominated by the court (Art. 146 in relation to Art. 155 §1 and §2 Family and Guardianship Code);
- Parental authority is given to the father of the child in case the presumption of paternity is ordered by the Court and has been established by the Court order (Art. 93 §2);
- Based on the adoption provision, the adopting parent and the child enter into a legal relationship of the same nature as the relationship between a parent and a child (Art. 121 §1 Family and Guardianship Code);
- A court order issued in relation to Art. 58 §1, 107 §1 and §2, 109§1 and §2 point 5 Family and Guardianship Code may limit or terminate custody of the parent(s) over the child, in consequence, custody may be granted to the other parent, a foster family or an educational care institution.

³³ Wyrok SN z dnia 29 listopada 1999 r. III CKN 483/98: Je eli władza rodzicielska słu y obojgu rodzicom, to o istotnych sprawach dziecka rozstrzygaj oni wspólnie, a w braku porozumienia - rozstrzygni cie nale y do s du opieku czego (art. 97 § 2 kro). Decyzje opieku cze w stosunku do dziecka powinny by podejmowane sprawnie i bez zakłóce . Temu wymogowi nie mo e sprosta sytuacja, gdy jeden z rodziców przebywa stale za granic i jest tam mocno zaangażowany w tworzenie nowych podstaw swojej egzystencji. Współdziałanie rodziców przy wykonywaniu władzy rodzicielskiej staje si wówczas iluzj ; władz t wykonuje praktycznie rodzic opiekuj cy si dzie mi i nie powinno dochodzi do zakłóce w jej wykonywaniu. W konsekwencji zawieszenie władzy rodzicielskiej jednemu z rodziców umo liwia w przedstawionej sytuacji harmonijne wykonywanie uprawnie rodzicielskich drugiemu z nich (por. art. 94 § 1 sentence drugie Family and Guardianship Code), a dzieje si to w interesie dziecka.

³⁴ Art. 93 § 1 and Art. 107 § 2 Family and Guardianship Code.

³⁵ The notion of "best interests of the child" will be analyzed in detail in a further part of the report.

³⁶ Art. 93 § 2 Family and Guardianship Code in relation to Art. 107 and 109-111 Family and Guardianship Code.

³⁷ Art. 97 Family and Guardianship Code.

³⁸ Art. 58 Family and Guardianship Code:

§ 1. W wyroku orzekaj cym rozwód s d rozstrzyga o władzy rodzicielskiej nad wspólnym małoletnim dzieckiem obojga mał onków i o kontaktach rodziców z dzieckiem oraz orzeka, w jakiej wysoko ci ka dy z mał onków jest obowi zany do ponoszenia kosztów utrzymania i wychowania dziecka. S d uwzgl dnia porozumienie mał onków o sposobie wykonywania władzy rodzicielskiej i utrzymywaniu kontaktów z dzieckiem po rozwodzie, je eli jest ono zgodne z dobrem dziecka. Rodze stwo powinno wychowywa si wspólnie, chyba e dobro dziecka wymaga innego rozstrzygni cia.

§ 1a. S d mo e powierzy wykonywanie władzy rodzicielskiej jednemu z rodziców, ograniczaj c władz rodzicielsk drugiego do okre lonych obowi zków i uprawnie w stosunku do osoby dziecka. S d mo e pozostawi władz rodzicielsk obojgu rodzicom na ich zgodny wniosek, je eli

When one of the parents has single custody, the other parent is often granted access rights or visiting rights.

When both parents exercise joint parental authority, the parent who has been granted single custody rights over the child cannot permanently remove the child to another country without the consent of the other parent. When such consent has not been given, only the court can authorise the relocation.³⁹ The unilateral modification of the child's place of residence is considered to be a violation of custody rights and in some cases may constitute a criminal offence (see Section 2.4).

b) The child's habitual residence

The Family and Guardianship Code does not explicitly define what constitutes "important matters". According to the Supreme Court, the determination of the child's place of residence is an important matter.⁴⁰ In order to determine whether unlawful child abduction took place, it is thus necessary to identify exactly what the child's habitual place of residence is. The provisions of the Polish civil law do not contain a definition of the "habitual place of residence". The grounds laid down in art. 25⁴¹ of the Civil Code are relied on to distinguish the external factor ("corpus") - that is the actual fact of residence - and the internal factor ("animus manendi") - that is the intention to habitually reside. Art. 3 of the Hague Convention on Child Abduction mentions only the place of residence; the concept of place of residence is therefore to be understood as the actual fact of residence (external factor) without the element of intention (internal factor).⁴²

Under Polish law, the habitual place of residence (miejsce stałego pobytu)⁴³ is therefore different from the legal concept of "domicilium" place of residence (miejsce zamieszkania).⁴⁴ The Civil Code states that the place of residence of a child who is under parental authority is the place of residence of both parents or of that parent who has full parental authority or who has been appointed to exercise parental authority. If both parents have full parental authority but separate places of residence, the place of residence of the child is the place where the child permanently resides. If the child does not permanently reside with either parent, the court decides on the place of residence of the child.⁴⁵ An interesting example can be found in Order I CKN 776/2000 of 26 September 2000 of the Supreme Court, in which the Court ruled that the place of habitual residence of the child, as defined by Art. 3 of the Hague Convention on Child Abduction, is a matter of

przedstawili porozumienie, o którym mowa w § 1, i jest zasadne oczekiwanie, że b d współdziała w sprawach dziecka.

³⁹ Uchwała SN z dnia 10 listopada 1971 r. III CZP 69/71: Na wyjazd za granicę na pobyt stały małoletniego wraz z jednym z rodziców, któremu w wyroku rozwodowym powierzono wykonywanie władzy rodzicielskiej, potrzebne jest zezwolenie s du opiekun czego, jeżeli drugi z rodziców, któremu powierzono nadzór nad wychowaniem dziecka, nie złożył o wiadczenia wyrażającego zgodę na wyjazd dziecka.

⁴⁰ Uchwała SN z dnia 23 maja 2012 r. III CZP 21/2012: Rozstrzygnięcie o miejscu pobytu dziecka jest zatem rozstrzygnięciem o istotnej sprawie dziecka (art. 582 Code of Civil Procedure), a nie rozstrzygnięciem o pozbawieniu lub ograniczeniu władzy rodzicielskiej, nawet w sytuacji, w której brak porozumienia rodziców w tej kwestii stanowi główne zarzewie konfliktu. Art. 582 Code of Civil Procedure: [Rozstrzygnięcie o istotnych sprawach dziecka] Rozstrzygnięcie o istotnych sprawach dziecka, co do których brak porozumienia pomiędzy rodzicami, może nastąpić dopiero po umotywowaniu rodzicom złożenia o wiadczenie, chyba że wysłuchanie ich byłoby połączone z nadmiernymi trudnościami.

⁴¹ Art. 25. [Domicilium] Miejscem zamieszkania osoby fizycznej jest miejscowość, w której osoba ta przebywa z zamiarem stałego pobytu.

⁴² Postanowienie SN z dnia 26 września 2000 r. I CKN 776/2000.

⁴³ Art. 25, 26, 27 and 28 Civil Code.

⁴⁴ Art. 27, 28, 32, 41, 136, 143, 144, 508 § 1 and art. 1103 point 1 Code of Civil Procedure.

⁴⁵ Art. 26 Civil Code: [Domicilium dziecka] § 1. Miejscem zamieszkania dziecka pozostaje to miejsce pod władzą rodzicielską, jest to miejsce zamieszkania rodziców albo tego z rodziców, któremu wyłącznie przysługuje władza rodzicielska lub któremu zostało powierzony wykonywanie władzy rodzicielskiej. § 2. Jeżeli władza rodzicielska przysługuje na równi obojgu rodzicom mającym osobne miejsce zamieszkania, miejsce zamieszkania dziecka jest u tego z rodziców, u którego dziecko stale przebywa. Jeżeli dziecko nie przebywa stale u żadnego z rodziców, jego miejsce zamieszkania określa sąd opiekuńczy.

fact. Consequently, the habitual residence of a child is determined by the fact of long-term and stable living in a place where the child satisfies all its needs (school, social life, sports, cultural activities, etc.), regardless of the intention to habitually reside on the part of the person(s) under whose authority the child is.⁴⁶ Thus, in order to determine the child's habitual residence, Polish courts assess where the actual centre of existence of the child is and not the intention of the parent(s) holding parental authority to modify the child's place of residence.

4.13.4. Judicial and non-judicial tools available to the parties, including mediation

The Hague Convention on Child Abduction does not explicitly specify which non-judicial tools are available to the parties in cases of unlawful parental child abduction. Nonetheless, Art. 7⁴⁷ and 10⁴⁸ stress the importance of seeking an amicable solution and bringing about the voluntary return of the child. Furthermore, the Guide to Good Practice on Mediation⁴⁹ seems to grant priority to mediation as compared to other alternative dispute resolution methods. The Guide advocates good practices in mediation in view of resolution of international family disputes involving unlawful child abduction.

There are no provisions directly relating to mediation in case of unlawful parental child abduction in the Family and Guardianship Code. In the Polish legal system, mediation is most commonly practiced in divorce and separation cases, specifically when an amicable solution is sought as regards the future execution of parental authority.⁵⁰ By analogy, mediation can also be applied to cases involving parental child abduction. General provisions pertaining to mediation are set out in the Code of Civil Procedure.⁵¹ Mediation is a cooperative process aimed at finding a mutually acceptable solution to a family conflict. Under the Polish civil procedure, mediation is voluntary.⁵² It is carried out by means of a mediation agreement or a court statement which directs the parties to mediation. The mediation agreement can be concluded when one party submits an application for mediation to a mediator and the other party agrees to mediate.⁵³ The mediation agreement should govern the following aspects: the subject matter, the mediator and how the mediator is chosen. The mediator should be impartial and independent (he or she cannot be an active judge)⁵⁴ and is obliged to maintain confidentiality unless dismissed from this

⁴⁶ Postanowienie SN z dnia 26 września 2000 r. I CKN 776/2000 Miejsce stałego pobytu dziecka w rozumieniu przepisu art. 3 Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę, sporządzonej w Hadzce dnia 25 października 1980 r. (Dz. U. 1995 r. Nr 108 poz. 528), określaj fakty uzasadniające długotrwałe i stabilne przebywanie dziecka w miejscu, w którym zaspakajają ono wszystkie swoje potrzeby, niezależnie od istnienia po stronie osób, pod opieką których dziecko pozostaje, zamiaru stałego pobytu. O zamiarze stałego pobytu dziecka nie decyduje wola osób, pod których opieką przebywa.

⁴⁷ Art. 7 c of the Hague Convention: Central Authorities shall cooperate with each other and promote cooperation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through an intermediary, they shall take all appropriate measures (...) to secure the voluntary return of the child or to bring about an amicable resolution of the issues.

⁴⁸ Art. 10 of the Hague Convention: The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

⁴⁹ Full text can be found at: http://www.hcch.net/upload/guide28mediation_en.pdf (29.07.2014).

⁵⁰ Art. 445² Code of Civil Procedure: [Skierowanie do mediacji] W każdym stanie sprawy o rozwód lub separację sąd może skierować strony do mediacji w celu ugodowego załatwienia spornych kwestii dotyczących zaspokojenia potrzeb rodziny, alimentów, sposobu sprawowania władzy rodzicielskiej, kontaktów z dziećmi oraz spraw majątkowych podlegających rozstrzygnięciu w wyroku orzekającym rozwód lub separację. Przepis art. 436 § 4 stosuje się odpowiednio:

Art. 570² Code of Civil Procedure: [Skierowanie do mediacji] W sprawie, w której zawarcie ugody jest dopuszczalne, sąd może skierować uczestników do mediacji. Przedmiotem mediacji może być także określenie sposobu wykonywania władzy rodzicielskiej. Jeżeli uczestnicy postępowania nie uzgodnili osoby mediatora, sąd kieruje ich do mediacji prowadzonej przez stałego mediatora, o którym mowa w art. 436 § 4.

⁵¹ See Art. 183¹ - 183¹ Code of Civil Procedure.

⁵² Art. 183¹ § 1 Code of Civil Procedure.

⁵³ Art. 183¹ § 2 Code of Civil Procedure.

⁵⁴ Art. 183² § 2 Code of Civil Procedure.

obligation by the parties.⁵⁵ The court designates the mediator, but the parties have the right to select a different one.⁵⁶

There are several private and public mediation services functioning in Poland available to the parties to choose.⁵⁷ Among the various mediation services available to the parties, the most interesting seems to be MiKK e.V., a non-profit organization, active in the fields of mediation and support, advice and referrals in cases of cross-border child abduction.⁵⁸ On 24 October 2007, MiKK issued the Wrocław Declaration on Mediation of Bi-national Disputes over Parents' and Children's Issues.⁵⁹ The Declaration lays down the recommendations concerning bi-national co-mediations in child abduction cases and addresses matters such as: the national origin, gender and professional background of the mediator(s), and the time frame of the mediation process.

The Ministry of Justice of Poland and the Federal Ministry of Justice of Germany have signed an agreement on cross-border mediation. This agreement governs conflicts between parents (guardians) and children whose place of residence is in different countries. In particular, it addresses cases falling under the Hague Convention on Child Abduction, concerning the execution of parental authority and relating to rights of contact with children from Polish-German relations.⁶⁰

The parties can also seek non-judicial assistance from the European Parliament Mediator for International Parental Child Abduction. It is noteworthy that the primordial goal of mediation is linked to the best interests of the child, a concept which will be examined in more detail below (see Section 2.8). "For the cases of international child abduction, the scope of the mediation is achieving a negotiated agreement in the exclusive interests of the minor. The main responsibility of the European Parliament Mediator for International Parental Child Abduction is to assist the parents in finding the best solution for the well-being of their child. Therefore it must be stressed that the Mediator's fundamental duty is to ensure that the best interests of an abducted child are served. In order to save children and parents the emotional and psychological strain arising from legal proceedings, the EP Mediator provides information and advises on alternative ways to settle the dispute, namely mediation."⁶¹

Mediation in cases of unlawful child abduction is not a common practice in Poland. As already mentioned, mediation is more often used in separation and divorce cases, but even then, it is more of a formality rather than a common solution to a conflict.⁶² Several factors may justify the reluctance to use mediation. Firstly, the duration of the process may hinder the proceedings under the Hague Convention on Child Abduction. Furthermore, the longer the mediation takes, the greater the risk that the child will develop a center of existence in the new environment (as discussed in Section 2.2.b). This constitutes a legal basis for the judge to restrain from ordering the return of the child in view of protecting the child's best interests. Finally, the costs, international character and linguistic differences are further barriers to mediation.

⁵⁵ Art. 183 Code of Civil Procedure.

⁵⁶ Art. 183⁹ Code of Civil Procedure.

⁵⁷ Lists of mediators are available through the Central Authority or via accrediting bodies:

- Polskie Centrum Mediacji: <http://mediator.org.pl/> (29.07.2014)
- Stowarzyszenie Mediatorów Rodzinnych: <http://www.smr.org.pl/> (29.07.2014)
- Centrum Mediacji Partners Polska: <http://www.mediacja.org/> (29.07.2014)
- <http://www.mikk-ev.de/deutsch/mediatorenliste/polnisch/> (29.07.2014)

⁵⁸ <http://www.mikk-ev.de/english/englisch/> (29.07.2014).

⁵⁹ For more details see: <http://www.mikk-ev.de/wp-content/uploads/wroclaw-declaration.pdf> (29.07.2014).

⁶⁰ <http://ms.gov.pl/pl/dzialalnosc/mediacje/mediacja-transgraniczna/> (29.07.2014).

⁶¹ <http://www.europarl.europa.eu/aboutparliament/en/000c205a13/Mediator-Parlamentu-Europejskiego-ds.-rodzicielskiego-uprowadzenia-dziecka-za-granic%20.html> (29.07.2014).

⁶² This was confirmed to me orally in the course of interviews with lawyers and judges from Wrocław, Poland (conducted in June 2014).

4.13.5. Existing criminal sanctions

Under the Polish law, child abduction fulfils the criteria of a criminal offence provided that two conditions are met:

- 1) The parental authority of the parent who abducts the child is limited, suspended or terminated,
- 2) Parental authority has been limited, suspended or terminated by a prior judicial decision.

According to Article 211 of the Polish Penal Code, the abduction or retention of a child under the age of 15 may constitute a criminal offence⁶³. More specifically, it is considered as such when the abduction violates custody rights established by a prior court order. Pursuant to the Polish Supreme Court order III KK 116/2003 of 9 December 2003, a parent may be deemed to have committed unlawful parental abduction if his/her parental authority was limited, suspended or terminated prior to the abduction of the child.⁶⁴ The penalty afforded for unlawful child abduction is imprisonment for up to 3 years.

According to two rulings of the Supreme Court,⁶⁵ the abduction of a child may be considered as an abuse of parental authority and may constitute a legal basis for the termination of parental authority.⁶⁶

4.13.6. Compensation for the parent left behind

Poland expressed the reservation referred to in Article 26, paragraph 3 and Article 42 of the Hague Convention on Child Abduction.⁶⁷ The Polish State will therefore cover the costs linked to the execution of claims under the Hague Convention on Child Abduction, the costs resulting from the participation of the legal counsel or advisers or from court proceedings only insofar as these costs may be covered by its system of legal aid and advice. It is noteworthy that, as a general rule, the claimant does not bear the costs relating to court proceedings in child abduction cases. He/she covers the expenses of translation of the request for return and all other supporting documentation.

An interesting legal question is whether and in which circumstances the parent left behind can claim compensation. The Polish legal system has not yet established clear rules in this regard. Neither the Family and Guardianship Code, nor the Code of Civil Procedure contains provisions regarding the issue of compensation for the parent left behind. General rules

⁶³ Art. 211 Penal Code: [Uprowadzenie małoletniego lub osoby nieporadnej] Kto, wbrew woli osoby powołanej do opieki lub nadzoru, uprowadza lub zatrzymuje małoletniego poniżej lat 15 albo osobę nieporadną ze względu na jej stan psychiczny lub fizyczny, podlega karze pozbawienia wolności do lat 3.

⁶⁴ Postanowienie SN z dnia 9 grudnia 2003 r. III KK 116/2003: Wykonywanie czasowej opieki i nadzoru nad małoletnim dzieckiem przez jednego z rodziców w wyniku decyzji sądu wydanej w trybie art. 443 § 1 Code of Civil Procedure, nie pozbawia jeszcze, nie ogranicza, jak również nie zawiesza władzy rodzicielskiej drugiego z rodziców. Tym samym należy przyjąć, że jeżeli sąd w trybie art. 443 § 1 Code of Civil Procedure powierza w toku procesu o rozwód tymczasowo małoletnie wspólne dziecko poniżej lat 15 pieczy jednego rodziców, to drugi z rodziców, który uprowadza lub zatrzymuje to dziecko, nie może być podmiotem przestępstwa z art. 211 Penal Code, chyba że uprzednio ograniczono mu jego władzę rodzicielską albo w trybie art. 443 § 1 KPC rozstrzygnięto co do sprawowania pieczy przez drugiego z rodziców w sposób podobny do ograniczenia władzy rodzicielskiej. Zarządzenia sądu rodzinnego, wydawane w trybie art. 109 kroc, stanowią wyrażenie ograniczenia „w sprawowaniu władzy rodzicielskiej”, nie muszą oznaczać „ograniczenia” tej władzy w sposób, który czyniłby rodzica jej naruszającym celem podmiotem czynu z art. 211 Penal Code.

⁶⁵ Uchwała SN z dnia 21 listopada 1979 r. VI KZP 15/79 OSNKW 1980, Nr 1 poz. 2; uchwała SN z dnia 7 sierpnia 1982 r. VI KZP 18/82 OSNPG Nr 10 poz. 137.

⁶⁶ Art. 111 § 1 Family and Guardianship Code.

⁶⁷ Zastrzeżenie: Na mocy artykułu 42 i w związku z artykułem 26 ust. p 3 powyższej Konwencji Rzeczpospolita Polska oświadczają, że ponosi ona wszelkie koszty związane z wykonaniem wniosków konwencyjnych i wyników z udziału adwokata lub doradcy prawnego albo koszty sądowe tylko w takim zakresie, w jakim koszty te mogłyby być pokryte przez polski system pomocy społecznej i prawnej.

pertaining to compensation can be found in the Civil Code.⁶⁸ The Civil Code governs the possibility of claiming compensation for material damages caused by breach of contract, an action or omission committed voluntarily or through negligence, etc. Unlawful child abduction does not clearly fall under any of these categories, since the damage caused to the parent left behind is usually two-fold: moral and material. Claims made by the left behind parent for the reparation of strictly moral damages by the parent who abducted the child are still quite rare in the Polish District Courts (*S dy Rejonowe*).⁶⁹ In certain cases, the parent left behind can initiate proceedings to obtain reparation from the State for the moral tort and material damages he or she suffered, especially if the authorities failed to make adequate efforts to enforce the return of the abducted child. The *Stochlak vs. Poland Case* may serve as an illustration of such a precedential case in Polish family law.⁷⁰ Excerpts from the case are cited below.

“The applicant, a Polish national was born in 1956 and has lived in Canada since 1985. In 1993 he and his wife E.S., a Polish national, had a daughter. At the end of a holiday in Poland in 1996, E.S. refused to return to Canada, having decided to remain in Poland with their daughter. Mr. Stochlak brought proceedings for the return of the child in January 1997. On 7 March 1997, the District Court ordered that the child be returned to her father. That decision was upheld on 17 April 1998, after which E.S. lodged an appeal on points of law. (...) He was reunited with his daughter on 14 April 2003. Since then, they have lived together in Canada.

On 22 March 2007 the Warsaw Regional Court granted the Stochlaks a divorce. Parental authority was vested in both parents jointly, and the child’s place of habitual residence was fixed as her father’s home.

Relying on Article 8,⁷¹ Mr. Stochlak complained about the Polish authorities’ failure to act in the proceedings for the enforcement of judicial decisions ordering his daughter’s return to Canada. Proceedings relating to the granting of parental responsibility required urgent handling, as the passage of time could have irremediable consequences for relations between a parent and his or her child. It was clear in January 1997 that Mr. Stochlak’s daughter had been unlawfully removed. A year and seven months passed between the District Court’s first decision (7 March 1997) and the dismissal of E.S.’s appeal on points of law. Furthermore, in the context of the civil enforcement proceedings, during the three years following the decision of 2 December 1998 - ordering E.S. to return the child within three weeks - no activity by the authorities could be identified. It was only in January 2003 that a meeting was organised to ensure effective cooperation between the various State bodies. The authorities had not taken measures to punish the lack of cooperation by the child’s mother, which was the source of most of the problems. (...) The authorities had therefore failed to make adequate efforts to enforce Mr. Stochlak’s right to the return of his child.

The Court concluded unanimously that there had been a violation of Article 8. Under Article 41⁷² (just satisfaction) of the Convention, the

⁶⁸ Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny, Dz. U. 2014 r. poz. 121.

⁶⁹ This opinion was expressed by the judges from the District Courts in Wrocław Poland, interviews conducted in July 2014.

⁷⁰ Application Nr 38273/02, Order of European Court of Human Rights, Strasbourg, 22 September 2009.

⁷¹ Convention for the Protection of Human Rights and Fundamental Freedoms
http://www.echr.coe.int/Documents/Convention_ENG.pdf (29.07.2014).

⁷² *Idem*.

Court awarded 7,000 euros (EUR) in respect of non-pecuniary damage and EUR 6,000 for costs and expenses."⁷³

4.13.7. Judicial, administrative and other authorities competent for child abduction cases

According to Article 8 of the Hague Convention on Child Abduction, "any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child."⁷⁴ The request (application) for return must contain all the information and documents listed in Article 8 (obligatory a-d, and optional e-g) of the Hague Convention on Child Abduction.⁷⁵ In accordance with Article 12 of the Hague Convention on Child Abduction, the request for return is examined by the authorities of the Contracting State where the child has been abducted or retained.

In Poland, the Central Authority is represented by the Division of International Law of the Ministry of Justice of the Republic of Poland.⁷⁶ The Central Authority employs 5 people who are responsible for cases under the Hague Convention on Child Abduction and 2 people are also accountable for the carrying out of activities related to the EU Regulation 2201/2003. The employees of the Polish Central Authority deal exclusively with parental child abduction cases. Any other kind of kidnapping (such as, criminal kidnapping) lies beyond the scope of their responsibilities.⁷⁷ The responsibilities of the Ministry of Justice in child abduction cases are as follows: determination of the place of residence of the child, prevention of further threats to the best interests of the child, exchange of information about the child, quest for an amicable resolution of the conflict and preparation of the safe return of the child. As mentioned earlier, mediation is voluntary. The Central Authority does not take part in the mediation process. On request of the parties, the Authority can provide a list of mediators registered at the Regional Courts.⁷⁸

Moreover, the District Courts, Divisions for Families and Juveniles (S dy Rejonowe, Wydział Rodzinny i Nieletnich) are responsible for enforcing the provisions set forth in the Hague Convention on Child Abduction. Finally, the Public Prosecutor (Prokurator) is also engaged in the proceedings under the Hague Convention on Child Abduction.

In the Polish system, the procedure in child abduction cases is different depending on the place of abduction of the child. The distinction is as follows:

1. When the child has been abducted to Poland and is on the Polish territory, the proceedings are performed by the District Court,
2. When the child has been abducted from Poland, the District Court assists in preparing the request for return which is then sent by the Division of International Law of the Ministry of Justice of the Republic of Poland to the Contracting State where the child has been abducted.

In accordance with a ruling of the Supreme Court, the decision about the return of the unlawfully abducted child belongs to the authorities of the Contracting State to which the

⁷³ http://sim.law.uu.nl/SIM/CaseLaw/hof_nsf/233813e697620022c1256864005232b7/efbd112d2bba52a4c1257638002f0fab?OpenDocument and <https://wcd.coe.int/ViewDoc.jsp?id=1644137&Site=COE> (29.07.2014).

⁷⁴ Published in the Journal of Laws of the Republic of Poland (Dziennik Ustaw) Dz.U.1995.108.528.

⁷⁵ Example of a request for return in EN:

http://www.bjp.ms.gov.pl/Data/Files/_public/bjp/konw_haska/zwrotdz_form/ang.pdf (29.07.2014).

⁷⁶ <http://bjp.ms.gov.pl/pl/ministerstwo/wspolpraca-miedzynarodowa/konwencja-haska-dot-uprowadzenia-dziecka/> (29.07.2014).

⁷⁷ Information provided by Judge Leszek Kuziak from the Division of International Law of the Ministry of Justice of the Republic of Poland, 5 December 2014.

⁷⁸ <http://ms.gov.pl/pl/dzialalnosc/mediacje/> (11.12.2014).

child has been abducted and not to the authorities of the State where the child had its place of habitual residence before the abduction took place.⁷⁹

4.13.8. Sensitive issues featured in national case law since 2012

In accordance with Article 11 paragraph 6 EU Regulation 2201/2003, "If a court has issued an order on non-return pursuant to Article 13 of the Hague Convention on Child Abduction, 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."⁸⁰

The most sensitive issue in the Polish judicial practice is the timely transmission of documents to the parties, particularly to the abducting parent. The abducting parent may deliberately conceal the place of residence to hinder the fulfilment of deadlines set forth in the Hague Convention on Child Abduction and EU Regulation 2201/2003 and prolong the proceedings with a view to preventing the issue of the court order. As already mentioned, the lapse of time and consequent integration of the child in a new environment are key arguments in favour of rejecting the request for return.

Pursuant to Article 472⁸¹ of the Polish Code of Civil Procedure, the court may summon the parties in a way that they consider to be the most effective, even without regard to the other provisions of the code, when it considers this necessary to accelerate the court proceedings. This Article specifically applies to requests for the presentation of personal records and other documentation with specific relevance for the resolution of the case.

4.13.9. Justifications for refusing to return a child relocated to Poland

The Hague Convention on Child Abduction aims at restoring the legal order prior to the unlawful abduction of the child, specifically by ensuring the rapid return of the child. The task of the court is to issue a decision about restitution and not to establish custody or relations between the parents. Pursuant to Article 12 paragraph 1 of the Convention, "the judicial or administrative authority of the Contracting State where the child is shall order the return of the child, when a period of less than one year has elapsed from the date of the wrongful removal or retention". Under Polish law, the proceedings under the Hague Convention on Child Abduction have priority over other family law proceedings. The court

⁷⁹ Postanowienie S du Najwy szego - Izba Cywilna, III CZP 72/2010, 20-10-2010: Decyzj o wydaniu dziecka bezprawnie uprowadzonego lub zatrzymanego podejmuje wladza tego pa stwa, do którego dziecko zostało wywiezione, a nie wladza pa stwa, w którym dziecko miało bezpo rednio przed wywiezieniem miejsce stałego pobytu (art. 12 Konwencji dotycz cej cywilnych aspektów uprowadzenia dziecka za granic , sporz dzonej w Hadze dnia 25 pa dziernika 1980 r. - Dz. U. 1995 r. Nr 108 poz. 528). Nie stanowi to przeszkody do orzeczenia na podstawie Kodeksu rodzinnego i opieku czego o miejscu zamieszkania dziecka.

⁸⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003R2201&from=EN> (29.07.2014).

⁸¹ Art. 472 § 1: S d mo e wzywa strony, wiadków, biegłych lub inne osoby w sposób, który uzna za najbardziej celowy, nawet z pomini ciem sposobów przewidzianych przez przepisy ogólne, je eli uzna to za niezb dne do przyspieszenia rozpoznania sprawy. Dotyczy to równie dor cze oraz zarz dze maj cych na celu przygotowanie rozprawy, zwłascza za dania przedstawienia niezb dnych do rozstrzygni cia sprawy akt osobowych i innych dokumentów. § 2. Wezwanie i dor czenie dokonane w powy szy sposób wywołuje skutki przewidziane w Kodeksie, je eli jest niew łpliwie, e doszło ono do wiadomo ci adresata.

temporarily suspends a divorce case during which the procedure for the return of a child has been initiated.⁸²

Even though the restitution of the unlawfully abducted child is the primordial goal of the Hague Convention on Child Abduction, in some cases the non-return of the child may be justified. Article 12, paragraph 2 of the Convention states that, "(...) even where the proceedings have been commenced after the expiration of the period of one year, the judicial or administrative authority shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment." Furthermore, Article 13(b) states that, "the judicial or administrative authority may refuse the return of the child if there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

As mentioned earlier, the provisions of the Hague Convention on Child Abduction are directly applied in the Polish legal system, with due regard to the UN Convention on the Rights of the Child. Article 3 paragraph 1 of this Convention grants primary consideration to the best interests of the child.⁸³ Polish legal practice does not explicitly define what constitutes "the best interests of the child". Definitions found in legal literature vary depending on the author and, as such, allow a certain degree of flexibility as to what can be understood by "best interests". The Family and Guardianship Code provides a contrario interpretation by stating that when the best interests of the child are threatened, the court will take appropriate action.⁸⁴ Furthermore, a threat to the best interests of the child may

⁸² Art. 598² § 1 sentence 2 Code of Civil Procedure: Je eli w trakcie sprawy rozwodowej zostało wszcz te post powanie o wydanie dziecka, które toczy si na podstawie Konwencji dotycz cej cywilnych aspektów uprowadzenia dziecka za granic , sporz dzona w Hadze dnia 25 pa dziernika 1980 r., s d rozwodowy z urz du zawiesza post powanie. Nakaz zawieszenia wynika tak e z art. 16 Konwencji, której przepisy stanowi cz krajowego porz dku prawnego i s stosowane w Polsce bezpo rednio. Przepis ten wył cza mo liwo decydowania merytorycznego przez s d, po otrzymaniu zawiadomienia o bezprawnym uprowadzeniu lub zatrzymaniu dziecka, o prawie do opieki dopóty, dopóki nie zostanie ustalone, i wymagania okre lone przez Konwencj co do zwrotu dziecka nie zostały spełnione lub je eli w odpowiednim czasie po tym zawiadomieniu nie wpłyn ł stosowny wniosek sporz dzony na podstawie Konwencji.

⁸³ In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

⁸⁴ Art. 109 Family and Guardianship Code: Je eli dobro dziecka jest zagro one, s d opieku czy wyda odpowiednie zarz dzenia. § 2. S d opieku czy mo e w szczególno ci: 1) zobowi za rodziców oraz małoletniego do okre lonego post powania, w szczególno ci do pracy z asystentem rodziny, realizowania innych form pracy z rodzin , skierowa małoletniego do placówki wsparcia dziennego, okre lonych w przepisach o wspieraniu rodziny i systemie pieczy zast pczej lub skierowa rodziców do placówki albo specjalisty zajmuj cych si terapii rodzin , poradnictwem lub wiadczy ch rodzinie inn stosown pomoc z jednoczesnym wskazaniem sposobu kontroli wykonania wydanych zarz dze ;2) okre li , jakie czynno ci nie mog by przez rodziców dokonywane bez zezwolenia s du, albo podda rodziców innym ograniczeniom, jakim podlega opiekun;3) podda wykonywanie władzy rodzicielskiej stałemu nadzorowi kuratora s dowego;4) skierowa małoletniego do organizacji lub instytucji powołanej do przygotowania zawodowego albo do innej placówki sprawuj cej cz ciow piecz nad dzie mi;5) zarz dzi umieszczenie małoletniego w rodzinie zast pczej, rodzinnym domu dziecka albo w instytucjonalnej pieczy zast pczej albo powierzy tymczasowo pełnienie funkcji rodziny zast pczej mał onkom lub osobie, niespełniaj cym warunków dotycz cych rodzin zast pczych, w zakresie niezbd nych szkole , okre lonych w przepisach o wspieraniu rodziny i systemie pieczy zast pczej. § 3. S d opieku czy mo e tak e powierzy zarz d maj tkiem małoletniego ustanowionemu w tym celu kuratorowi. § 4. W przypadku, o którym mowa w § 2 pkt 5, a tak e w razie zastosowania innych rodków okre lonych w przepisach o wspieraniu rodziny i systemie pieczy zast pczej, s d opieku czy zawiadamia o wydaniu orzeczenia wła ciw jednostk organizacyjn wspierania rodziny i systemu pieczy zast pczej, która udziela rodzinie małoletniego odpowiedniej pomocy i składa s dowi opiekun czemu, w terminach okre lonych przez ten s d, sprawozdania dotycz ce sytuacji rodziny i udzielanej pomocy, w tym prowadzonej pracy z rodzin , a tak e współpracuje z kuratorem s dowym.

See also order of the Polish Supreme Court: III CZP 48/92: Przyniesienie dziecka polskiego, zwi zane z przeniesieniem do innego kraju, mo e nast pi , je eli nie ma mo liwo ci umieszczenia go na równorz dnych warunkach w rodzinie zast pczej lub adopcyjnej na terenie Polski. W post powaniu tym

serve as legal ground for the court to limit, suspend or terminate one or both parents' parental authority.⁸⁵ When the best interests of the child are evaluated, the Polish court takes into account the wishes expressed by the child, provided that his or her degree of intellectual and physical maturity, as well as health justify such consideration.⁸⁶

In summary of the above, the justifications for refusing to return a child relocated to Poland are as follows:

- The child has settled in into his/her new environment and has established his/her centre of existence there (school, social life, sports, etc.),
- The return would place the child in an intolerable situation or expose him or her to physical or psychological harm,
- The return would be against the best interests of the child,
- The return would be against the will of the child who is intellectually and physically capable of reasonably expressing his/her views.

4.13.10. On-going projects of future legislation on children

In Poland, the most significant reforms in relation to the application of the Hague Convention on Child Abduction were implemented in 2000. The amendments addressed the implementing provisions of the Code of Civil Procedure (Art. 598¹ - 598²¹, Oddział 5 and Oddział 6) concerning the return of the child who is under parental authority and regulating contact with the child.

Since 2000 there has been a debate as to which of two points is more important and should be granted priority in legal doctrine and practice: the "best interests of the child" or the interests of the parent who is deprived of contact with the child. In relation to this topic, the issue of existing criminal sanctions for child abduction (Art. 211 Penal Code) was also discussed and critiqued. For now, no legislative changes have been proposed in relation to these issues.

Furthermore, there are no new calls for reforms or ongoing legislative action. The judicial authorities are satisfied with the existing regime.⁸⁷

decyduj ce znaczenie ma nadrz dny interes dziecka (art. 20 ust. 3 i art. 21 lit. b Konwencji o Prawach Dziecka, Dz. U. 1991 r. Nr 120 poz. 526).

⁸⁵ Art. 93 § 2 Family and Guardianship Code in relation to Art. 107 and 109-111 Family and Guardianship Code.

⁸⁶ Art. 576 § 2 Family and Guardianship Code: S d w sprawach dotycz cych osoby lub maj tku dziecka wyslucha je, je eli jego rozwój umyslwy, stan zdrowia i stopie dojrza o ci na to pozwala, uwzgl dniaj c w miar mo liwo ci jego rozs dne yczenia. Wysluchanie odbywa si poza sal posiedze s dowych.

⁸⁷ Confirmed by Judge Katarzyna Biernacka from the Division of International Law of the Ministry of Justice of the Republic of Poland, 29 July 2014.

National report accomplished by Katarzyna Jagodzinska on 29 July 2014.

Orders of the Polish Supreme Court:

Postanowienie SN z dnia 16 stycznia 1998 r. II CKN 855/97

Postanowienie SN z dnia 26 września 2000 r. I CKN 776/2000

Postanowienie SN z dnia 20 października 2010 r. III CZP 72/2010

Uchwała SN z dnia 10 listopada 1971 r. III CZP 69/71

Uchwała SN z dnia 21 listopada 1979 r. VI KZP 15/79 OSNKW 1980, Nr 1 poz. 2

Uchwała SN z dnia 7 sierpnia 1982 r. VI KZP 18/82 OSNPG Nr 10 poz. 137

Uchwała SN z dnia 12 czerwca 1992 r. III CZP 48/92

Uchwała SN z dnia 23 maja 2012 r. III CZP 21/2012

Wyrok SN z dnia 29 listopada 1999 r. III CKN 483/98

4.14. Romania

4.14.1. Statistical Assessment

4.14.1.1. Key statistical overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	3191 (2.3%)	9126 (6.4%)	5437 (2.9%)	4566 (4.2%)
International divorces	189 (0.6%)	328 (0.9%)	408 (1.1%)	456 (1.5%)
International divorces involving children	n/a	n/a	n/a	117

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	9	7	51	n/a
Outgoing return requests made under the Hague Convention	n/a	3	16	n/a

* Marriage and divorce figures based on centrally-collected Eurostat data, and may not correspond exactly to data provided directly to us by the relevant national statistical authority. Percentages indicate international marriages/divorces as a proportion of all marriages/divorces.

4.14.1.2. Available national data

As regards to international marriages and divorces, Romania's statistical authority has only provided us with certified data for 2012-2013. Data collected on international marriages and divorces do not include marriages where both spouses are foreign (probably because such cases are very rare and do not justify keeping records on them).

As regards to Hague Convention Abductions, the figures shown by INCASTAT and visible on the related website¹ allow the following comments.

In 1999, Romania received nine return applications and one access application. In 2003, Romania received seven incoming applications for return and no application for access rights. In 2008, Romania has received a total of 51 applications for return, out of which 43 from members to the Brussels II Regulation, and a total of two applications for access rights.

These figures show that the number of applications (for return and access) received by Romania before its accession to the EU is low. After 2007, such number increased significantly (the number of applications in 2008 is seven times higher than in 2003). This increase may probably be related to the increased mobility of Romanians abroad due to the (limited) free movement of persons applying to Romanian nationals in the EU member states after 2007.

Data concerning all kinds of child abduction (including non-Hague related) are provided in the section on "Existing criminal sanctions". As explained there, according to data provided

¹ http://www.hcch.net/index_fr.php?act=publications_details&pid=2852&dtid=32

by the Ministry of Justice website on the enforcement of the former art. 307 Penal Code (now art. 379, relating to the retention by a parent of his/her underage child, without the consent of the other parent), in 2009 a total of 1624 complaints for child abduction (both nationally and internationally) were filed with the prosecutors' offices, out of which penal procedures were commenced in 8 cases which were deferred to the relevant courts. In 2010, a total of 1895 complaints for child abduction (both nationally and internationally) were filed with the prosecutors' offices, out of which penal procedures were commenced in 16 cases which were deferred to the relevant courts.

The above mentioned data recorded by the Ministry of Justice on all child abduction is not retained on the same basis as that provided to INCASTAT in the 2008 Hague Convention Study; instead, it also includes non-Hcch abductions.

As these figures show, the number of complaints filed for all child abduction (both nationally and internationally) has increased by 17% from 2009 to 2010. However, only a very small number of individuals concerned by these complaints has been actually prosecuted according to penal law (0.5% in 2009 and 0.8% in 2010). In the large majority of cases, these acts did not qualify as a criminal offence. Such complaints have largely intervened in the context of marital disagreements which remained purely civil law issues. Even if the 2010 figures show that the number of prosecuted cases has doubled as compared to 2009 (16 procedures instead of 8), the absolute numbers concerning criminal repression of child abduction are still very low. These low figures seem also consistent with the INCASTAT figures concerning the previous years (see above).

4.14.2. The National legal framework

Romania ratified the 1980 The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction² on 20 November 1992, through Law No. 100/1992, with effect from 1 February 1993.

The implementing legislation consists mainly of Law No. 369 of 15 September 2004 (hereinafter "Law No. 369/2004") on the application of the Convention on the civil aspects of the international child abduction.

Law No. 369/2004 was modified in 2014, in response to certain criticism made with regard to the former legal framework. These amendments are discussed under section II.2.4 here below.

Romania is a party to the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, adopted on 19 October 1996³, since 1 January 2011. The convention was ratified through Law no. 361/2007 of 11 December 2007 (as rectified on 4 May 2010).

In addition, Romania ratified the United Nations Convention on the Rights of the Child of 1989, ratified through Law no. 18/1990, republished, the Convention on Contact concerning Children, Strasbourg 2003, through Law no. 87/2007 as well as the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (concluded 29 May 1993). It has also ratified the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children of 20 May 1980, ratified through Law no. 216/2003.

² http://www.hcch.net/index_en.php?act=text.display&tid=21

³ http://www.hcch.net/index_en.php?act=conventions.text&cid=70

4.14.3. Characterisation of Parental Child Abduction

4.14.3.1. General rules regarding parental responsibility and custody over the child

4.14.3.1.1. Parental responsibility

Parental responsibility and custody rights in Romania are regulated by the Civil Code (hereinafter "CC"). The general framework of parental responsibility is provided by Articles 483 et seq. CC.

Parental responsibility is defined by art. 483 CC as being the collection of rights and obligations with regard to both the child's person and possessions. These rights and obligations are equally incumbent on both parents. The same article further provides that parents should exercise parental authority exclusively in the child's best interests and that they should associate the child in the decision-making process with regard to decisions that concern him/her, in accordance with his/her age and mental development. Both parents are responsible for raising their underage children.

These provisions should be read together with those of article 487 CC, which provides that parents have the right and obligation to raise the child, assuming a caretaking role with regard to the child's physical health and development, his/her education, his/her instruction and professional training, in accordance with their intimate convictions and with the child's specific abilities and needs. They are responsible for providing the child with the guidance necessary for the adequate exercise of the rights bestowed on the child by law. The provisions of Art. 483 CC are applicable until the child acquires full legal capacity.

In case of disagreement between parents with regard to the exercise of parental responsibility rights and the fulfilment of the correlated legal duties, the court, after hearing the parents and taking into account the conclusions of a psycho-social enquiry report, shall decide in accordance with the best interests of the child. In such case, the hearing of the child is compulsory, as article 264 CC becomes applicable. Article 264 CC provides for the compulsory hearing of the minor child aged over 10 in the civil and administrative matters which concern him/her. The same article provides for the faculty of the competent authority to hear a child aged below 10 years, if that authority deems it necessary. The same provision further details the rights of the child to be heard and for his/her views to be considered in accordance with his/her age and maturity. It is noteworthy that Romanian courts refer to these rules when confronted with requests for return under the Hague Convention on Child Abduction.

As most legal regimes scrutinized by the court decisions we have studied provide for joint custody, the courts simply state that both systems of law provide for basically the same rules. We have no data on the approach courts would take in case of conflicting provisions.

4.14.3.1.2 Custody and rights of access (visiting rights)

The main applicable legal provisions are articles 397 et seq. CC and the Law no. 272/2004 on child protection.

Under Romanian law, both parents enjoy equal custody rights after their divorce, unless otherwise decided in court. Exclusive custody may be awarded to a sole parent, when serious grounds justify such decision, in light of the best interests of the child (article 398 § 1 CC). In this case, the other parent is entitled to supervise the manner in which the child is raised and educated, maintaining the right to consent to the child's adoption.

The child's residence following the parents' divorce is regulated by article 400 CC, which provides that, in the absence of an agreement by the parents or where such agreement is contrary to the best interests of the child, the court shall decide, when granting the divorce, that the child's residence shall be that of the parent with whom he/she has been living habitually (article 400 § 1 CC).

If the child has been living with both parents, prior to the divorce the child had been living with both parents, then his/her new residence shall be established by the court with due regard to the child's best interests (article 400 § 2 CC). Exceptionnally and only when it is in the best interests of the child, his/her residence may be designated as that of a grandparent or of another relative, or at a childcare institution (article 400 § 3 CC).

As provided by article 401 CC, the parent(s) who was/were separated from their child is/are entitled to have personal contact with the child. In case of disagreement between parents, the court determines how this right may be exercised in practice : inside or outside of the child's residence, inside or outside of the requesting parent's residence, in public places – such as at school, during vacations, etc. In such cases, the child must be heard, as 264 CC becomes applicable.

Romania has also enacted a special law concerning child protection (Law no. 272/2004). According to article 14 of this law, the child has the right to maintain personal relations and direct contact with his or her parents and relatives, as well as with other persons with whom the child has developed personal relations based on emotional attachment,, to the extent that this is not contrary to the child's best interests.

According to article 15 of Law no. 272/2004, personal relations may be maintained using the following modalities: a) meetings between the child and the parent or another person who, according to the Law, has the right to maintain personal relations with the child; b) visiting the child at his or her residence; c) hosting the child, for a specific period of time, by the parent or by another person with whom the child does not live on a regular basis; d) correspondence or any other form of communication with the child; e) sending the child information regarding the parent or other persons who, according to the law, have the right to maintain personal relations with the child; f) sending the parent or other persons who have the right to maintain personal relations with the child, information regarding the child, including recent photos, medical evaluations or school records. The law provides that sending information to the child the best interests of the child and any special legal provisions regarding confidentiality and dissemination of personal data should be observed.

According to article 16 of the same law, the child who as a result of a legal measure, has been separated from both of his / her parents or from just one of them, has the right to maintain personal relations and direct contacts with both parents, except when this is contrary to the best interests (article 16 § 1). The courts, considering the best interests of the child as a priority, can limit the exercise of this right, if there are compelling reasons, like the endangerment of the child's physical, mental, intellectual, moral or social development (article 16 § 2).

According to article 17 of the same law, a child whose parents reside in different states has the right to maintain personal relations and direct contacts with both of them, except when this is contrary to the child's best interests of (article 17 § 1).

4.14.3.2. Definition of parental child abduction

4.14.3.2.1. Legal basis

Romanian law defines unlawful parental child abduction by reference to the 1980 Hague Convention on Child Abduction. In practice, the courts refer to the definition given by article 3 of the Hague Convention on Child Abduction and, seldom, to the one given by the Bruxelles II Regulation. Their interpretation is discussed in section 3.2.2 below.

A complementary legal provision defining child abduction, national and international undistinctedly, is article 379 of the Penal Code⁴ (hereinafter "PC").⁵

⁴ Law No. 286/2009, in force since 1 February 2014, formerly Article 307

⁵ This reads as follows:

"Infringement of measures regarding custody of children

4.14.3.2.2. Relevant case-law

As a preliminary remark, it should be noted that, according to article 12 of Law no. 369/2004 as amended, all cases involving international parental child abductions are decided by the Bucharest County Court in the first instance, with a possibility to appeal its decisions before the Bucharest Court of Appeal⁶). Decisions on appeal are final. The centralization of procedures involving children has allowed a specialization of the relevant courts and thus contributed to a consistent jurisprudence on this matter.

When deciding parental child abduction cases, the courts have generally based their reasoning on the provisions of article 3 of the Hague Convention on Child Abduction, sometimes correlated with the corresponding provisions of the EU Regulation 2201/2003.

Firstly, concerning the applicable law, the courts have established that, in order to determine whether a child abduction prohibited by article 3 of the Convention has taken place, foreign law and the pertinent judicial or administrative court orders may be relied on, without resorting to specific procedures for the recognition of the court order passed abroad or of the alleged legal right⁷.

Secondly, the jurisprudence clarified that, according to article 3.2 of the Hague Convention on Child Abduction, such right may be conferred directly by the applicable national law, without it being necessary to possess a specific court ruling (or other administrative instance ruling) in this regard⁸.

It is noteworthy that the above-mentioned case law all refer to the Pérez-Vera Report⁹Hague Convention on Child Abduction.¹⁰

Thirdly, concerning the definition of international parental child abduction, the following caselaw is relevant:

- In a case from 2011, the Bucharest Court of Appeal has indicated that within the meaning of the Hague Convention on Child Abduction, the removal of a child by any of the holders of the joint parental responsibility right without the consent of the other holder is illegal. It further stated such actions are not illegal by virtue of the law, but by virtue of the infringement of the other holder's rights, which are equally protected by law and the exercise of which is disrupted by such actions¹¹.
- Courts have regularly decided that by bringing the child to Romania and refusing to return him/her to his/her place of habitual residence, the parental rights (where they are sufficiently proved under the applicable law) of the other parent are infringed, thereby falling under the provisions of article 3 of the Hague

(1)The retention by a parent of his/her underage child, without the consent of the other parent or of the person to whom the custody of the child has been attributed, shall be punished with imprisonment between one and three months or with a fine.

(2) The person to whom the custody of the child has been attributed and who repeatedly prevents any of the parents to maintain parental contact with the child in accordance with the rules established by the parties or by the competent authority, shall incur the same penalty.

(3) The criminal prosecution shall be commenced upon complaint".

⁶ See also the Romanian Supreme Court decision no. 1010 of 26 March 2014, which qualifies this procedure as an appeal ("apel"), which is devolutive, and not as a "recurs", which is not devolutive

⁷ Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 705 of 6 June 2011.

⁸ Bucharest County Court, 3rd Civil Division, civil judgment no. 1086 of 27 September 2005; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil judgment no. 148 of 4th February 2010 quashing a previous decision by the Bucharest County Court whereby the tribunal had considered that, in the absence of a court's decision or administrative decree, the parental responsibility of the petitioner had not been established, notwithstanding a legal provision which bestowed parental responsibility on both parents – see Bucharest County Court, 5th division, civil judgment no. 1234 of 4 November 2009.

⁹ Elisa Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, 1982 <http://www.hcch.net/upload/expl28.pdf>

¹⁰ According to which "The first source referred to in article 3 is law, where it is stated that custody ' may arise ... by operation of law'. That leads us to stress one of the characteristics of this Convention, namely its application to the protection of custody rights which were exercised prior to any decision thereon" (Hague Convention on Child Abduction Pérez-Vera Report, para. 68).

¹¹ Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil judgment no. 316 of 22 March 2011.

Convention on Child Abduction¹². Another similar decision had been pronounced, for instance, in 2006, by a Bucharest county court, which obliged the father to return the child to her habitual residence in Austria and to her mother, who had exclusive custody¹³. In another decision of 2005, the court had also decided that the child, raised by his parents in the United States of America in joint custody and brought to Romania by his mother without the father's consent, had to be returned to his father in the USA¹⁴. The infringement of the custodian parent's rights was also invoked in another decision of 2005, whereby the child had to be returned from Romania, where she had been taken by her mother, to Great Britain, where the custodian father lived¹⁵.

- it was similarly decided that the refusal to reintegrate the child in his/her habitual environment after a trip abroad, to which the parent enjoying parental responsibility had consented, is considered child abduction under article 3 of the Hague Convention on Child Abduction¹⁶.
- also, the Bucharest Court of Appeal explained that one of the key elements that should be considered in order to determine whether the removal of a child was illegal is the habitual residence of the child, which is an autonomous concept of European law and thus without an analogous provision under national law. Habitual residence should be determined on a case by case basis, in accordance with the factual circumstances presented before the court¹⁷.
- finally, in another decision, the Bucharest Court of Appeal decided that in the light of article 13 of the Hague Convention on Child Abduction and of the fact that the children had been living in Romania for three years, during which a cultural integration had taken place, the situation no longer constituted an international child abduction¹⁸.

In a similar decision of 2006, the same court had decided that, in applying articles 12 and 13 of the Hague Convention on Child Abduction, the bringing of two children from Israel to Romania by their mother in an attempt to escape the father's blatantly violent behaviour¹⁹ does not qualify as child abduction in the sense of article 3 of the Hague Convention on Child Abduction²⁰.

In another case, the application for return was denied by the court based on the child's refusal to be returned, as understood by article 13 of the Hague Convention on Child Abduction. In that instance, the children, aged 16 and 13, had been heard by the court and had confirmed their refusal to follow their father back to Hungary, mainly because of the latter's inappropriate behaviour towards the family, of the poor living conditions they had in Hungary as compared to the maternal grandparents' house in Romania and of the close relationship they had with their mother²¹.

Law no. 272/2004 on the protection and promotion of the rights of the child provides that all public authorities or authorized private institutions, as well as the natural and legal persons responsible for child protection, must observe, promote and guarantee the rights of the child, as stipulated by the Constitution and the law, in accordance with the provisions of the UN Convention on the Rights of the Child (article 1 § 2). It also provides for the general principle according to which the best interests of the child takes priority over the rights and

¹² Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil judgment no. 211 of 15 February 2010

¹³ Bucharest Sector 1 Court, civil decision no. 4606 of 21 June 2006

¹⁴ Targoviste County Court, civil decision no. 1038 of 10 March 2005.

¹⁵ Bucharest County Court, civil decision no. 1372 of 24 November 2005.

¹⁶ Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil judgment no. 231 of 18 February 2010; Bucharest Sector 1 Court, civil decision no. 4606 of 21 June 2006.

¹⁷ Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil judgment no. 96 of 26 January 2010.

¹⁸ Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 107 of 28 January 2010.

¹⁹ In that case demonstrated by a court injunction handed down in Israel which prohibited the father from coming within 100 metres of the children and the mother.

²⁰ Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil judgment no. 868 of 22 June 2006.

²¹ Bucharest County Court, 5th Civil Division, civil decision no. 830 of 16 August 2005.

duties of the child's parents, legal guardians, or other persons legally responsible for him or her (article 2§1).

Importantly, article 14 of this law provides that the child has the right to maintain personal relations and direct contacts with his or her parents, relatives, as well as with other persons with whom the child has developed relations based on attachment. The child has the right to meet his or her relatives and to maintain personal relations with them, as well as with other persons with whom the child has enjoyed a family life, to the extent that this is not contrary to the best interests of the child.

As for the parents or other persons who are legally responsible for the child, they may not prevent the personal relations of the child with his or her grandparents, brothers and sisters, or with any other persons with whom the child has enjoyed a family life, except when a court of law so decides, assessing that there are strong reasons based on endangerment to the child's physical, mental, intellectual or moral development (article 14 § 3 of the law).

article 15 of the law provides for the modalities through which personal relations may be achieved (see also above).

Law no. 248/2005 concerning the free movement abroad of Romanian citizens, in article 30 prescribes the conditions under which a minor of Romanian nationality may be allowed to leave the country (customs control procedures), if he/she is not accompanied by both parents. According to this article, unless the accompanying parent can prove that he or she has sole custody over the child, he/she must produce written consent from the other parent concerning the trip and confirming the destination and relevant dates.

4.14.4. Existing criminal sanctions

AS per article 379 of the Penal Code²² article, the infringement of measures regarding custody of children consisting in the retention by a parent of his/her underage child, without the consent of the other parent or of the person to whom the custody of the child has been attributed, is punishable by imprisonment between one and three months or by a fine.

According to data provided by the Ministry of Justice's website²³ regarding enforcement of the former article 307 PC²⁴ article, in 2009 a total of 1624 child abductions were reported (both nationally and internationally). For 2010, 1895 cases were reported. Criminal proceedings were commenced by the prosecutors in 24 cases, which were deferred to the relevant courts.

The abovementioned data includes all child abduction cases for 2009 and 2010 (also non-Hague related child abductions).

According to the figures collected by the Incastat: in 1999, Romania received nine return applications and one access application; in 2003, it received seven incoming applications for return and no application for access rights; in 2008, it has received a total of 51 applications for return, out of which 43 from members to the EU Regulation 2201/2003, and a total of two applications for access rights²⁵.

A complementary provision which may be of interest if the circumstances call for it, is the one contained in article 197 of the Penal Code, which incriminates mistreatment with regard to minor children. Mistreatment is defined as being the serious jeopardizing of

²² Law No. 286/2009, in force since 1 February 2014; former Article 307 PC.

²³ <http://www.just.ro/>

²⁴ Now article 379 PC.

²⁵ http://www.hcch.net/index_fr.php?act=publications_details&pid=2852&dtid=32

the physical, intellectual or moral development of the child, through any kind of measures or treatment by parents or by the caretaker. Mistreatment is punishable with imprisonment from 3 to 7 years and the prohibition to exercise certain parental rights.

4.14.5. Compensation for the parent left behind

A civil fine between RON 2.500 and RON 12.500 may be ordered under Art 11 § 2 of Law n° 369/2004, in the case of refusal to perform the return obligation within the time limit set by the court. This provision has frequently been invoked by the courts²⁶;

Daily penalties ("daune cominatorii") may also be applied in case of violation of rights to access (visiting rights). article 905 of the Code of Civil Procedure contains in this regard a provision entitling the enforcement court to apply penalties when the debtor of the obligation is refusing to abide by the court order. In this respect, one case of a county court is noteworthy, whereby the mother was required to pay a daily penalty until due performance of the court order granting visiting rights to the father²⁷.

The main rules in the field of civil damages are provided in Chapter IV of the Civil Code (CC), which regulates tort liability ("raspunderea civila delictuala").

The general rule in the field is provided by article 1349 CC which provides that every person has a duty to follow the conduct rules set by law or by local customs and to abstain from infringing through his/her actions or omissions the rights and legitimate interests of other persons. The person having discerning ability who breaches this duty, shall be liable for all resulting damages, and will be obliged to reparation in full.

article 1381 (1) CC further provides that any injury or loss entails the right to obtain compensation. According to article 1385 CC, compensation should cover the entire damage, unless otherwise provided by the law. Compensation should account for the incurred damage, for the lost profit and for the expenses incurred in order to avoid or limit the damage.

In the practice we reviewed, no material damages have been awarded in court. No information is available on whether material damages were claimed.

According to article 453 of the Code of Civil Procedure (hereinafter "CCP"), costs shall be awarded to the winning party, upon request.

In practice, courts have awarded such legal costs²⁸.

article 189 CPC provides that any person, who deliberately or by negligence obstructs the normal sequence of the procedure, thus causing a delay in the proceedings, may be ordered to compensate the material or moral damage caused by the resulting delay. The faulty or negligent acts or omissions which may be sanctioned by the application of this provision are listed, limitedly, by articles 188 and 187 CPC.

In this regard, we note a ruling by the Bucharest County Court, deciding that a request for clarification of the court's ruling filed by a defendant who had benefitted from legal aid constituted an abusive exercise of procedural rights, within the meaning of article 723 (1) of the Civil Code of Procedure. This request, in reality, was considered to have been

²⁶ See e.g. Bucharest County Court ruling of 12.06.2013, case no. 15072/3/2013, in which it was also ordered that the defendant incur all costs necessary for the return of the child to his/her habitual residence; see also Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 705 of 6 June 2011.

²⁷ Galați County Court of 1st instance, Civil Division, judgment no. 741 of 10 April 2012.

²⁸ E.g. Bucharest County Court, 5th Civil Division, judgment no. 25724/3/2007 of 13 March 2008, awarding costs of RON 5159,5 in favor of the defendant; Bucharest Court of Appeal decision no. 889/2013 of 3 June 2013, awarding RON 2900 in favor of the defendant

intended to delay the final settlement of the case, given that the time limit to return the child starts running from the date when the decision subject to clarification remains final²⁹.

article 1349 CC prescribes compensation for moral damages.

The Romanian Supreme Court has defined the immaterial damage as a distinctive form of damage, which is closely related to the person, in the sense that it affects the person either in its physical and mental integrity or in its affective feelings.

In determining the extent to which moral damage deserves compensation, courts have generally relied on the guidance given by the ECHR, relating mainly to the proportionality of the compensation with the seriousness of the damage³⁰.

4.14.6. Enforcement methods

Responsibility for the enforcement of court orders falls in the first instance on enforcement officers (as per article 623 CPC and Law no. 188/2000 on Enforcement Officers).

The Ministry of Justice, in its capacity as Central Authority designated for the enforcement of the Hague Convention on Child Abduction, also has important duties, which are provided in Regulation of April 5th, 2005 (on the functioning of the Ministry of Justice in its capacity as Central Authority concerning the civil aspects of international child abduction).

In accordance with article 14 (5) of Law no. 369/2004, combined with article 910 CPC, the enforcement must be carried out in the presence of a representative of the General Direction of the Child Protection Division which is territorially competent, and, if the General Direction of the Child Protection Division believes it to be necessary, in the presence of a psychologist. The enforcement officer may request the assistance of the police department, which shall provide their assistance with priority.

Other authorities that may incidentally be solicited for the enforcement of different procedural orders are:

- the General Directorate for Passports (a unit of the Ministry of Internal Affairs)
- the General Inspectorate for Immigration (a unit of the Ministry of Internal Affairs)
- the Police and
- the Gendarmerie.

Finally, the provisions of article 626 CPC should also be mentioned. In accordance with this article, State agents shall ensure the prompt and effective enforcement of court decisions and other enforceable orders. In addition, they shall be liable for any damages resulting from a refusal to enforce.

The parliamentary debates and the case-law we reviewed show the following recurring problems encountered with respect to enforcement:

- Lack of specific provisions regulating the return procedure³¹;
- Length of the procedure³².

²⁹ Bucharest County Court, 4th Civil Division civil judgment no. 2102 of 25 November 2011, case no. 64634/3/2011.

³⁰ See e.g. Ploiesti Court of Appeal – Commercial, Administrative and Tax division, Decision no. 676 of 20 April 2010.

³¹ See e.g. Bucharest County Court – 4th Civil Division, civil judgment no. 2102/25.11.2011, case no. 64634/3/2011; see also Romanian Parliament, Explanatory memorandum to Law no. 63/2014 concerning the amendment of Law no. 369/2004 on the enforcement of the Hague Convention on Child Abduction.

4.14.7. Sensitive issues featured in national case law

The case-law we reviewed shows that provisions of the Hague Convention on Child Abduction which have been most discussed before Romanian courts are articles 3 and 13. The main decisions have been presented under chapter 3.2.2 here above.

The provisions of articles 2 and 24 of the EU Regulation 2201/2003 were sometimes discussed.

The main issues concerning the application of the Convention are:

- the assessment of the child's best interest;
- the child's possibility to adapt or re-adapt to his environment in case of return;
- the length of the procedures;
- the disrespect of the non-custodian parent's right of access;
- the non-custodian parent's right to be heard.

Most of these issues were brought before the ECHR and are discussed here below.

- In the case of *Blaga v. Romania*³³, the ECHR found that that the domestic courts had not sufficiently balanced the applicant's interest of a right to family life against the competing interest of the other parties in the case and therefore had not sufficiently protected the best interest of the children as defined in the light of the Hague Convention on Child Abduction principles. In particular, the Court noted that when assessing the risks entailed by a potential separation of the children from their current environment, the last-instance court concluded that it amounted to a serious risk for them, without giving any express consideration to the issue of whether the children could quickly re-adapt to a return in the country where their habitual residence was (the U.S.). The ECHR further criticized the national courts for not attempting to examine if it would have been possible for the children to return to the U.S. accompanied by their mother and whether arrangements could have been made within the legal framework of the State of habitual residence or following agreements with the father for them to live together, separately from their father, pending the outcome of divorce and custody proceedings, and consequently whether such arrangements would have alleviated the serious risks mentioned by the court.

In addition, the Court noted that a period of more than 13 months elapsed from the date on which the applicant lodged his request for the return of the children to that on which the final decision was taken. The Court noted in this regard that the appellate court had quashed the judgment of the first-instance court on account of procedural flaws which had been independent of the applicant's actions. Also, the domestic authorities had allowed for a month and several days to lapse before they had re-registered the case on the first-instance court's docket. In addition, it noted that the first-instance court had held the first re-hearing of the case only one month and several weeks after the file had been re-registered on its docket. Consequently, the Court considered that the domestic authorities failed to act expeditiously in the proceedings to return the children, manifestly in breach of the applicable law.

The Court emphasized that a change in the relevant facts may exceptionally justify a decision to deny the petition for return of the children, when that change was not brought about by the State's actions or inactions.

³² See Romanian Parliament, Explanatory memorandum to Law no. 63/2014 concerning the amendment of Law no. 369/2004 on the enforcement of the Hague Convention on Child Abduction; see also ECHR decisions mentioned in chapter 5 here below.

³³ Application no. 54443/10, Judgment of 1 July 2014

Other important decisions in cases where Romania was a requested party are shortly summarized here below³⁴.

- In *LaFargue v. Romania*³⁵, the Court ruled unanimously that Romania had breached article 8 of the ECHR in failing to take adequate measures to ensure respect for the father's right of access over a period of 6 years. The Court also made an award of compensation to the father under article 41 of the ECHR.
- In *Raban v. Romania*³⁶, the Court noted that it could not question the assessment of domestic authorities unless there was clear evidence of arbitrariness. There was no such evidence of arbitrariness in that case; on the contrary, the Appellate Court had examined the case and given a judgment paying particular consideration to the principle of the paramount interests of the children— who had been very young when they left Israel, and who now appeared to be very well integrated into their new environment. Consequently, there was no reason to depart from the findings of the domestic Court of Appeal.
- In *Karrer v. Romania*³⁷, the Court questioned the depth of the domestic Court's assessment of the child's best interests. The Court noted that no attempt had been made to contact the father to hear his position. The witness testimonies considered by the domestic courts only consisted of declarations of the mother and her parents, while the welfare report produced by the Custody Service mainly restated the mother's allegations of domestic violence and her reasons for departure. Thus, the Court concluded that the analysis conducted by the domestic authorities to determine the child's best interests was not sufficiently thorough.

The Court recalled that the EU Regulation 2201/2003 (Art 11 § 3) requires courts being seized of return petitions to act expeditiously and, except where exceptional circumstances made this impossible, to issue judgment no later than six weeks after the application had been lodged. The Court noted that no satisfactory explanation had been put forward by the Romanian Government with regard to the 11 months which had elapsed in the conduct of the proceedings before the Court of first-instance and the instance of appeal.

- In *Iosub Caras v. Romania*³⁸, the ECHR held that by failing to inform the divorce courts of the existence of the Hague proceedings, the authorities, in particular the Ministry, deprived the Hague Convention of its very purpose, that is to prevent a decision on the merits of the right to custody being taken in the State of refuge; also, the time it took for the courts to adopt the final decision in the present case failed to meet the urgency of the situation.

Finally, we note an interesting decision which was rendered by the Bucharest Court of Appeal in 2010, quashing a lower court decision for disregard of the order of precedence between international conventions and the national legal provisions. The Court noted that the provisions of article 16 of the Hague Convention on Child Abduction prohibit member States from taking any decision with regard to the custody of the child before determining whether the child should be returned to his/her habitual residence. The Court recalled that provisions of the international conventions to which Romania is a party take precedence over national law³⁹.

³⁴ A complete list of relevant cases is available on <http://www.incadat.com>

³⁵ Application No. 37284/02, Judgment of 13 July 2006.

³⁶ Application No 25437/08, Judgment of 26 October 2010.

³⁷ Application No 16965/10, Judgment of 26 October 2010.

³⁸ Application No. 7198/04, (2008) 47 E.H.R.R. 35, Judgment of 27 July 2006.

³⁹ Bucharest Court of Appeal, 3rd Division, 3rd Civil Juvenile and Family Division, civil decision no. 211 of 15 February 2010, case no. 228/2010.

4.14.8. The child's best interests as "absolute" main goal of the regime

While the effectiveness of the return mechanism is considered to be the main goal of the Hague Convention on Child Abduction and is certainly taken into consideration by the Judges and the legislator, courts are more inclined to give absolute precedence to the best interests of the child. This seems to be the overarching goal of the Romanian court practice.

This main goal is emphasized by article 2 and 3 of Law no. 272/2004 on child protection.⁴⁰

Other indications in this regard are offered by the following case law:

- "The entire national legislation in the field provides that any measures concerning children, including measures taken by the court, should be based on a full compliance with the child best interests principle – a principle which is given consideration by the provisions of the Hague Convention on Child Abduction of 1980" [translated]⁴¹.
- "It results, thus, from the systematic interpretation of national law and international law provisions that contracting States accord significant protection to children's best interests, to their physical and mental development and, within this context, to family life, where this is understood as an actual bond, and not as strictly biological connection" [translated]⁴².
- "The Court notes that the procedure instituted by the Hague Convention on Child Abduction is grounded precisely on the child's best interests principle, being absolutely necessary that holders of custody rights exercise such rights in good faiths and in the child's best interests" [translated]⁴³.
- "The celerity of such a procedure should not negatively impact the other due process requirements, which could in turn, negatively impact on the child's best interests" [translated]⁴⁴.

⁴⁰ Article 2 reads as follows:

- "(1) The present law, any other regulation enacted in the field of the respect and promotion of children's rights, just as any other legal act issued or, as the case may be, concluded, in this field, gives precedence with priority to the best interests of the child.
- (2) The best interests of the child are circumscribed to the child's right to a normal physical and moral development, to a social and affective balance and to family life.
- (3) The child's best interest principle should be given deference with relation to the rights and obligations incumbent upon parents, other legal representatives and any other persons to whom the child is given for caretaking.
- (4) The child's best interest principle shall be given deference by any measures and decision regarding children, undertaken by public officers and by authorized private entities, as well as by court rulings.

[...]" Article 3 reads as follows:

"The provisions of this law are applicable to:

- a) children who are Romanian nationals on the Romanian territory;
- b) children who are Romanian nationals abroad;

[...]

e) children who are foreign nationals on the Romanian territory, in confirmed emergency situations [generally circumstances where the child is abandoned or abused], within the meaning of this law, by the competent Romanian authorities".

⁴¹ Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 705 of 6 June 2011.

⁴² Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 231 of 18 February 2010.

⁴³ Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 1034 of 5 June 2011.

⁴⁴ Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 96 of 26 January 2010.

4.14.9. The effectiveness of the return

This goal has notably been acknowledged by the procedure instituted for the settlement of abduction cases, which, unlike other procedures does not include an appeal on the merits phase (“apel”). The judgments rendered by the court of first instance (which, as already mentioned, is always the Bucharest County Court), are subject only to an appeal on points of law (non-devolutive appeal; “recurs”) before the Bucharest Court of Appeal. A decision rendered by the Court of Appeal is final and enforceable.

This absence of a second degree jurisdiction has been challenged before the Constitutional Court, which has dismissed the unconstitutionality exception, stating that the choice made by the legislator is justified by the celerity requirement applicable in such cases⁴⁵.

It is noteworthy that the Romanian legislator took into consideration the criticism expressed notably by the ECHR (see chapter 5 here above), and recently enacted several amendments to Law no. 369/2004 concerning the enforcement of the Hague Convention on Child Abduction. Such amendments were published in the Romanian Official Gazette on 13th May 2014 and entered into force 3 days later. As far as the effectiveness of the return is concerned, the main improvements concern the significant shortening of the applicable deadlines during the whole procedure, which are presented below.

4.14.10. Criteria to assess the “best interest of the child”

Law no. 272/2004 on child protection has recently defined these criteria as follows:

“Art 6

When determining the child’s best interests, the following shall be given consideration:

- a) physical and mental development needs, education and health needs, security and stability needs, and belonging needs in relation to the family;
- b) the child’s view, in accordance with his/her age and maturity;
- c) the child’s history, having regard in particular to any abuse, neglect, exploitation or any other form of violence towards the child, as well to potential dangerous situations which may arise in the future;
- d) the parents’ or caretakers’ capability to raise and care for the child and to respond to his /her actual needs;
- e) the continuation of personal contact with individuals to whom the child has become [emotionally] attached”.

In order to define the best interests of the child, legal scholars refer mainly to the UN Convention on the Rights of the Child, ratified through Law no. 18/1990, republished.

Legally, the best interests of the child are configured according to the assembly of the child’s fundamental rights. Typical examples of such rights are the right to life, the right to physical and mental integrity, right to identity, freedom of expression, freedom of thought, right to protection against any form of violence, harm, psychological or physical abuse, abandonment, lack of care, the right to education etc.⁴⁶

⁴⁵ Constitutional Court of Romania, Decision no. 947/2011 on the constitutionality of the provisions of article 12 § 2 of law no. 369/2004.

⁴⁶ A Bacaci, V.-C. Dumitrache, C. Hageanu, Dreptul familiei, Ed. All Beck, 4th ed., Bucharest 2005 ; I.P. Filipescu, Tratat de dreptul familiei, 8th ed. revised, Ed. Universul Juridic, Bucharest 2006; D. Titian, A. Constantin, M. Carstea, Codul familiei adnotat, Ed. Hamangiu, Bucharest 2007.

The legislators' silence with regard to a definition of the concept of the child's best interest is understandable, in view of the magnitude of its legal as well as sociological, psychological, social and economic consequences. The determination by law of this concept's content would be an almost impossible task and, due to its complexity, such determination would have probably been incapable of encompassing all the aspects that should be taken into account when the best interests of the child are under scrutiny. The evaluation depends on the evaluator, on the child who is being evaluated and on factual aspects which need to be considered when the child's wellbeing is examined.

This means that, on the one hand, the person who is called to apply the law and to fulfill those duties that lead to the implementation of child's interests should determine the best interest of the child and the measures which are best fit to fulfil those interests. A second conclusion, which is the result of the former, is that the concept of the child's best interests, beyond the limits of the fundamental rights which are inherent to every person, is a concept the content for which should be defined with respect to each child: the best interests differ in accordance with the singularity of each minor child: his/her age, physical development, state of health, intellectual development, character, sensitivity, affective bonds, gifts and aptitudes, socio-moral and material profile of the environment where the child was born and raised, family ties etc. Put differently, each child is a universe in himself/herself, each child's best interests should be determined concretely and individually, not in general and in abstract terms. The "rules" of his/her evolution should be set for him/her only, and not by following predefined models. Not least, the child's best interests should be determined in accordance with the context where this issue arises, that being the matter for which they are being analyzed: the establishment or adjustment of protection measures, the establishment of a maintenance allowance, changes of the educational and scholar paths followed until then, the approval of the minor child's marriage etc⁴⁷.

The child's best interests should be determined in accordance with the Law, which means that the child's best interests cannot prevail over contrary legal provisions⁴⁸.

The child's best interests are discussed by scholars also as a matter of social responsibility. A public dimension of the interest shown to the child's wellbeing is identified. The authority which is called to determine whether in a certain case the child's best interests were observed or which is the best measure for a certain child, should observe whether the specific living environment offers the minor child moral, legitimate and ethical behavioral benchmarks and whether the child is raised and educated in accordance with generally accepted values – respect for life, for freedom, is law abiding, observance of other persons' civil rights, as well as with moral values such as honesty, uprightness, compassion, dignity etc. For instance, when the child is raised in a family practising extreme cruelty towards animals, or where fascism or race superiority theories are praised, or where the adults in the family "teach" the child how to commit crimes (theft, [illegal] use of weapons, kidnapping, counterfeiting etc.) or where the child's access to education or to medical care is prevented, the judicial authority is entitled to issue orders for protective measures with regard to the child and the withdrawal of parental responsibility⁴⁹.

The public dimension of the interest in the child's wellbeing is reflected by the provisions of article 5 of Law no. 272/2004, which provide that in addition to the parental responsibility, a residual responsibility for the child's upbringing and education is borne by the local community to which the child and his/her family belong⁵⁰.

⁴⁷ Cristina Irimia, in *Noul Cod Civil – Comentariu pe articole* [The New Civil Code – Commentary Article by Article], Ed. C.H. Beck, 2012, p. 482 s.

⁴⁸ I.P. Filipescu, *Tratat de dreptul familiei*, 8th ed. revised, Ed. Universul Juridic, Bucharest 2006, 682.

⁴⁹ Cristina Irimia, in *Noul Cod Civil – Comentariu pe articole* [The New Civil Code – Commentary Article by Article], Ed. C.H. Beck, 2012, p. 482 s.

⁵⁰ Cristina Irimia, in *Noul Cod Civil – Comentariu pe articole* [The New Civil Code – Commentary Article by Article], Ed. C.H. Beck, 2012, p. 482 s

The violation of the child's best interests by his/her parents, while exercising parental responsibility, may be punished through the withdrawal of parental responsibility in accordance with article 508 New Civil Code.

4.14.11. Relevant case law

- In one case, the Bucharest Court of Appeal denied the father's right to the return of the child at the habitual residence, on the ground of article 13 of the Hague Convention on Child Abduction. The Court considered a written certificate from the First Aid service at the place of the habitual residence, the social enquiry investigation report drawn by the Romanian social assistants, the characterization made by the kindergarden direction in Romania and the psychological evaluation report which mentioned the presence of subconscious anxiety related to domestic violence in the habitual residence as well as the display by the mother of symptoms present in emotionally abused women⁵¹.
- In another decision, the Bucharest Court of Appeal decided that in light of article 13 of the Hague Convention on Child Abduction and of the fact that the children had been living in Romania for three years during which a cultural integration had taken place, the situation no longer constituted an international child abduction. It concluded that the return of the children to their habitual residence would not be in their best interest, and would have a traumatizing effect on the children⁵².
- In another case, the Court of Appeal stated that it may not be deemed to be in the child's best interests to legitimize a situation which is based on an injustice, namely the refusal by the mother to return the child, thereby clearly breaching the father's rights of custody over the child. This was because these were granted upon him by the soliciting State's law and by the applicable international provisions⁵³.
- The Bucharest County Court decided that the child has the right to return to her habitual residence, considering that this would reestablish a situation that both parents initially deemed as being in the child's best interests, prior to the removal of the child, without questioning through this return the merits of the custody procedure⁵⁴.
- The Bucharest Court of Appeal's established practice seems to be that of dismissal of the article 13 exception when the evidence produced does not show a serious risk of physical or emotional harm⁵⁵.

4.14.12. Existing critics and comments on the legal rules in force

Criticisms with regard to the regime have brought about the recent enactment of Law no. 63/2014 amending Law no 369/2004 concerning the enforcement of the Hague Convention on Child Abduction. As this law entered into force in May 2014, it is too early to provide an evaluation of the newly reformed regime.

Among the problems encountered with the former regulation, the preparatory work for the enactment of Law no. 63/2014 cited the following aspects of the Hague Convention on Child Abduction⁵⁶:

⁵¹ Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 705 of 6 June 2011.

⁵² Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 107 of 28 January 2010.

⁵³ Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 231 of 18 February 2010.

⁵⁴ Bucharest County Court, 3rd Civil Juvenile and Family Division, civil decision no. 705 of 6 June 2011.

⁵⁵ See e.g. Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 211 of 15 February 2010; Bucharest Court of Appeal, 3rd Civil Juvenile and Family Division, civil decision no. 148 of 4 February 2010.

- Lack of impartiality of the Ministry of Justice, which acted both as representative of the petitioner residing abroad before Romanian courts and as Central Authority, in charge, in particular, with finding an amicable settlement to the dispute;
- Lack of clarity with regard to the attributions of the Ministry of Justice in its capacity as representative of the petitioner residing abroad before Romanian courts;
- Length of the procedures, partly due to: long time limits granted by courts for the voluntary performance of the return obligation; the compulsory participation of the Tutelary Authority to the trial;
- Incompatibility between the provisions of Law 369/2004, according to which the Bucharest County Court and the Bucharest Court of Appeal have material jurisdiction concerning transnational requests rights of access, and the common provisions of procedural law, according to which the judecatorie (district court) has material jurisdiction with regard to requests for visiting rights, whether national or transnational.

The main reforms undertaken through the enactment of Law no. 63/2014 in May 2014 are the following:

- Representation of the petitioner residing abroad by a Romanian lawyer under the judicial assistance regime (except where the petitioner choses private representation by a lawyer of his/her choice);
- Immediate authorization of the enforcement of a court decision on preventive measures of child protection or on provisional measures;
- Significant restriction of deadlines (time limits) granted by courts for the voluntary performance of the return obligation ;
- Rendering optional the participation of the Tutelary Authority to the trial, in view of the fact that the Ministry of Justice would be the guarantor of the child's best interests;
- Institution of a summary procedure, where oral debates and oral evidence is limited;
- Institution of measures which aim to preclude the repeat of an illegal moving of the child, in particular, the retention by the court of the child's passport while the case is pending;
- Institution of coercive measures against the debtor of the return obligation, in particular the increase of the civil fine amount;
- Institution of a national procedure for the enactment of article 11 §§ 6 and 7 of Regulation n° 2201/2003;
- Unifying of the rules governing material jurisdiction with regard to transnational requests for rights of access.⁵⁷

⁵⁶ See Romanian Parliament, Explanatory memorandum to Law no. 63/2014 concerning the amendment of Law no. 369/2004 on the enforcement of the Hague Convention on Child Abduction.

⁵⁷ Report written by Aladar Sebeni, Ph.D, and Madalina Diaconu, Ph.D, on 12 December 2014.

4.15. Slovakia

4.15.1. Statistical Assessment

4.15.1.1. Key statistical overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	n/a	3300 (11.8%)	3659 (13.3%)	3570 (13.7%)
International divorces	n/a	178 (1.6%)	256 (2.1%)	296 (2.7%)
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	n/a	n/a	52	61
Outgoing return requests made under the Hague Convention	n/a	n/a	107	79

* Marriage and divorce figures based on centrally-collected Eurostat data. Percentages indicate international marriages/divorces as a proportion of all marriages/divorces.

4.15.1.2. Key statistical overview

The number of international abductions of children from the Slovak Republic is 25 incoming cases and 28 outgoing cases in 2013, according to statistics of the Slovak Center for International Legal Protection of Children in Bratislava.

For the development of international abductions of children in Slovakia, see table below:¹

Year	Abducted to Slovakia	Abducted from Slovakia	Total registered abductions
2002	3	7	10
2003	9	14	23
2004	12	23	35
2005	15	37	52
2006	22	58	80
2007	30	73	103
2008	52	107	159
2009	32	61	93
2010	56	89	145
2011	41	58	99
2012	61	79	140
2013	25	28	53

¹ All information made according to annual reports of The Center for the International Legal Protection of Children and Youth

Other statistical data especially on marriages and divorces with foreigners are not provided.²

4.15.2. The national legal framework

Slovakia has ratified the UN Convention on the Rights of the Child³ as well as the Hague Convention.⁴ Child abductions from one EU Member State to another fall under EU Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Another international document in force is the European Convention on the Exercise of Children Rights.⁵ Article 6 of the Convention on the Civil Aspects of International Child Abduction requires each Contracting State to designate a Central Authority to discharge the duties which are imposed by the Convention upon such Authorities. Article 7 of the Convention obliges Contracting States to co-operate with each other and to promote co-operation their relevant national authorities to secure the prompt return of children and to achieve the other objects of the Convention. This provision also contains a list of appropriate measures to be taken by the Central Authorities. In the Slovak Republic, the tasks of the Central Authority are exercised by the Center for International Legal Protection of Children in Bratislava (Centrum pre medzinárodnoprávnu ochranu detí a mládeže Špitálska ul. . 8, 814 99 Bratislava). The Center has 17 employees, nine lawyers, a psychologist, a social worker and five administrative employees.⁶

Legal norms of relevance to international child abductions involving in the Slovak Republic can also be found in national material and procedural law (mainly in the Civil Code, Family Law and Penal Code), in EU Regulation 2201/2003 and in the other above-mentioned international conventions, which are an integral part of the Slovak legal order.

According to Slovak family law, parental responsibility belongs⁷ to both parents.⁸ If one of the parents is no longer alive, is unknown or does not possess the full capacity to carry out legal acts, all parental responsibility goes to the other parent.⁹ The court may suspend, limit or divest on parental of responsibility only under the circumstances provided by law.¹⁰ The right to the upbringing and care for a child is only one of several rights and responsibilities which fall under parental responsibility.¹¹ Unless the parental responsibility of the parent who is not the primary caregiver of the child has been withdrawn or limited, such parent is further entitled to make decisions on fundamental matters concerning the child.¹²

District courts are the courts having general jurisdiction in cases concerning parental responsibility.¹³ Therefore, in these cases, the district court for the area of the child's residence will have jurisdiction. Prior to issuing its final decision, the court may, by means of a preliminary ruling, order the defendant to give the child over to the care of the other parent or another individual determined by the court.¹⁴ It is possible to appeal the district court's decision on parental responsibility within fifteen days after the delivery of the

² See Statistical Office of the Slovak Republic : <http://slovak.statistics.sk/> <10.12.2014>

³ In Slovak Collection of laws No. 104/1991.

⁴ In Slovak Collection of laws No. 119/2001.

⁵ In Slovak Collection of laws No. 54/2001.

⁶ Source: Výro né správy Centrum pre medzunárodnoprávnu ochranu detí a mládeže, The Center for the International Legal Protection of Children and Youth: <http://cijpc.sk/centrum/> <10.12.2014>

⁷ The Slovak Family Code No 36/2005 Coll.

⁸ Idem, § 28 para 2.

⁹ Idem, § 28 para 3.

¹⁰ Idem, § 29 and 35.

¹¹ Idem, § 30 para 1.

¹² Idem, § 30 para 2.

¹³ Civil Procedure Code No. 99/1963 Coll., § 9 and § 179a.

¹⁴ Civil Procedure Code No. 99/1963 Coll., § 76.

written decision. Appellate courts are regional courts. In addition, the district court may order that its decision is preliminarily enforceable.¹⁵ In cases of international child abduction, it is possible to request a court to order the return of the child. The proceedings must be initiated as soon as possible, but no later than one year after the child is abducted. Before commencement of proceedings, the presiding judge may issue an interlocutory injunction if this is necessary to regulate the parties' relationships in the interim, or if there is concern that the execution of the court's decision might be thwarted.¹⁶

The regional court's decision can also be appealed e.g. if the regional court has modified or overturned a decision of the district court, or if a question of fundamental legal interest is involved.¹⁷

In the Slovak Republic, it is necessary to file a petition for the enforcement of a decision on parental responsibility with the court.¹⁸ The court having jurisdiction to decide on the petition for enforcement is, again, the district court at the place of the minor's residence.¹⁹ Prior to ordering the enforcement of the decision, the court will request the party concerned to comply with the decision voluntarily. If the requested party refuses to do so, the court may warn the party and point out the consequences of the failure to fulfil the obligations imposed by the decision. If the obliged party still refuses to carry out the decision, the court issues the enforcement order and it can also impose a fine of up to 1,640 €. ²⁰ Enforcement is carried out physical by removal of the child. If it is evident from the very beginning that the obliged parent will not comply with the decision voluntarily, the court may order the enforcement immediately.²¹ It is however, possible to appeal the enforcement order before a regional court. The enforcement order does not specify exactly how the handover of the child shall be carried out and within what time frame.

In the above mentioned proceedings, all parties are equal,²² everyone has the right to assistance of counsel from the very beginning of such proceedings²³ and everybody is entitled to compensation for damage caused to him or her by an unlawful decision of a court, other state bodies, or public administrative authorities, or as the result of an incorrect official procedure.²⁴ Everyone has the right to have his or her case considered in public, without unnecessary delay and in his or her presence, as well as to express his or her views on all of the admitted evidence.²⁵ The public may be excluded only in cases specified by law.²⁶ Anyone who declares that he does not speak the language in which a proceeding is being conducted has the right to the services of an interpreter.²⁷ Rights to a fair trial are protected under the jurisprudence of Constitutional Court of the Slovak Republic.²⁸

Parental abduction is a crime in the Slovak Republic.²⁹ It is punishable by imprisonment for a period ranging from six months up to three years. Where there are aggravating circumstances, the offender may be punished by imprisonment for a period of between one and five years.

¹⁵ This means that the decision can be enforced even though it has not yet come into legal force, e.g. because an appeal has been filed.

¹⁶ Civil Procedure Code No. 99/1963 Coll., § 74.

¹⁷ *Idem*, § 237.

¹⁸ *Idem*, § 251.

¹⁹ *Idem*, § 9.

²⁰ *Idem*, § 53.

²¹ *Idem*, § 75a.

²² Constitution of the Slovak Republic No 460/1992 Coll. Art. 47/3.

²³ *Idem*, Art. 47/2.

²⁴ *Idem*, Art. 46/3.

²⁵ *Idem*, Art. 48/2.

²⁶ *Idem*, Art. 48/2.

²⁷ *Idem*, Art. 47/4.

²⁸ *Idem*, Art. 124.

²⁹ Penal Code No. 300/2005 Coll. § 210.

If the child is wrongfully removed from the Slovak Republic to a foreign country, the Center for International Legal Protection of Children³⁰ operates as the requesting central authority under the EU regulation and the Convention on the Civil Aspects of International Child Abduction. It sends the request for the return of a child to the requested central authority of the state to which the child was wrongfully removed or is being wrongfully retained.

The left-behind parent can demand the child's return via the Center for International Legal Protection of Children to the central authority of the state to which the child was wrongfully removed or by filing a petition with a court in that state (the petition must comply with all the conditions imposed by the law of that state).

In the first case, the Center for International Legal Protection of Children closely cooperates with the central authority of the requested state. The Center provides the contact with the authority of the requested state and informs the left-behind parent about return proceedings. The Center helps to obtain and complete all the documents which are necessary and which can help to make the proceedings progress more quickly.

If the child has been abducted from another State to the Slovak Republic, the Center for International Legal Protection of Children operates under the EU regulations and Convention on the Civil Aspects of International Child Abduction as the central authority of the requested state. It receives the request for the return of the child to the country of the child's habitual residence.

The left-behind parent can request the child's return in a number of ways: via the central authority of the state of his/her habitual residence, through the central authority of the state to which the child has been abducted to (the Center for International Legal Protection of Children) or by filing a petition with a District Court (the petition must comply with all the conditions imposed by Slovak law).

4.15.3. Judicial practice and relevant case law

According to information provided by the Slovak Center for International Legal Protection of Children in Bratislava, "the courts dealing with matters of international child abductions discuss mostly Article 13 of the Hague Convention and Article 11 EU Regulation 2201/2003, namely whether adequate arrangements have been made to secure the protection of the child after his or her return" (see appendix of the report).

According to information from the Slovak Constitutional Court web service,³¹ four cases referring to the Convention on the Civil Aspects of International Child Abduction were dealt with by the Slovak Constitutional Court. The majority of these constitutional complaints were rejected.

Three of them were proclaimed as ill-founded and respectively rejected.³² In the case I. US 209/2012, the Constitutional Court held that there had been a violation of Article 6 para 1 of the European Convention on Human rights (the lengthy proceedings).³³

³⁰ See Centrum pre medzinárodnoprávnu ochranu detí a mládeže <http://cipc.sk/unosy-deti/> <12.03.2014>.

³¹ See <http://portal.concourt.sk/pages/viewpage.action?pagelId=1277961> <12.03.2014>

³² Case of the Slovak Constitutional Court III. US 228/2011 (31.5.2011).
http://www.concourt.sk/SearchRozhodnutiav01/rozhod.do?urlpage=dokument&id_spisu=396838
<12.03.2014>. Case of the Slovak Constitutional Court I. US 291/2012 (13.6.2012)
http://www.concourt.sk/SearchRozhodnutiav01/rozhod.do?urlpage=dokument&id_spisu=448750
<12.03.2014>. Case of the Slovak Constitutional Court III. US 112/2012 (13.3.2012)
http://www.concourt.sk/SearchRozhodnutiav01/rozhod.do?urlpage=dokument&id_spisu=430432
<12.03.2014>.

³³ Case of the Slovak Constitutional Court I. US 209/2012 (27.6.2012)
<http://portal.concourt.sk/pages/viewpage.action?pagelId=1277961> <12.03.2014>.

Three cases concerning the Convention on the Civil Aspects of International Child Abduction against Slovakia are pending before the European Court of Human Rights.³⁴

In the first case, L.G.R. and A.P.R. against Slovakia, an application (no. 1349/12) was lodged on 6 January 2012.³⁵

The first applicant is a British national, who was born in 2006 and presently stays in Bratislava (Slovakia). The application has been submitted on his behalf by his father, the second applicant, who has parental responsibility for the first applicant as a matter of English law. The second applicant is also a British national. He was born in 1965 and lives in Newton St. Cyres (England). The facts of the case, as submitted by the applicants, were summarized in the statement of facts as follows (abbreviated): In 2006, prior to the first applicant's birth, the second applicant married the first applicant's mother, a Slovak national. The family lived in England. In July 2007 the mother informed the second applicant that she and the first applicant would not be returning from holiday in Croatia to the United Kingdom and that she intended to take the first applicant to Slovakia and settle there permanently. In August 2007 the mother and the first applicant, who was then less than 1 year old, travelled to Slovakia and have not returned to the United Kingdom since. In November 2009 an English court granted the couple divorce.

In November 2007, the father commenced proceedings in the Slovakian courts for return of the son to England and Wales under the Convention on the Civil Aspects of International Child Abduction. In December 2007 and 31 March 2008, respectively, the Bratislava II District Court and, following the mother's appeal, the Bratislava Regional Court ordered the return of the first applicant to England and Wales as the country of habitual residence. It was emphasized that the order did not imply that the son must reside with either parent but merely that status quo ante be restored so that questions of custody and access might be determined by the English courts which had jurisdiction over them. The return order became enforceable on 9 June 2008.

In December 2008, the Prosecutor General acceded to a petition by the mother and exercised his discretionary power to challenge the return order by way of an extraordinary appeal on points of law. It was argued that the courts had failed to establish properly whether the son had been wrongfully removed or retained and whether there were grounds for not ordering return under Article 13 of the Hague Convention. At the same time, the Prosecutor General suspended the enforceability of the return order. In February 2009, in response to an enquiry on behalf of the father, the President of the District Court informed the Office of the President of Slovakia on the state of the proceedings. She added the following comment:

"It does not behove me to judge the actions of the Office of the Prosecutor General. I am not privy to the reasons why an extraordinary appeal on points of law was lodged. I detect a problem in the system, which allows for such a procedure even in respect of decisions on return of minor children abroad ("international child abductions"). Irrespective of the outcome of the concrete case, the possibility of lodging an appeal on points of law and an extraordinary appeal on points of law in cases of international child abduction protracts the proceedings and suppresses the object of the [Hague Convention], which is as expeditious a restoration of the original state as possible, that is to say the return of the child to the country of habitual residence within the shortest possible time."

³⁴ The content of the Cases is reproduced from home page of the European Court of Human Rights. For full and authentic information please consult the Statements of facts on home page of the European Court of Human rights <http://hudoc.echr.coe.int/> <12.03.2014>.

³⁵ For full and authentic information on Statement of facts please see <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111103> <12.03.2014>.

In June 2009, the Supreme Court quashed the return order and remitted the matter to the first-instance court for re-examination. In March 2010, the District Court dismissed the father's application for the return of the first applicant. Relying on Article 13 of the Hague Convention, the District Court observed that the child had been living in Slovakia for two and a half years and that he had developed ties with the environment there. His return was thus "not in the interest of the child and its healthy mental development".

In August 2010, the Regional Court quashed the decision of 29 March 2010 following the second applicant's appeal and remitted the case to the first-instance court. The Court of Appeal found that the District Court had failed to provide adequate reasons for its decision.

In December 2011, following the mother's appeal on points of law, the Supreme Court quashed the Regional Court's decision to dismiss her appeal against the new return order and remitted the appeal to the Regional Court for re-examination. It held that the latter had failed to provide adequate reasons for dismissing the mother's arguments under Article 13 of the Hague Convention.

The applicants complain under Articles 6 § 1 of the European Convention on Human Rights that the Slovakian authorities have failed: 1) to act expeditiously, 2) to enforce the order for the first applicant's return, and 3) have thereby deprived them of the possibility of having matters concerning custody and access in respect of the first applicant determined by the courts of England and Wales, which were the only courts with jurisdiction over such matters. The applicants also complain under Article 8 of the Convention that the failure to order definitively the return of the first applicant to the country of habitual residence constituted an interference with their right to respect for family life and a failure by the Slovakian authorities to respect their positive obligations towards them under Article 8.

In the second case, José Juan Lopez Guio against Slovakia, an application (no. 10280/12) was lodged on 13 February 2012.³⁶ The applicant, Mr José Juan Lopez Guio, is a Spanish national who was born in 1967 and lives in Madrid. On 21 October 2010 the applicant lodged an application with the Bratislava I District Court under the Convention on the Civil Aspects of International Child Abduction. The application was directed against a Slovak national ("the mother"), to whom the applicant was not married. In his application, the applicant argued that the mother had wrongfully removed or retained their child, a Slovak national born in 2009, and sought the child's return to Spain as to the country of the child's habitual residence. At that time (September 2010), the child was provisionally entrusted to the care of the mother under the decision of the Martin District Court, in the judicial district of which the mother and the child were staying in Slovakia. The decision was appealed. Following the hearing of 18 November 2010, the District Court ordered the child's return to Spain. The order for the child's return was upheld by the Bratislava Regional Court and became final, binding and enforceable on 4 February 2011, following the mother's unsuccessful appeal. By way of a letter of 12 February 2011, the applicant invited the mother to abide by the return order, to no avail. On 2 February 2011, the applicant applied to the Martin District Court for a warrant for enforcement of the return order.

On 16 March, 28 April and 13 May 2011, respectively, the District Court called upon the mother and interviewed her and the applicant with a view to having the return order complied with, to no avail. On 16 May 2011, the District Court issued the enforcement warrant and authorized the applicant to carry it out. The mother appealed to the Žilina Regional Court, which – on 7 September 2011 – decided to stay the proceedings on the ground that, meanwhile, the mother had petitioned for reopening of the return proceedings and that, if the petition was granted, the enforcement proceedings would be stayed by operation of law. It appears that the enforcement proceedings have been stayed since.

³⁶ For full and authentic information on Statement of facts please see <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111104> <12.03.2014>.

The applicant complains *inter alia* that the Slovakian authorities have failed to ensure a prompt return of the child; that the proceedings for its return have not been expeditious; that he is not being provided with a translation of judgments and decisions into a language he understands; and that – as a result - he has been deprived of contact with his child for a protracted period of time.

In the third case, Tommy Hoholm against Slovakia, an application (no. 35632/13) was lodged on 30 May 2013.³⁷ The applicant, Mr Tommy Hoholm, is a Norwegian national, who was born in 1975 and lives in Norway. In 2000, the applicant married a Slovak national (A.) in Norway. There were two sons of the marriage born in 2000 and 2002 respectively. The family lived together in Norway until May 2004, when the applicant left the family home. In August 2004, an administrative decision was taken in Norway on the couple's separation. In September 2004, the Vesterålen District Court (*tingrett*) (Norway) issued an interim order that, until the resolution of the matter on the merits, the children be under joint parental responsibility of both parents and in the care of A. The court also determined the applicant's visiting rights and forbade both parents to remove the children from the Norwegian territory without the consent of the other parent. Nevertheless, in July 2005, A. with the children left Norway for Slovakia.

In December 2005 the applicant initiated in Slovakia proceedings against A. under the Hague Convention on Civil Aspects of International Child Abduction seeking an order for the return of the children to the country of habitual residence - Norway. The action was examined by the courts in four rounds, two of which were followed by enforcement proceedings. In 2012 the Constitutional Court declared the complaint inadmissible.³⁸

The applicant contended that the length of the proceedings had been excessive and that the courts had failed to ensure effective protection of his right to respect for his family life. Among other things, the applicant submitted that as a result, manipulation of the children has affected them and the merits of the case are being determined by the mere passage of time, that during and as a result of the lengthy proceedings, he has been completely severed from his children with no access whatsoever; that *inter alia* by allowing for an array of various remedies, the respondent State has failed to secure his right to respect of his family life; and that the ultimate dismissal of his action was arbitrary *inter alia* because the courts had attributed undue importance to the position of his children, which was the result of brainwashing and manipulation of them, that the courts had failed to take due account of the "Parental Alienation Syndrome". Lastly, the applicant submitted that any attempts at enforcement of the previous return orders had met with no success.

4.15.4. Mediation

Mediation is an out-of-court resolution of a complicated family situation with the assistance of a mediator. It is an informal and voluntary process, but it is precisely structured. The mediator is a trained professional who is responsible for leading the process and for effective communication among parties. In contrast to the judge, the mediator does not resolve, judge or propose any solutions. He or she is prepared to listen to both participants and to work with their emotions. He or she oversees the complicated situation, identifies the problems and presents them to the participants as topics for negotiation. The goal of mediation is to find new solutions and alternative views of the situation. The process is focused on the future. The mediator ensures that the

³⁷ For full and authentic information on Statement of facts please see <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-123827> <12.03.2014>.

³⁸ Case of the Slovak Constitutional Court III. US 534/2012 (30.10.2012) <http://portal.concourt.sk/pages/viewpage.action?pageId=1277961> <12.03.2014>.

solutions are real and viable, and that they reflect the possibilities and needs of the participants.

Mediation in Slovakia is regulated by the Mediation Act.³⁹ It stipulates for the Slovak Republic the execution of mediation, basic principles, organization and effects of mediation and applies to disputes arising particularly from civil-law and family-law relations. The mediator under the Mediation Act may be any natural person, entered in the list of mediators, on which the parties to mediation agree and who assumes the function of mediator.⁴⁰ The mediator⁴¹ is obliged to execute his role independently, impartially, consistently, with due professional care, to instruct the parties to mediation on their rights that might be affected by mediation, and without unreasonable delay, inform the parties to mediation about all facts on the basis of which he could be excluded from the execution of mediation, if, with regard to his relation to the case or to the parties to mediation, his impartiality may be questioned.⁴² Mediation is based on a contract.

The mediation contract is a written agreement between the parties to mediation that they will make an attempt at settling by mediation all or some of the disputes that have arisen or will arise between them in a given relationship.⁴³ The agreement that results from mediation must be recorded in writing and is binding for the parties to mediation. On the basis of agreement that has resulted from mediation, the authorized party may file in a petition in judicial execution of the decision or a petition in the execution, if the agreement is executed in the form of a notarial deed or if it is approved as conciliation before a court.⁴⁴

As mentioned at the beginning of this section the mediation is an out-of-court resolution of a complicated family situation with the assistance of a mediator, which is an informal and voluntary, i.e. not compulsory, process.

4.15.5. Existing criminal sanctions

Parental abduction is a crime in the Slovak Republic. This crime is punishable by a period of imprisonment from six months up to three years. Where there are aggravating circumstances, the offender may be punished by imprisonment for a period of one year up to five years.⁴⁵

According to Art 209 of the Slovak Penal Code, whoever removes a child or person suffering from a mental disorder from the custody of the person who, under another legal regulation or an official decision, has the obligation to take care of them, will be punished by a prison sentence for a period of three to eight years. An offender will be punished by a prison sentence of four to ten years if he or she committed this act with the intention of acquiring special benefits for themselves or someone else, or the commission of such an act threatens the moral development of the kidnapped person. An offender will be punished by a prison sentence of seven to fifteen years if he or she caused grievous bodily harm by committing the act or if he or she procured a substantial benefit by committing such an act for themselves or another person. An offender will be punished by a prison sentence of fifteen to twenty five years in circumstances where he or she committed this act as a

³⁹ Mediation Act No 240/2004 Coll.

⁴⁰ Mediation Act No 240/2004 Coll. § 3.

⁴¹ The Ministry of Justice of the Slovak Republic keeps a list of mediators. The Ministry maintains a designated list of mediators, permitting anybody who is fully competent for legal acts, who has completed the university studies at the university of the second degree, has integrity, and holds the certificate of vocational training of the mediator (Mediation Act No 240/2004 Coll. § 8).

⁴² Mediation Act No 240/2004 Coll. § 4/2.

⁴³ Mediation Act No 240/2004 Coll. § 7/1.

⁴⁴ Mediation Act No 240/2004 Coll. § 15.

⁴⁵ § 210 of the Penal Code No. 300/2005.

member of an organised group or where he or she procured another large scale benefit by committing such an act for themselves or another person.

According to Art 210 of the Slovak Penal Code, whoever as parent or close relative removes a child or person suffering from a mental disorder from the custody of the person who, under another legal regulation or an official decision, has the obligation to take care of them, will be punished by a prison sentence ranging from six months to three years. An offender will be punished by a prison sentence of one to five years if an act is committed with the intention of acquiring special benefits or if he or she procured a substantial benefit by committing such an act for themselves or another person.

4.15.6. Civil Law liability

General Liability for civil law damages is regulated by § 420 of the Civil Code. According to this provision, any person is liable for damage which he causes by breaching a legal obligation (duty). A person will be relieved of his liability if he proves that he or she did not cause the damage.⁴⁶

4.15.7. On-going projects on child abduction

We are not aware of any project for amending the Slovak system on child abduction.⁴⁷

⁴⁶ Civil Code No. 64/1964 Coll. § 420.

⁴⁷ Last updated on 10 January 2015.

4.16. Sweden

4.16.1. Statistical Assessment

4.16.1.1. Key statistical overview

Marriages and Divorces	2000	2004	2007	2012
International marriages*	6725 (16.9%)	8417 (19.5%)	9855 (20.6%)	6187 (12.2%)
International divorces	4789 (22.3%)	4760 (23.7%)	5650 (27.3%)	5059 (21.6%)
International divorces involving children**	n/a	n/a	5531	6421

Parental child abduction	1999	2003	2008	2012
Incoming return requests received under the Hague Convention	14	22	29	42
Outgoing return requests made under the Hague Convention	n/a	32	24	31

* Marriage and divorce figures based on centrally-collected Eurostat data. Percentages indicate international marriages/divorces as a proportion of all marriages/divorces.

** Figures given for 2007 refer to 2008 (the year for which data was made available). Both figures in fact refer to numbers of children (aged 0-17) rather than numbers of divorces.

4.16.1.2. Available national data

4.16.1.2.1. International Marriages

Year	2008	2009	2010	2011	2012	2013
International marriages						
All marriages ¹	50,300	48,033	50,730	47,564	50,616	45,703

Source: www.scb.se

4.16.1.2.2. International Separations and Divorces

Year	2008	2009	2010	2011	2012	2013
International divorces						
All divorces ²	21,400	22,211	23,593	23,388	23,422	25,110

Source: www.scb.se

¹ Figures from 2009 and onwards include same-sex marriages. Data available at <http://scb.se/> (22.12.2014).

² Figures from 2009 and onwards include divorces between persons in same-sex marriages. Data available at <http://scb.se/> (22.12.2014).

4.16.1.2.3. Child Abduction

Year	Data from INCASTAT			Data from the Central Authority ³				
	1999	2003	2008	2009	2010	2011	2012	2013
Requests received	14	22	29	35	31	42	42	24
Requests made	n/a	32	24	31	39	44	31	34

Data on child abduction shows that the number of requests received under the Hague Convention on Child Abduction by the Central Authority have increased significantly from 1999 although not in a consistent manner, the highest figures being for the years 2011 and 2012. As regards the number of requests made, there is no increasing or decreasing overall trend between 2003 and 2013. Similar to the figures on the requests received, there are distinct variations from one year to another ranging from low 24 for 2008 to high 44 for 2011.

4.16.2. The national legal framework

The Hague Convention on Child Abduction has been implemented in Sweden through the Act on Recognition and Enforcement of Foreign Decisions Concerning Custody etc. and on the Return of Children (Lag (1989:14) om erkännande och verkställighet av utländska vårdnadsavgöranden m.m. och om överflyttning av barn) (hereinafter "the Implementation Act").⁴ This Act addresses Sweden's obligations deriving from both the 1980 Hague Convention on Child Abduction and the 1980 European Convention on Custody of Children. Thus, the Act contains provisions stating that a child taken or retained wrongfully in Sweden shall, upon application, be returned immediately to the State of its habitual residence.

The Act also regulates the procedure and defines wrongful removal and detention and the grounds for refusing a return. Section 11 of the Child Abduction Act states that the removal or the retention of a child is unlawful where it is in breach of rights of custody, whether custody rights were attributed to a person, an institution or another body, and provided that at the time of the removal or retention, those rights were actually exercised. Section 12 of the Act provides that the return of an abducted child may be refused if: (1) at the time of the application for proceeding one year has elapsed since the removal or retention, and the child is now settled in its new environment; (2) there is a serious risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; (3) the child objects to being returned and has attained an age and a degree of maturity at which it is appropriate to take account of its views; or (4) the return of the child is incompatible with the fundamental principles of Sweden relating to the protection of human rights and fundamental freedoms.

The Act is complemented by a Government Ordinance on Recognition and Enforcement of Foreign Decisions Concerning Custody, etc. and on the Return of Children.⁵ The Ordinance contains specific rules on procedural matters in cases of child abduction. It also states that the Ministry for Foreign Affairs is the central authority in Sweden for international child abduction.

³ Data for the years 2009 - 2013 has been provided by the Central Authority and refers to the number of return applications received and made by the Central Authority per year under the Hague Convention.

⁴ Lag (1989:14) om erkännande och verkställighet av utländska vårdnadsavgöranden m.m. och om överflyttning av barn, available at <http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Lag-198914-om-erkannande-oc-sfs-1989-14/> (12.12.2014).

⁵ Förordning (1989:177) om erkännande och verkställighet av utländska vårdnadsavgöranden m.m. och om överflyttning av barn, available at <http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Forordning-1989177-om-erkan-sfs-1989-177/> (18.12.2013).

4.16.3. National notion of unlawful parental child abduction

As mentioned in the previous section, section 11 of the Implementation Act provides that an abduction of a child is unlawful when a person without authorization separates a child from a person or persons who, in the country where the child has his or her habitual residence, have custody of the child. Given that the unlawfulness of the taking of a child depends on which person or persons have custody of the child, it becomes appropriate to examine the rules on custody.

Provisions on custody are laid down in the Children and Parents Code (Föräldrabalk(1949:381)).⁶ In Swedish law, the concept of "custody" (vårdnad) can be defined as including all those rights and obligations necessary to decide in matters concerning the child's personal affairs and needs (chapter 6 section 2 of the Children and Parents Code).

Custody includes inter alia the right to decide where the child shall live.

All children under the age of 18 shall be in the custody of one or two adults. Normally, the parents jointly have the custody of the child. Custody of a child can be transferred from the child's parents or from one of the parents to a third person only in exceptional circumstances such as abuse or serious negligence (chapter 6 section 7 of the Children and Parents Code).

Generally, the joint custody of the parents continues to apply after a divorce without the court conducting the divorce proceedings having to make any decision to this effect in connection with the divorce. In cases where the parents have joint custody but do not live together, they shall decide together where the child shall live. If the parents cannot come to an agreement, one or both of the parents can refer the matter to the competent court to decide on where the child shall live (chapter 6 section 3 and 14a of the Children and Parents Code).

The Family code was amended in 2006 in order to further emphasize the importance of giving primary consideration to the best interest of the child in all matters regarding custody.

Parents having joint custody shall decide on matters concerning the child by mutual agreement. In case of travel or moving with the child to another country, the consent of both parents is thus necessary. Should only one parent have custody of the child, it is not necessary to have the consent from the other parent for such a decision. However, it might be necessary to review the modalities of the rights to access to the child for the parent not having custody.

An abduction was judged not unlawful by the Supreme Administrative Court, after having examined thoroughly the question of the place of habitual residence of the child.⁷ The child in question was born in the United States but had after the divorce of the parents mostly lived with her mother in Sweden. The father brought the child to the United States, where the mother, through an ex parte injunction, was granted the temporary care of the child but with the condition that she was prohibited from leaving the country. Nevertheless, the mother left the United States taking the child with her. The father requested before the Swedish courts that the child should be returned to the United States according to section 11 of the Implementation Act. The Court found that the child had her habitual residence in Sweden at the time of the abduction, i.e. when the mother brought the child back to Sweden. Therefore, the court ruled that the abduction was not unlawful and that the application for the return of the child was inadmissible.

⁶ Föräldrabalk (1949:381), available at http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Foraldrabalk-1949381_sfs-1949-381/ (18.12.2014).

⁷ RÅ 1995 ref 99, 20 December 1995, Supreme Administrative Court of Sweden [INCADAT HC/E/SE 448].

In another case, the child had lived with her mother in Sweden for two years when the father requested before the Swedish courts that he move the child to the USA in accordance with an agreement previously made by the two parents.⁸ The parents, who had joint custody of the child, had decided that the child, until she turned 18 years old, should live four years in the USA and eight years in Sweden. The court ruled that the mother's retention of the child was lawful and thus did not violate section 11 of the Implementation Act. The reason for the finding was that the court considered the child to have her habitual residence in Sweden at the time of the application of the father. The mother's violation of the parents' agreement did not alter the findings of the court.

Another case concerns a child born in Sweden, where he had resided for the first few years of his life and where his parents had joint custody.⁹ When he was 4 years old, the child was taken to England by the mother, who decided they would hereafter reside in that country, against the will of the Swedish father. After several stays in England and in Sweden, the father took the child back to Sweden, where he retained him against the mother's will. The mother's application for the return of the child was rejected. The court found that the child had his habitual residence in Sweden and not in England. The reasoning relied on the fact that he had only spent nine months in England and the rest of the time in Sweden.

In a more recent case,¹⁰ the Supreme Court considered that an interim court order from the country of habitual residence (Czech Republic) stating that the children in question had the right to be in Sweden, amounted to an authorisation for the earlier abduction of the children from the Czech Republic to Sweden. Therefore, the Court dismissed the request from the father to have the children returned to him in the Czech Republic.

4.16.4. Judicial and non-Judicial tools available to the parent left behind

The Implementation Act provides that a child who has been unlawfully taken to or retained in Sweden should, upon application, be returned immediately to the State of his or her habitual residence. The Act also regulates the procedure and defines wrongful removal and detention, and the grounds for refusing a return in accordance with the Hague Convention on Child Abduction. Furthermore, the Act lays out the basis for enforcement of return decisions (sections 11 and 12 of the Act).

Section 19 of the Implementation Act states that in cases where there is a risk that a child will be taken out of the country, or when the enforcement of the decision will presumably be obstructed, the Stockholm District Court may order that the child should immediately be taken into care by the authorities in any way the Court finds suitable. If there is no time to await such a court order, the police may bring the child under immediate care or take any urgent measures that can be made without harming the child. In these situations, a medical doctor and a social worker must assist the police. The action should be instantly reported to the Court, which then has to decide, without delay, if the child should remain in custody (Section 20 of the Act).

The parents are encouraged to find a voluntary solution through mediation. Article 16 of the Implementation Act provides that the Court may request a representative of the social services, or another person deemed suitable, to act as a mediator in order to find a voluntary solution. Such a measure may only be taken if it is presumed to result in the voluntary return of the child and if it can be done without undue delay of the case. The maximum period allowed for mediation is a period of two weeks, which can only be prolonged under exceptional circumstances. The provision reflects the general principle in

⁸ RÅ 1996 ref 52, A.F.J. v. T.J., 9 May 1996, Supreme Administrative Court of Sweden [INCADAT: HC/E/SE 80].

⁹ RÅ 2001 ref. 53, 12 September 2001, Supreme Administrative Court of Sweden [INCADAT HC/E/SE 447].

¹⁰ NJA 2012 s. 269, 27 April 2012, Supreme Court of Sweden [INCADAT HC/E/SE 1165].

Swedish family law, namely, to encourage amicable solutions in matters regarding inter alia custody, residence and access. The principle was reinforced by an amendment to the Children and Parents Code in 2006 introducing the possibility for the courts to encourage, when appropriate, amicable solutions in cases that shall be settled by court decision. Such amicable solutions must be compatible with the best interests of the child. The Courts may also appoint a mediator to help the parents reach an amicable solution (chapter 6, section 18 and 18 a in the Children and Parents Code).

Before the Court decides on the return of a child, it shall let the child express his or her views on the matter. The child shall be heard unless it is deemed impossible in respect to the child's age and maturity (section 17 of the Implementation Act). Generally, someone from the social services hears the child and then reports the child's views and feelings to the court. According to section 18 of the Implementation Act, the court may, if it decides that the child shall be returned, order the return of the child under threat of the penalty of a fine or, alternatively, decide that the return shall be executed by the police authorities.

The Stockholm District Court is the only competent court to hear cases regarding the return of children under the Hague Convention on Child Abduction (Article 11 of the Implementation Act).

4.16.5. Existing criminal sanctions

Wrongfully removing a child may constitute a crime under Swedish law. Such unlawful child abduction (*egenmäktighet med barn*) is regulated in chapter 7, section 4 of the Swedish Penal Code (*Brottsbalken (1962:700)*).¹¹ The provision applies to both cross border and internal child abductions. It provides that a person carrying out such unauthorized separation of a child shall be sentenced to a fine or imprisonment of a maximum of one year, and in cases where the crime is considered serious, a maximum of 4 years.

The Supreme Court stated that it is not a criminal offence to retain a child against the will of the other parent at a location where the parents earlier had agreed to move the child.¹² In this particular case, the parents were divorced but had joint custody of the child. The judgment has been subject to criticism and, following the publication of a report¹³ which included an examination of the matter and a legislative proposal, chapter 7 section 4 was amended so that the retention of a child under such circumstances is a criminal offence. The amended law came into force 1 July 2014.

4.16.6. Compensation for the parent left behind

It is possible for a parent to claim damages in cases of unlawful child abduction. In the case of a parent who had been found guilty of unlawful child abduction under chapter 7, section 4 of the Penal Code, the court ruled, as regards the civil sanctions, that he should also pay damages to the other parent for the psychological harm and the costs for health care he had suffered.¹⁴ To our knowledge, damages have been limited to those cases where the child abduction has fallen under chapter 7, section 4 of the Penal Code.

¹¹ Brottsbalken (1962:700), available in English at <http://www.regeringen.se/sb/d/108/a/1536> (21.01.2014).

¹² NJA 2006 s. 708, 23 May 2007, Supreme Court of Sweden [B 1300-06].

¹³ Proposal made based on suggestion presented in the official governmental report *Betänkandet Fridskränkningens brotten och egenmäktighet med barn* (SOU 2011:85).

¹⁴ RH 2006:75, 15 November 2006, Appeal Court Övre Norrland [B 686-06].

4.16.7. Judicial, administrative and other authorities competent for child abduction cases

The Stockholm District Court is the competent court for matters regarding child abduction and decides how the rules shall be enforced. The measures available are regulated in the Implementation Act and have been described above. The actual enforcement is carried out by the police or by the social authorities, depending on the measure in question. As mentioned above, the court may, in accordance with section 18 of the Implementation Act, decide that the return shall be executed by the police authorities.

The central authority regarding international child abductions is the Ministry for Foreign Affairs. If a child has been removed to one of the countries with which Sweden has an agreement, the Ministry can help try to secure the return of the child. The same applies if a child has been wrongfully removed and brought to Sweden from another country. The Ministry provides support and information but does not enforce the rules on child abduction nor does it provide any kind of mediation procedure. It does not deal with kidnappings which amount to criminal offences but merely with parental child abductions. Three to five staff at the Ministry are accountable for child abduction cases, however, they are also handling a wide range of other international civil law matters.¹⁵

4.16.8. Issues more frequently considered in case law concerning the application of the Hague Convention and EU Regulation 2201/2003

4.16.8.1. The concept of “habitual residence”

As regards the application of the Hague Convention on Child Abduction transposed into Swedish law through the Implementation Act, it is the rules and concept of “habitual residence” laid down that has been mostly discussed by the courts.

In a particular case, mentioned above,¹⁶ the Supreme Court had to decide whether the habitual residence of a child was in Sweden or in the United States. The child in question was born in the United States but had, after the divorce of the parents, mostly lived with her mother in Sweden. The father brought the child to the United States, where the mother through an ex parte injunction was granted the temporary care of the child but with the prohibition to leave the country. Nevertheless, the mother left the United States for Sweden, taking the child with her. The father requested in Swedish courts that the child should be returned to the United States according to section 11 of the Implementation Act. The Court found that the child had her habitual residence in Sweden at the time of the abduction, i.e. when the mother brought the child back to Sweden, and therefore dismissed the application.

Another case concerned a child born in Sweden, where he had lived the first few years of his life and where his parents had joint custody.¹⁷ At four years of age, the child was taken to England by his mother, who decided they would hereafter reside in that country, against the will of the father. After several stays in England and in Sweden, the father took the child back to Sweden, where he retained him against the mother's will. The mother's application for the return of the child was rejected. The court found that the child had his habitual residence in Sweden, not in England motivated by the fact that he had lived over three years in Sweden and only nine months in England.

In another case, the Supreme Court decided that a 10-year-old boy retained in Sweden by his father was to be returned to his mother in Croatia in accordance with Article 11 of the Implementation Act.¹⁸ The child in question was born in Sweden in 1998. Following the parents' divorce in 2004, the child moved to Croatia with his mother. In 2005, the father

¹⁵ Telephone contact with case officer at the Ministry (17.12.2014).

¹⁶ RÅ 1995 ref 99, 20 December 1995, Supreme Administrative Court of Sweden [INCADAT HC/E/SE 448].

¹⁷ RÅ 2001 ref. 53, 12 September 2001, Supreme Administrative Court of Sweden [INCADAT HC/E/SE 447].

¹⁸ NJA 2008 s. 963, 23 October 2008, Supreme Court of Sweden [Ö 3484-08].

was granted sole custody of the child in Sweden, and in 2007 the mother was granted sole custody by a court in Croatia. After having celebrated Christmas in Sweden in 2007, the father retained the child in Sweden and claimed that the child had been taken to Croatia in 2004 against the will of the father. Considering that the child had, in 2007, lived for three and a half years in Croatia and had attended school there, the court found that his habitual residence was in Croatia. The court also took into account the fact that Croatian courts had previously dismissed the father's request to return the child to Sweden and had awarded the mother sole custody of the child. Further, the court found that the return did not constitute any serious risk for the child's physical and mental health. It also stated that the fact that the child expressed a wish to remain in Sweden was, considering his young age, not of considerable importance.¹⁹

In another occasion, the Supreme Court considered that an interim court order from the country of habitual residence (in this case the Czech Republic) stating that the children in question had the right to stay in Sweden amounted to authority for the earlier abduction of the children from the Czech Republic to Sweden.²⁰ The court held that the decision of the Czech Court should be treated as equivalent to a consent for the purposes of Article 13(1)a of the Hague Convention on Child Abduction. Therefore, the Court dismissed the request from the father in the Czech Republic to have the children returned to him.

As regards the application of EU Regulation 2201/2003, the Appeal Court (Svea Hovrätt) found that a child who was abducted and brought to Sweden from Finland by his mother should be returned to Finland in accordance with the father's request. At the time of the abduction, the parents had joint custody of the child and the child had his habitual residence in Finland. Following threats directed at the mother, the father had a restraining order prohibiting him from visiting the mother. As regards the father's relationship with the child, the allegations of psychological abuse were vague and connected to the relationship between the parents. The court ruled that the child should be returned to Finland according to Article 11 of the Implementation Act by referring to Article 11(4) of EU Regulation 2201/2003 and the fact that it considered established that adequate arrangements had been made to secure the protection of the child after his return to Finland.

4.16.8.2. The concept of "best interest of the child" and the application of the "return mechanism"

The main goal of the Swedish regime is to implement and respect the rules laid down in the Hague Convention on Child Abduction. Thus, the effectiveness of the return mechanism is an essential element of the regime. In order to have an effective return mechanism, the Implementation Act contains provisions requiring expeditious procedures. Article 15 of the Implementation Act provides that an application for the return of a child shall be dealt with expeditiously by the relevant authorities. In case the matter has not been decided within six weeks from the date of the application of the return, the court shall state the reasons of the delay in case the applicant party so requests. In the preparatory works to the Act as regards article 15, reference is made to Articles 2 and 11 of the Convention.

To act in the "best interests of the child" is also addressed as an essential objective of the regime. In the preparatory works to the Implementation Act, it is stated that the possibilities under the Hague Convention on Child Abduction to refuse the return of a child with regard to the "best interests of the child" essentially correspond to those available

¹⁹ For further comments on the case see M. Bogdan, EG-domstolens och svensk rättspraxis I internationell privat- och processrätt [2010], Svensk Juristtidning 2010 s. 33, p. 46 ff.

²⁰ NJA 2012 s. 269, 27 April 2012, Supreme Court of Sweden [INCADAT HC/E/SE 1165].

under domestic law.²¹ Therefore, the Convention is considered to provide sufficient protection of the child.

The “best interests of the child” (barnets bästa) is not specific to the area of child abduction, but applies to all judgments and decisions concerning inter alia rights of custody, residence and rights of access. Thus, the concept of the “best interests of the child”, described and defined in chapter 6 section 2a of the Children and Parents Code, must always be taken into consideration by the court’s municipality’s social council (socialnämnden) when deciding a case. In assessing the best interests of the child, special consideration shall be given to the risk that a child or another person in the family may be subject to abuse (physical and psychological), and to the risk that the child may be illegally abducted or retained or otherwise mistreated. Consideration shall also be given to the will of the child in accordance with his or her age and maturity and the child’s need to have a close relationship with both parents.

According to chapter 6 section 1 of the Children and Parents Code, children have the right to care (omvårdnad), security and a good upbringing. They shall be treated with consideration taken to their person and individuality (egenart) and may not be exposed to physical or psychological abuse.

The case law indicates that a decisive factor when taking into consideration the best interests of the child is to maintain a certain stability in the child’s life. In deciding the “habitual residence” of a child, the courts consider not only the time a child has spent in a country, but also whether the child has established him or herself in the country. One example is a case where the Supreme Court, as regards the question of habitual residence, took into consideration that the child had been in school for a considerable period of time, that he had relatives close by and that he seemed to have adapted to the environment.²²

The Supreme Court considered thoroughly whether it would be in the best interests of an abducted child to return to his mother in the case of a boy illegally brought from Sweden to Tunisia at the age of three.²³ After the abduction, the child had been living in Tunisia for ten years and the father had prevented almost all contact between the child and his mother. The court ruled that a return to Sweden, which would allow the return of the physical custody to the mother, would entail too many risks for the child since he would be removed from the environment in where he grows up and to which he is used to live in. Therefore, the court ruled that it was in the best interests of the child to stay with the father in Tunisia.

In a recent case, the Supreme Court refused to return a child who had been living in Sweden for four years to the father in Turkey from where the child had been abducted.²⁴ In its judgment, the court referred to section 12 point 2 in the Implementation Act which implements Article 13 b in the Hague Convention on Child Abduction, Article 8 in the ECHR and Article 3 and 11 in the UN Convention on the Rights of the Child. The case concerned a reconsideration of a previous legally binding judgment ordering the return, which, however, had not been enforced due to obstruction of the mother. The case has in part been criticized by Jänterä-Jareborg who argues that it can be perceived as if the court rewards an abducting parent who obstructs the enforcement and who at a later stage argues that the child is settled in the new country and that a return would be contrary to the best interest of the child.²⁵

²¹ Regeringens proposition 1988/89:8 om olovligt bortförande av barn i internationella förhållanden, p. 19, available at http://www.riksdagen.se/sv/Dokument-Lagar/Forslag/Propositioner-och-skrivelser/prop-1988898-om-olovligt-bor_GC038/ (19.12.2014).

²² NJA 2008 s. 963, 23 October 2008, Supreme Court of Sweden [Ö 3484-08].

²³ NJA 1992 s. 93, 17 February 1992, Supreme Court of Sweden [DT 98].

²⁴ NJA 2013 s. 1143, 20 December 2013, Supreme Court of Sweden [Ö 4071-13].

²⁵ M. Jänterä-Jareborg, *Barnets Bästa och Sveriges ansvar för överflyttning av olovligen bortförda barn* [2014], *Svensk Juristtidning* 2014 s. 428, p. 389.

In a similar case concerning a reconsideration of a previous legally binding judgment ordering the return of a child, the Svea Court of Appeal (Svea hovrätt) found that the child could not be returned by applying the same exception as in the previously mentioned case; section 12 point 2 in the Implementation Act (Article 13 b in the Hague Convention on Child Abduction). Since the child had been abducted from another EU Member State (Italy), the court also applied Article 11.4 of EU Regulation 2201/2003. The mother who had abducted the child from the father in Italy had in the new court proceedings, which took place only two months after the first decision, referred to new evidences consisting of medical certificates stating that the child was autistic and therefore extremely sensitive to changes. According to established case law in Sweden, the courts may in a new process reconsider a previous legally binding judgment concerning the return of a child provided that there are new circumstances at hand. Jänträ-Jareborg has stated that this practice may be incompatible with Article 10 of EU Regulation 2201/2003. In essence, she argues that the competence of the Swedish courts' ceases when the original decision to return the child becomes legally binding.²⁶

4.16.9. On-going projects of future legislation on child abduction

In a report from 2009 on abducted children in cross border situations conducted at the request of the Swedish Parliament, the regulatory framework concerning child abduction and how the matter is handled by concerned authorities was described and analysed.²⁷ The need for the report was motivated by the increasing general awareness of problems related to child abduction. One of the questions discussed were whether the existing regime sufficiently respects the "best interests of the child". The authors refer to an article by Jänträ-Jareborg and suggest that the provision on when a return of the child may be refused has been applied too restrictively by the courts and has therefore not sufficiently respected the best interests of the child. The report refers to the fact that when the Hague Convention on Child Abduction was adopted, the general view was that it was often the father who abducted the child. However, today, the abducting parent is often the mother who generally is the child's primary care taker. The authors suggest that there may be a need of wider margin of appreciation to refuse a return when the child is abducted by the primary care taker, as compared to the situation where the child is abducted by the parent who has not provided the daily care of the child. If not, there is a risk that the best interests of the child are not respected.²⁸

To our knowledge, the findings in the report have not lead to any amendments in the regulatory frame work on child abduction or to any significant change in the practices of the concerned authorities. Moreover, it does not appear as if the report has triggered any particular discussions or comments or had any effect on the legal literature in the field.²⁹

²⁶ M. Jänträ-Jareborg, *Barnets Bästa och Sveriges ansvar för överflyttning av olovligen bortförda barn* [2014], *Svensk Juristtidning* 2014 s. 428, p. 408.

²⁷ Report 2008/09:RFR8, *Bortförda och kvarhållna barn i internationella förhållanden - En uppföljning*, 2009.

²⁸ *Ibid*, p. 27.

²⁹ The present report was completed by Henrik Westermark on 22 December 2014.

4.17. United Kingdom¹

Glossary of terms

CACA 1985	Child Abduction and Custody Act 1985 http://www.legislation.gov.uk/ukpga/1985/60/contents
Family Procedure Rules	Part 12 Chapter 6 of the Family Procedure Rules 2010, Statutory Instrument 2010/2955 http://www.legislation.gov.uk/uksi/2010/2955/made
MOU	Memorandum of Understanding
ONS	Office for National Statistics

4.17.1. Statistical Assessment

4.17.1.1. Key statistics overview

Marriages and Divorces	2000	2004	2007	2012
International marriages	n/a	n/a	n/a	n/a
International divorces	n/a	n/a	n/a	n/a
International divorces involving children	n/a	n/a	n/a	n/a

Parental child abduction	1999	2003	2008	2012
England and Wales				
Incoming return requests received under the Hague Convention	149	142	200	229
Outgoing return requests made under the Hague Convention	n/a	124	158	220

¹ The United Kingdom (the "UK") comprises the three legal systems of England and Wales, Scotland and Northern Ireland. Although certain legislation of the UK Parliament, such as the Child Abduction and Custody Act 1985, has general application across Scotland and Northern Ireland as well as in England and Wales, each jurisdiction has its own separate independent judiciary. For the purposes of this study, the main focus will be on the situation in England and Wales, which, in 2008, accounted for more than 90% of all return requests received by UK Central Authorities. Reference will be made to significant developments and notable case law concerning Scotland and Northern Ireland, where appropriate.

Northern Ireland				
Incoming return requests received under the Hague Convention	6	2	13	14
Outgoing return requests made under the Hague Convention	n/a	6	10	10
Scotland				
Incoming return requests received under the Hague Convention	n/a	n/a	n/a	n/a
Outgoing return requests made under the Hague Convention	n/a	n/a	n/a	n/a

4.17.1.2. Available national data

As identified in an earlier study conducted by the SICL,² the UK Office for National Statistics ("ONS") have confirmed that there does not exist a registration of nationalities or country of origin when couples get married or divorced in the UK. When a couple gets married, spouses are not required to enter the country of origin neither are these data registered or collected afterwards. Accordingly, there is no available data on international marriages. This is confirmed by Eurostat.

Statistics concerning international child abduction are recorded for England and Wales in the annual Official Solicitor and Public Trustee Annual Report. The most recent report contains results for 2012. These are reproduced below.

The Scottish Central Authority failed to respond to requests for information. However, the Northern Ireland Central Authority produced data on request for all recent years up to 2013.

England and Wales³

YEAR	Incoming return cases	Outgoing return cases	Incoming contact cases	Outgoing contact cases
2012	229	220	28	37
2011	244	200	33	39
2010	226	150	28	35
2009	193	214	34	45
2008	200	183	38	45
2003	142	148	17	43
1999	149	126	25	29

² ISDC, Study on Parental Responsibility, EP study 425.615, p. 43.

³ Statistics obtained from Ministry of Justice, *Official Solicitor and Public Trustee Annual Report* in respect of each year 2010-2013, available from <http://www.justice.gov.uk/publications/corporate-reports/ospt> (30.04.2014) and [for 1999, 2003 and 2008], the UK Report (England and Wales) contained in Hague Conference on Private International Law, *A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – National Reports* (drawn up by Nigel Lowe, Cardiff University Law School), Preliminary Document No 8 C of May 2011, p.180.

Scotland⁴

YEAR	Incoming return cases	Incoming contact cases
2008	7	2
2003	12	0
1999	10	3

Northern Ireland⁵

YEAR	Incoming return cases	Outgoing return cases	Incoming contact cases
2013	11	9	n/a
2012	14	10	n/a
2011	10	6	n/a
2010	8	8	n/a
2009	9	7	n/a
2008	13	12	2
2003	2	5	0
1999	6	n/a	1

4.17.2. The National legal framework

Those parts of the Hague Convention on Child Abduction ratified by the United Kingdom are set out in Schedule 1 attached to the **Child Abduction and Custody Act 1985 ("CACA 1985")**.⁶ This legislation implements into domestic law in each of the jurisdictions of England and Wales, Scotland and Northern Ireland the reproduced provisions of the Hague Convention on Child Abduction.⁷

Section 10 of CACA 1985 provides for the possibility of procedural rules to be introduced to supplement the implementation of the Hague Convention on Child Abduction in UK law. In England and Wales, it is secondary legislation, known as the **Family Procedure Rules 2010 (the "Family Procedure Rules")**,⁸ which contains a chapter specifically dedicated to procedural aspects of proceedings brought under the Hague Convention on Child Abduction. These rules of court which govern the practice and procedure to be followed in family proceedings in relevant courts are made by the Family Procedure Rule Committee, an advisory non-departmental public body of the Ministry of Justice comprising of judges, lawyers and specially appointed non-judicial members. Rules include provisions on where to start proceedings, the matters on which judges may make directions for dealing with particular cases and when and in what circumstances proceedings may be stayed (suspended) and transferred.

⁴ No statistics made available by Scottish Central Authority, despite request. Available data obtained from Hague Conference on Private International Law, see Lowe's 2011 Statistical Analysis, Part A, p.11.

⁵ Statistics for 2009-2013 for incoming return cases, and for 2003-2013 for outgoing return cases made available by Mark Clokey of Northern Ireland Courts Service, the Northern Ireland Central Authority, following request. Other data obtained from Hague Conference on Private International Law, see Lowe's 2011 Statistical Analysis, Part A, p.11.

⁶ Child Abduction and Custody Act 1985, available at <http://www.legislation.gov.uk/ukpga/1985/60/contents> (20.03.2014). Note that this version of the legislation has not yet been updated to include section 1(3) CACA 1985 which introduces EU Regulation 2201/2003, and confirms that it takes precedence over the Hague Convention.

⁷ Section 1(2) states that "Subject to the provisions of this Part of the Act, the provisions of that Convention set out in Schedule 1 to this Act shall have the force of law in the United Kingdom."

⁸ Part 12 Chapter 6 of the Family Procedure Rules 2010, Statutory Instrument 2010/2955, available at <http://www.legislation.gov.uk/uksi/2010/2955/made>.

The Rules are further supplemented by Practice Directions issued by the President of the Family Division of the High Court of Justice in England and Wales,⁹ and these provide specific practical guidance on how the family procedure rules can be complied with. Practice Directions are described as published statements usually issued by the head of the court or division to which they relate, indicating the procedure to be followed in particular matters, and that unlike rules of court, and they have no statutory authority.¹⁰ In effect, it may be said that the Rules explain what to do, while the Practice Directions explain how to do it.

Practice Direction 12F specifically concerns international child abduction, and is described as explaining,

“what to do if a child has been brought to, or kept in, England and Wales without the permission of anyone who has rights of custody in respect of the child in the country where the child was habitually resident immediately before the removal or retention,” as well as, “what to do if a child has been taken out of, or kept out of, England and Wales without the permission of a parent or someone who has rights of custody in respect of the child.”¹¹

Practical guidance is provided on, among other things, who to contact, what the Central Authority will do, how to initiate court proceedings, the timetable for the case and securing police assistance.¹²

4.17.3. Characterisation of parental Child Abduction

Habitual residence

Before a wrongful removal or retention can be established under the Convention, it has to be shown that the child has been removed from or retained out of the State of his habitual residence. Baroness Hale confirmed in the seminal case of *A v A*,¹³ reported in 2013, that in England and Wales, the concept of habitual residence must be interpreted as having the same meaning under the Convention as under the revised EU Regulation 2201/2003, and that that test is the one laid down by the CJEU in *Proceedings brought by A*.¹⁴ Namely, “habitual residence” will denote the “place which reflects some degree of integration by the child in a social and family environment,” that it is a question of fact and not a legal concept such as domicile, and that, “the essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.”¹⁵

The Supreme Court in *A v A* also reiterated and supported the dictum of Lord Brandon in *Re J (A Minor)(Abduction: Custody Rights)*,¹⁶ the propositions of which Baroness Hale and her fellow judge, Lord Hughes, said were best regarded as helpful generalisations of fact (rather than propositions of law). The generally stated propositions extracted were that habitual residence in country A may be abandoned in a single day, that habitual residence

⁹ The High Court of Justice is one of Senior Courts of England and Wales, together with the Court of Appeal and the Crown Court, and has three main divisions: the Queen's Bench Division, the Chancery Division and the Family Division.

¹⁰ Jonathan Law and Elizabeth Martin (eds.), *Oxford Dictionary of Law*, 7th Edition 2009, Oxford University Press, p.415

¹¹ Family Procedure Rules, Practice Direction 12F – International Child Abduction, available from Ministry of Justice at http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12f.

¹² Further detail of the substance of the Family Procedure Rules and Practice Direction is provided in section 3 of this report below.

¹³ [2013] 3 Weekly Law Reports 761.

¹⁴ Case C-523/07.

¹⁵ Baroness Hale in *A v A*, op. cit. at [54].

¹⁶ [1990] 2 All England Law Reports 961 at 965.

in country B cannot be established in a single day and that an infant who is in the sole lawful custody of his mother will necessarily have the same habitual residence as she has. It was also said by Lord Hughes in *A v A* that simple physical presence is not by itself enough to establish habitual residence and that it will be a matter for the court in any particular case to decide whether the established residence has matured in to habitual residence.¹⁷

Scottish law also relies on the principle that habitual residence is a question of fact to be decided by reference to all the circumstances of any particular case.¹⁸ Greater emphasis would appear to be placed on the intentions behind a child residing in a particular country, Scottish courts holding that habitual residence is a residence which is being enjoyed (perhaps voluntarily) for the time being and with the settled intention that it should continue for some time,¹⁹ that there is no requirement that the residence be intended to be permanent or indefinite,²⁰ that it may be for a limited period and that it is sufficient that there is an intention to reside for an appreciable period.²¹

Wrongful removal/retention

UK case law has also examined the meaning of “wrongful” in the context of Article 3 of the Convention. Lord Justice Dyson in the case of *Hunter v Murrow* summarised the general approach in determining whether the removal or retention of a child is wrongful.²² In the first instance, it must be established what rights, if any, the applicant had under the law of the state in which the child was habitually resident immediately before his or her removal or retention. Known as the “domestic law question”, this requires the court to look at the domestic law of that state and to decide what rights are recognised by that law; secondly, the court must determine whether those rights are properly to be characterised as “rights of custody” in accordance with the Convention.

In *Re F (Children) (Abduction; Rights of Custody)*,²³ President Potter commented that the court should resist the temptation to make its own findings as to the foreign laws applicable and should instead have the assistance of expert evidence.

In breach of “rights of custody”

It is well established that rights of custody may arise by operation of law or by reason of a judicial or administrative decision or by reason of an agreement having legal effect under the law of the country of residence.²⁴ The distinction drawn between “rights of custody” as referred to in Article 5(a) of the Convention and “rights of access” as referred to in Article 5(b) have been reinforced by courts in the UK.²⁵ A right to be consulted on where the child should reside but without a power to veto (i.e., to withhold consent to the child’s removal from the jurisdiction) did not amount to “rights to custody”²⁶

¹⁷ Lord Hughes in *A v A*, op. cit. at [80(iv)].

¹⁸ Per Lord Brandon in *Re J (A Minor)(Abduction: Custody Rights)*, op. cit.

¹⁹ *Dickson v Dickson*, 1990 Scottish Civil Law Reports 692 at 703A per Lord President Hope.

²⁰ *Cameron v Cameron*, 1996 Scots Law Times 306.

²¹ Ibid. As summarised in A. B. Wilkinson and K. McK. Norrie (eds.), *The Law Relating to Parent and Child in Scotland*, 3rd ed. 2013, The Scottish Universities Law Institute, p. 386.

²² [2005] England and Wales Court of Appeal Civil Division 976.

²³ [2008] 3 Weekly Law Reports 527.

²⁴ Hague Convention on Child Abduction, Article 3.

²⁵ In *S v H (Abduction: Access rights)* ([1997] 3 Weekly Law Reports 1086, an unmarried mother who had sole custody of her son and who came lawfully to England from Italy was found not to have acted in breach of the father’s “rights of custody” since he had no parental authority and the access order in his favour did not give him authority to prevent the mother taking the child out of the country. Similarly, in Scotland, a right of access does not carry with it the right to determine the child’s place of residence and will therefore not amount to a “right of custody” (*Pirrie v Sawacki*, 1997 Scots Law Times 1160).

²⁶ *Re V-B (Abduction: Custody Rights)* [1999] 2 Family Court Reporter 371.

whereas a right to veto is likely to amount to a right of custody.²⁷ A potential right of veto (being the right to go to court to, among other things, seek an order on relocation abroad), however, would not be capable of conferring rights of custody.²⁸

Within the UK, insofar as individuals are concerned, all those vested with parental responsibility have "rights of custody" for the purposes of the Convention. This is the position regardless of whether that responsibility is automatic, as is the case of married parents and unmarried mothers or in the case of unmarried fathers where they have been formally registered as the father or given a parental responsibility order or agreement or as a result of being a guardian or having a residence order in their favour.

Under English law, a parent with whom the child resides (pursuant to a court-issued residence order) cannot remove a child from the jurisdiction without the written consent of every person with parental responsibility or the leave of the court.²⁹ This means that the non-resident parent, having only rights of access but with continuing parental responsibility, can be deemed to have a "right of custody" protected by the Hague Convention on Child Abduction. Such a veto on the child's removal has been accepted as a right of custody, in particular by the American courts with the decision of the US Supreme Court in *Abbott v Abbott*.³⁰

In Scotland, a provision in the Children (Scotland) Act 1995³¹ has a similar effect. Where both the child's parents have and are exercising either the right to have the child living with him or her or otherwise to regulate the child's residence or if the child is not living with him or her, the right to maintain personal relations and direct contact with the child on a regular basis, then no one may remove the child from or retain the child outside the UK without the consent of both such parents. This too, has been held to amount to a right of custody protected by the Hague Convention on Child Abduction, meaning that a Scottish parent with only the right of contact can require the return of the child to Scotland if removed from the UK by the parent with whom the child resides.³²

It should be noted however, that both in England and Wales and in Scotland, "rights of custody" is not confined to any national meaning, and that such rights may be attributed to those without any formal parental responsibility. Various cases³³ have given rights of custody to unmarried fathers without parental responsibility who may be said to have been de facto caring for the child in question. In *Re C (Child Abduction: Unmarried Father: Rights of Custody)*, Judge Munby concluded that the authorities show that there can be circumstances in which an unmarried father will acquire rights of custody even if he is not the sole primary carer and even if he is sharing care with another person other than the mother.³⁴

In the UK generally, an institution such as a local authority or adoption agency, as well as individuals, can have rights of custody.³⁵ It is also now well established that "rights of custody" for the purposes of Articles 3 and 5 of the Hague Convention on Child Abduction can be vested in a court. Guidance on when such rights of custody vest in the court has

²⁷ *Re D (Abduction: Rights of Custody)* [2007] 1 All England Law Reports 783.

²⁸ *Ibid*, according to Baroness Hale at para [38].

²⁹ Children Act 1989, section 13, available at <http://www.legislation.gov.uk/ukpga/1989/41/contents> (10.04.2014).

³⁰ 130 Supreme Court 1983, 176 L. Ed. 2d 789.

³¹ Sections 2(3) and (6).

³² *J v J*, 2005 1 Session Cases 428. Referred to in A. B. Wilkinson and K. McK. Norrie (eds.), *The Law Relating to Parent and Child in Scotland*, op. cit.

³³ See *Re W*; *Re B (Minors) (Abduction: Father's Rights)* [1999] Fam 1, *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 All England Law Reports 961, House of Lords, *Re F (Abduction: Unmarried Father: Sole Carer)* [2002] England and Wales High Court.

³⁴ [2003] 1 Family Law Reports 252, summarised in Alistair McDonald Q.C. (ed.), *Clarke, Hall and Morrison on Children*, Issue 86 November 2013, Division 5, section [298]

³⁵ *Re JS (Private International Adoption Agency)* [2000] 2 Family Law Reports 638.

been provided in the seminal case of *Re H (A Minor)(Abduction: Rights of Custody)*.³⁶ In summary, where a court has been seized of a question of custody and has the power to determine the child's residence, it may be deemed to have rights of custody.

4.17.4. Judicial and non-Judicial tools available to the parent left behind, including mediation

The CACA 1985, in which the Hague Convention on Child Abduction is implemented in to domestic UK law,³⁷ contains a number of statutory provisions which seek to clarify or interpret Articles of the Hague Convention on Child Abduction for the purposes of UK law. These include specifying which authorities will discharge the functions of the Central Authority,³⁸ the courts which have jurisdiction,³⁹ providing for interim directions to be made to secure the welfare of the child,⁴⁰ the proof of documents and evidence,⁴¹ how applications are to be funded⁴² and making provision for rules of court to be made by the appropriate bodies⁴³. Section 9 of CACA 1985 furthermore provides for the suspension of the court's usual powers to examine the merits of rights of custody where it is established that a child has been wrongfully removed to the UK within the meaning of the Hague Convention on Child Abduction.

As stated above, secondary legislation, in the form of Part 12, Chapter 6 of the Family Procedure Rules contains the procedural steps which apply to proceedings under the Hague Convention on Child Abduction. It specifies that proceedings must be brought before the High Court in England and Wales, what the application for the return of a child must include and provides authority to the court as to what directions it may make in relation to the proceedings.⁴⁴

Practice Direction 12F,⁴⁵ provides more user-friendly guidance to those involved in the proceedings. It provides contact details of the Central Authority, how to make and respond to a relevant application and the timetable for the case. In particular, it emphasises that proceedings must be completed within 6 weeks, and, relying on case law, sets out how proceedings will be expedited.⁴⁶ It also explains how "rights of custody" may be attributed to someone who does not have strict legal rights of parental responsibility.⁴⁷

As to funding of proceedings under the Hague Convention on Child Abduction in the UK, section 11 of CACA 1985 refers to the reservation conferred by Article 26 of the Convention allowing for the costs of litigation to not be borne by any Minister or other authority, but instead by the Legal Services Commission in England and Wales or the legal aid authorities in Scotland and Northern Ireland. Applicants are entitled to public funding free of charge regardless of the party's means and regardless of the merits of their application. Respondents are however means-tested and merits-tested.⁴⁸

³⁶ [2000] 1 Family Law Reports 374, House of Lords, where Lord Justice Thorpe's guidance given in the Court of Appeal ([2000] 1 Family Law Reports 201 at 211-212 was not commented on by the House of Lords.

³⁷ By virtue of section 1(2) CACA 1985.

³⁸ Hague Convention on Child Abduction, section 3.

³⁹ *Idem*, section 4.

⁴⁰ *Idem*, section 5.

⁴¹ *Idem*, section 7.

⁴² *Idem*, section 11.

⁴³ *Idem*, section 10.

⁴⁴ Family Procedure Rules, *op. cit.*, Rule 12.48.

⁴⁵ See section 2 of this report, above.

⁴⁶ Family Procedure Rules, Practice Direction 12F, *op. cit.*, section 2.14, referring to the judgment of the Court of Appeal, Civil Division, in *Vigreux Michel & Another* [2006] England and Wales Court of Appeal Civil Court 630.

⁴⁷ Family Procedure Rules, Practice Direction 12F, *op. cit.*, sections 2.16 to 2.17.

⁴⁸ Applications are made under the CACA 1985 and the Community Legal Service (Financial) Regulations 2000, regulation 3(1)(f), available at <http://www.legislation.gov.uk/ukxi/2000/516/regulation/3/made>.

Compulsory and/or voluntary mediation in the context of international child abduction is not provided for under UK domestic law, although the use of mediation may be said to be encouraged by both the Hague Convention on Child Abduction, which requires Central Authorities to, "....take measures to bring about an amicable resolution of the issues,"⁴⁹ and Regulation 2201/2003, under which Central Authorities must take appropriate steps to, "facilitate agreement between holders of parental responsibility through mediation or other means.....".⁵⁰

The use of voluntary mediation in tandem with proceedings under the Hague Convention on Child Abduction has nevertheless been pioneered by Reunite, a UK charity which specialises in international parental child abduction. This is said not to prejudice or delay court proceedings in either country, but to run alongside proceedings.⁵¹ As well as providing advice, information and support to parents who fear their child may be at risk of child abduction, Reunite performs an educational function and works closely with the Ministry of Justice and Foreign and Commonwealth Office. The Charity is partly funded by these government departments.

In 2006, Reunite trialled a mediation pilot scheme for use in cases of international parental child abduction after having secured funding. The results formed the subject of a report on the effectiveness of mediation published on behalf of Reunite in June 2012.⁵² Mediation was made available to those involved in cases where children had been removed to, or retained in, the United Kingdom and where the left-behind parent was pursuing an application under the Hague Convention on Child Abduction for the return of the child. Of 80 cases initially referred to the charity as potentially suitable for mediation, 41 were screened, with 28 eventually proceeding to a concluded mediation. A Memorandum of Understanding ("MoU")⁵³ was agreed in 21 of these cases. A MoU records the agreement reached, following mediation, about residency, contact and related issues and is signed by the parents and the mediators. It is then submitted as what is known as a draft consent order in court proceedings. Such an order will only then become legally binding when it has been submitted to the court.

Typically, it is reported,⁵⁴ the consent order will contain the following provisions: permission for the left-behind parent to withdraw the originating application pursuant to the Hague Convention on Child Abduction, the incorporation of the residence and contact conditions contained within the Reunite MoU; a requirement that the consent order be registered as a mirror order with a court of competent jurisdiction in the other country concerned, and the release by the court officer of the children's passports to the residential parent.

4.17.5. Existing criminal sanctions

In England and Wales, according to section 1 of the Child Abduction Act 1984,⁵⁵ "a person connected with a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the appropriate consent." The same provision

⁴⁹ Article 7(c).

⁵⁰ Article 55(e).

⁵¹ See Reunite leaflet, Mediation Service, available at

<http://www.reunite.org/edit/files/Downloadable%20forms/Mediation%20Leaflet.pdf>.

⁵² Trevor Buck on behalf of Reunite, An evaluation of the long-term effectiveness of mediation in cases of international parental child abduction, Reunite International Child Abduction Centre, June 2012, available at <http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Mediation%20research%20report.pdf>.

⁵³ An example of which is contained at *ibid*, Appendix 2.

⁵⁴ Trevor Buck on behalf of Reunite, An evaluation of the long-term effectiveness of mediation in cases of international parental child abduction, Reunite International Child Abduction Centre, June 2012, *op. cit.*, p. 46.

⁵⁵ Child Abduction Act 1984, section 1, available at <http://www.legislation.gov.uk/ukpga/1984/37/section/1>.

applies in Scotland and in Northern Ireland under Part II of the Child Abduction Act 1984⁵⁶ and the Child Abduction (Northern Ireland) Order 1985, respectively.⁵⁷

Recent case law⁵⁸ has ruled that once consent has been given to take a child outside the UK even for a limited time, it is not an offence under the Act if that child is subsequently detained beyond the agreed time. This is because “taking out of the UK” is not to be interpreted as a continuing activity.

A “person connected with” a child is a parent, father who was unmarried to the mother at the time of the child’s birth (where there are reasonable grounds for believing he is the father), guardian, person with a residence order with respect to the child or someone who has custody of the child. Having “appropriate consent” means the consent of each of the child’s mother, his/her father (where he has parental responsibility for him/her), the guardian of the child, any person in whose favour a residence order is in force, anyone who has custody of the child or anyone with the leave of the court.⁵⁹

The penalty for committing such an offence in England and Wales is imprisonment for a term of up to 7 years.⁶⁰ The same maximum penalty applies in Northern Ireland. In Scotland, the maximum penalty is imprisonment for a term not exceeding two years or a fine, or both.⁶¹

A further criminal offence in England and Wales with which a parent can be charged is the common law offence of kidnapping his own child.⁶² This requires the following elements: (a) the taking or carrying away of one person by another; (b) by force or by fraud; (c) without the consent of the person so taken or carried away; and (d) without lawful excuse.⁶³ The maximum penalty for kidnapping is life imprisonment, but it should be noted that any prosecution of this offence against a person connected with a child under the age of 16 may only proceed with the consent of the Director of Public Prosecutions, the most senior public prosecutor in England and Wales.⁶⁴

4.17.6. Compensation for the parent left behind

There are no known civil law sanctions for parental child abduction in the UK jurisdictions. However, it is possible for courts to make orders allowing successful parties to obtain costs from the other party. In *ECL v DM* (costs in Hague Convention proceedings),⁶⁵ it was held that there is no requirement in Article 26 of the Hague Convention to exclude the power to make costs orders against claimants. It is nevertheless usual in child abduction cases for no order as to costs to be made, except in circumstances where a party’s conduct had been unreasonable or where there was a considerable disparity of means.⁶⁶

⁵⁶ Child Abduction Act 1984, part II, available at <http://www.legislation.gov.uk/ukpga/1984/37/part/II>.

⁵⁷ Child Abduction (Northern Ireland) Order 1985, available at <http://www.legislation.gov.uk/nisi/1985/1638/contents>.

⁵⁸ *R (Nicolaou) v Redbridge Magistrates’ Court* [2012] England and Wales High Court 1647 (Admin). But see section 4.17.12 below concerning Law Commission proposals to change the law in this regard.

⁵⁹ Granted pursuant to the Part II of the Children Act 1989, available at <http://www.legislation.gov.uk/ukpga/1989/41/part/II>.

⁶⁰ Child Abduction Act 1984, section 4(1).

⁶¹ *Ibid*, section 8.

⁶² “Common law offence” refers to an offence of the common law which has been developed entirely by the courts and for which there is no actual legislation. In this case, see *R v D* [1984] 2 All England Law Reports 449, House of Lords.

⁶³ Summarised in Alistair McDonald Q.C. (ed.), Clarke, Hall and Morrison on Children, op. cit., Division 5, section 35.

⁶⁴ Child Abduction Act 1984, section 5.

⁶⁵ [2005] England and Wales High Court 588 (Family Division).

⁶⁶ See Alistair McDonald Q.C. (ed.), Clarke, Hall and Morrison on Children, op. cit., Division 5, section 621.

4.17.7. Enforcement methods

The Central Authority administrative agency designated by the Hague Convention is different for each of the UK jurisdictions. In England and Wales, responsibility is held by the Lord Chancellor through the International Child Abduction and Contact Unit ("ICACU"); in Scotland, it is the Secretary of State (via the Justice Directorate (International Law Team)) for the Scottish Government and in Northern Ireland, it is the Department of Justice (via the Northern Ireland Court Service (Legal Adviser's Division)).⁶⁷

Courts with jurisdiction to entertain applications under the Hague Convention are, in England and Wales, the High Court, in Scotland, the Court of Session and in Northern Ireland, the High Court of Northern Ireland.⁶⁸

4.17.8. Sensitive issues featured in national case law

The meaning of "habitual residence" and what "rights of custody" include are two issues which have been the subject of considerable case law over the past fifteen years. The more relevant case law has been addressed above in section 4.17.3.⁶⁹ Determination of the "best interests of the child", another issue given certain attention in recent cases, is addressed in 4.17.11. below.

Important case law⁷⁰ has considered the issues presented by the obligation to return under Article 12 of the Hague Convention on Child Abduction and its relation to the three principle various defences available under Article 13. First, there is the application of Article 13(a) and the meaning of consent; secondly, of what is known as the child's objection defence; and, finally, the child's risk defence under Article 13(b). These are considered below in conjunction with the corresponding provisions introduced by Regulation 2201/2003, where applicable.

Consent

The leading case on consent is *Re P-J Children (Abduction: Consent)*,⁷¹ where, in 2009, Lord Justice Ward summarised the current position based on existing case law:

- "(1) Consent to the removal of the child must be clear and unequivocal.
- (2) Consent can be given to the removal at some future but unspecified time or upon the happening of some future event.
- (3) Such advance consent must, however, still be operative and in force at the time of the actual removal.
- (4) The happening of the future event must be reasonably capable of ascertainment. The condition must not have been expressed in terms which are too vague or uncertain for both parties to know whether the condition will be fulfilled. Fulfilment of the condition must not depend on the subjective determination of one party, for example, "Whatever you may think, I have concluded that the marriage has broken down and so I am free to leave with the child". The event must be objectively verifiable.

⁶⁷ CACA 1985, section 3.

⁶⁸ CACA 1985, section 4.

⁶⁹ Although a particular issue in the field of rights of custody recently dealt with in the jurisdiction of Northern Ireland is addressed below.

⁷⁰ Of which many of the citations and relevant extracts relied on in this report have been helpfully collated in Alistair McDonald Q.C. (ed.), *Clarke, Hall and Morrison on Children*, op. cit.

⁷¹ [2009] England and Wales Court of Appeal 588.

(5) Consent, or the lack of it, must be viewed in the context of the realities of family life, or more precisely, in the context of the disintegration of the family life. It is not to be viewed in the context of, nor governed by, the law of contract.

(6) Consequently consent can be withdrawn at any time before actual removal. If it is, the proper course is for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed.

(7) The burden of proving consent rests on him or her who asserts it.

(8) The inquiry is inevitably fact specific and the facts and circumstances will vary infinitely from case to case.

(9) The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal?"

As acknowledged above, recent case law to examine the issue of consent has clarified that consent cannot be governed by the law of contract⁷² and that statements made in anger in the heat of an argument which were neither intended nor understood as giving permission to remove or retain a child cannot be regarded as "consent".⁷³

Child's objection defence

That a return order can also be refused if the judicial or administrative authority finds that the child objects, means, according to Lord Justice Thorpe in *Re K (Abduction: Case Management)*⁷⁴ more than a mere expression of wishes and feelings but indicates a strength, a conviction and rationality of view against being returned and, "has attained an age and degree of maturity at which it is appropriate to take account of his views."

In 2008, President Potter consolidated previous case law and offered some guidance on how to approach the issue of a child's objections in the case of *Re F (Children) (Abduction: Rights of Custody)*:⁷⁵

- (1) "Are the objections to return made out? In this connection is the child objecting to being returned to the country of habitual residence as opposed simply to expressing a preference for staying with the abducting parent?
- (2) Has the child reached an age and degree of maturity at which it is appropriate to take account of his views?
- (3) In this connection have those views been shaped or coloured by undue influence or pressure directly or indirectly exerted by the abducting parent to an extent which requires such views to be disregarded or discounted?
- (4) If, and to the extent that, it is appropriate to take account of the child's objections, in exercising the court's discretion whether or not to order return, what weight should be placed on those objections in the light of any countervailing factors, and in particular the philosophy of the Hague Convention on what have been called the "Convention considerations"? These are both that the deterrence of abductors and the welfare interests of children are generally best served by the making of an order for prompt return to the Requesting State for consideration of the position by the

⁷² Per Lord Justice Ward in *ibid*.

⁷³ *JPC v SLW and SMW (Abduction)* [2007] England and Wales High Court 1349 (Family Division).

⁷⁴ [2010] England and Wales Court of Appeal Civil Division 1546.

⁷⁵ [2008] England and Wales High Court 272 (Family Division). Summarised in Alistair McDonald Q.C. (ed.), *Clarke, Hall and Morrison on Children, op. cit.*, Division 5, section 450.

appropriate home court; they also include comity and respect for judicial processes of the Requesting State, as well as welfare considerations directed to the position of the child in question.”

This case-by-case approach is also witnessed in Scotland,⁷⁶ and case law reported as recently as 2010 has seen the objections of children as young as six years old being taken into account.⁷⁷

Linked to this, the need to hear the child's views, reinforced by Article 11(2) of Regulation 2201/2003, has also presented a challenge to UK courts. It was mooted whether the existing domestic mechanisms⁷⁸ allowing children's views to be considered would need to be amended. Baroness Hale said in *Re D (A Minor)/(Abduction: Rights of Custody)*⁷⁹ in 2006 that the, “Brussels II Regulation requires us to look at the question of hearing children's views afresh.” The principal change brought about by this review of existing procedures has been that the courts will now always consider as early in the process as possible, whether and, if so, how to hear the child's views. Previously, it was noted that the children's views had been raised very late in proceedings, and abused as a last minute tactic by the abducting parent.⁸⁰

In *Re F (a child)(abduction: obligation to hear the child)*,⁸¹ the Court of Appeal remitted the case back to the High Court in order that the child's views could be heard, after it was found that the failure to consider the views of a child (a 7-year old brought to England from Spain) was a fundamental deficiency in the judge's decision. The question of how and whether the court will hear the child in accordance with Article 11(2) was, it said, something to be considered at the first directions appointment.

Child's risk defence

A further issue which has generated important case law is that concerning the refusal for returning a child under Article 13(b) of the Hague Convention on Child Abduction where it is shown that there is a grave risk or that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Article 11(4) of Regulation 2201/2003, according to which a court is no longer allowed to refuse a return under Article 13(b) of the Hague Convention on Child Abduction if it is established that adequate arrangements have been made in the requesting State to secure the protection of the child upon his/her return, does not appear to have featured greatly in reported cases.

The 2011 case of *Re E (Children) (Abduction: Custody Appeal)*⁸² took into account the ruling of the Grand Chamber of the European Court of Human Rights in *Neulinger and Shuruk v Switzerland*⁸³ that return orders could be capable of violating both the abducting parent's and the child's rights to respect private and family life, and that Article 13(b) of the Hague Convention on Child Abduction in particular should be interpreted in light of the child's best interests.⁸⁴ It categorically found however, that faithful application

⁷⁶ See analysis in A. B. Wilkinson and K. McK. Norrie (eds.), *The Law Relating to Parent and Child in Scotland*, op. cit., p.404-406

⁷⁷ *W v W (Abduction: Acquiescence: Children's Objections)* [2010] England and Wales High Court 332 (Family Division).

⁷⁸ Which usually involve an enquiry and report by a “CAFCASS” officer, or less often, by joining the child as a party to the court proceedings. “CAFCASS” refers to the Children and Family Court Advisory and Support Service, a non-departmental public body accountable to the Secretary of State at the Ministry of Justice, independent of the courts, which employs social workers to support children involved in adoption and court proceedings.

⁷⁹ [2006] UK House of Lords 51.

⁸⁰ See comment of Baroness Hale in *Re D (A Minor)/(Abduction: Rights of Custody)*, *ibid*, at [61].

⁸¹ [2006] England and Wales Court of Appeal, Civil Division 468.

⁸² [2011] UK Supreme Court 27.

⁸³ (Application No 41615/07), [2011] Family Law Reports 122.

⁸⁴ See II.2.3 of this report, below.

of the Hague Convention on Child Abduction is already compliant with Article 3(1) of the UN convention of the Rights of the Child and that the ruling does not mean that any particular changes (such as a “full blown examination of the child’s future”)⁸⁵ needed to be made to the approach of the English courts. Although Article 13(b) of the Hague Convention on Child Abduction must still be interpreted within the human rights framework, it does not mean that adjustments are needed in order for applications to be interpreted in light of the child’s best interests. This view was reiterated in the more recent case of *Re S (A Child)(Abduction: Rights of Custody)*.⁸⁶

As to what amounts to harm or an intolerable situation, it has been rejected that this would demand violence or other specific abuse to the child for an Article 13(b) defence to succeed. In *Re W (a child) (abduction: conditions for return)*, Lord Justice Wall said:

“It is well recognised that in the context of domestic violence, the position of the child is vitally affected by the position of the mother. If the effect on the mother of the father’s conduct is severe, it is, in my judgment, no hindrance to the success of an Art 13(b) defence that no specific abuse has been perpetrated by the father of the child.”⁸⁷

In the case of *Re S (A Child)(Abduction: Rights of Custody)*,⁸⁸ the Supreme Court confirmed that a respondent’s subjective perception of the risks of a return leading to an intolerable situation for the child could be sufficient to establish an Article 13(b) defence.

The residual discretion to return

Particular debate about the nature of a discretion for the court to order the child’s return even where an exception is established under Articles 12 or 13 of the Hague Convention on Child Abduction, has featured in recent case law. Although such discretion is widely acknowledged as existing in relation to Article 13, there was doubt that a court could order a child’s return where it could be said that the child was settled in its new environment according to Article 12(2) of the Hague Convention on Child Abduction.

Relying on Article 18 of the Hague Convention on Child Abduction that the powers of judicial or administrative authorities to order the return of a child at any time are not intended to be curtailed by the Convention, the prevailing view, first espoused by Lord Justice Thorpe in 2004 in the case of *Cannon v Cannon*⁸⁹ is that a specific discretion is specifically conferred. In the seminal 2007 case of *Re M (Children)(Abduction: Rights of Custody)*,⁹⁰ Baroness Hale emphasised that there could be no notion of the exercise of such discretion being treated as exceptional only. Nevertheless, she also sought, by way of illustration, to highlight that the child’s welfare should not unnecessarily be put at risk by such broad ranging discretion:

“All this is merely to illustrate that the policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of the particular child. The Convention itself contains a simple, sensible and carefully thought out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying international child abduction.”⁹¹

⁸⁵ Per Baroness Hale and Lord Wilson, *Re E (Children)(Abduction: Custody Appeal)*, op. cit.

⁸⁶ [2012] UK Supreme Court 10.

⁸⁷ [2004] England and Wales Court of Appeal Civil Division 1366 at [49].

⁸⁸ [2012] UK Supreme Court 10.

⁸⁹ [2004] England and Wales Court of Appeal Civil Division 1330.

⁹⁰ [2007] UK House of Lords 55.

⁹¹ Per Baroness Hale, *Ibid*, at [48].

Time for processing applications

A further issue to come to the fore in recent case law are the time frames relating to court proceedings.

First, there is the time taken for the court process itself leading to judgment. This has been the subject of recent jurisprudence, particularly in light of Article 11(3) of Regulation 2201/2003 which demands that domestic courts issue judgment on applications under the Hague Convention on Child Abduction no later than six weeks after proceedings are lodged, unless exceptional circumstances apply.

In the 2006 case of *Vigreux v Michel*,⁹² proceedings took five months, with administrative delays leading to what was described as an unacceptable time frame. Lord Justice Thorpe set down some practical guidance on expediting proceedings, which has since been embodied in Practice Direction 12F.⁹³ Lord Justice Wall said:

“Failure to adhere to the time-tables proposed will not only result in the English Court being in breach of its international obligations; it will represent an unacceptable abnegation of the court’s responsibility properly to address cases of international child abduction – a matter which, in the past, we have taken legitimate pride.”⁹⁴

Secondly, there are the time constraints introduced by Articles 11(6) and 11(7) of Regulation 2201/2003 once a court has refused to order a return under Article 13 of the Hague Convention on Child Abduction.

The one-month deadline under Article 11(6) of the Regulation 2201/2003 for providing the Member State where the child was habitually resident with the court order on non-return as well as other documentation is a deadline which English courts must ensure is respected, in the first instance, with the trial judge expediting the approval of the transcript, and if necessary, translation, of his or her judgment.⁹⁵

Home state adjudication on custody following a refusal by Member State to return the child

A further issue which has generated important case law in the UK is that raised by the scheme introduced by Articles 11(6)-(8) and 42 of Regulation 2201/2003, according to which a Member State in which a court has refused to return the child can thereafter be required to return the child to its home State following adjudication there and pursuant to a court order issued in that State where the child has habitual residence.

Although this scheme has been examined by the European Court of Justice, the English cases of *Re A* (custody decision after a Maltese non-return order)⁹⁶ reported in 2006, *Re A, HA v MB* (Brussels II Revised: Article 11(7) Application)⁹⁷ reported in 2007, *M v T* (Abduction: Brussels II Revised, Art 11(7))⁹⁸ reported in 2010 and *AF v T and Another* (Brussels II Revised: Art 11(7) Application)⁹⁹ reported in 2011, have also resulted in a set of common principles at the domestic level which were usefully summarised by Judge Theis in the 2011 case of *D v N and D* (By the Guardian Ad Litem) (Brussels II Revised: Art 11(7)):¹⁰⁰

⁹² [2006] England and Wales Court of Appeal Civil Division 630.

⁹³ Family Procedure Rules, Practice Direction 12F – International Child Abduction, available from Ministry of Justice, op. cit., fn7

⁹⁴ Op. cit. at [88].

⁹⁵ See comments of Lord Justice Thorpe in *Vigreux v Michel*, op. cit., at [46].

⁹⁶ [2006] England and Wales High Court 3397 (Family Division).

⁹⁷ [2007] England and Wales High Court 2016 (Family Division).

⁹⁸ [2010] England and Wales High Court 1479 (Family Division).

⁹⁹ [2011] England and Wales High Court 1315 (Family Division).

¹⁰⁰ [2011] England and Wales High Court 471 (Family Division) at [39].

“(1) The interrelationship of Articles 10 and Articles 11(7) and (8) of the Brussels II Regulation [2201/2003] permit the State of origin (from where the child has been wrongfully removed or retained to) to undertake an examination of the question of the custody of the child, once a judgment of non-return pursuant to Article 13 has been made by a State where a request has been under the Hague Convention 1980;

(2) Proceedings under Article 11(7) should be carried out as quickly as possible;¹⁰¹

(3) In undertaking the examination of the question of the custody of the child, the Judge should be in a position that he or she would have been in if the abducting parent had not abducted the child. Thus the whole range of orders that would normally available to a Judge should be available when examining the question of the custody of the child;¹⁰²

(4) In undertaking the examination of the question of the custody of the child, the court exercises a welfare jurisdiction: the child’s welfare shall be the court’s paramount consideration;¹⁰³

(5) It may not be necessary or appropriate to categorise the jurisdictional foundation for such an enquiry as deriving from, or relying upon, the inherent jurisdiction. The foundation for any examination of the question of the custody of the child is simply through the gateway of Article 11(7);

(6) The court has a well-known and historic ability to order the summary return of a child to and from another jurisdiction;

(7) As part of the court’s enquiry under Article 11(7) the court does have the ability to order a summary return of the child to this country to facilitate the decision making process leading to a final judgment;¹⁰⁴

(8) In deciding whether to order a summary return or to carry out a full welfare enquiry, the court exercises a welfare jurisdiction.¹⁰⁵ It is not altogether clear whether the decision to order a return of the child on a summary basis is more appropriately considered as akin to that which might be ordered under the inherent jurisdiction or whether it is effectively a specific issue order under the Children Act 1989 order: if it is more appropriately considered as akin to the inherent jurisdiction then – at least as to the question of summary return – it may not be necessary for the court mechanistically and slavishly to direct itself to the welfare checklist;¹⁰⁶ that having been said, once the child has returned and the court is considering what order to make the court should direct itself to the welfare checklist;

(9) Any summary return order is directly enforceable through the procedures in the Brussels II Regulation [2201/2003].¹⁰⁷”

¹⁰¹ M v T (Abduction: Brussels II Revised, Art 11(7)), op. cit. at para [8] at 1689.

¹⁰² Re A; HA v MB (Brussels II Revised: Art 11 (7) Application), op. cit., at para [90]; M v T (Abduction: Brussels II Revised, Art 11(7)), op. cit., at para [17] at 1691 – 1692.

¹⁰³ Section 1(1) of the Children Act 1989; Re A; HA v MB (Brussels II Revised: Art 11 (7) Application), op. cit.; M v T (Abduction: Brussels II Revised, Art 11(7)), op. cit., at para [17] at 1691 – 1692).

¹⁰⁴ M v T (Abduction: Brussels II Revised, Art 11(7)), op. cit., at para [17] at 1692; Povse v Alpagó Case C-211/10 [2010] 2 Family Law Reports 1343).

¹⁰⁵ M v T (Abduction: Brussels II Revised, Art 11(7)), op. cit., at para [17] at 1692.

¹⁰⁶ The “welfare checklist” refers to the list of considerations, set out at section 1(3) of the Children Act 1989, which a court must refer to in determining arrangements for the upbringing of children in family law proceedings. See the Children Act 1989, section 1 at <http://www.legislation.gov.uk/ukpga/1989/41/section/1>.

¹⁰⁷ EU Regulation 2201/2003, op. cit., Articles 42 and 47; Povse v Alpagó, op. cit.

Inchoate Rights of Custody

Also worthy of mention is a case recently reported in the jurisdiction of Northern Ireland. In a case involving a child left in the care of maternal grandparents,¹⁰⁸ the Supreme Court of the United Kingdom reviewed English and overseas case law concerning inchoate rights of custody, noting that the concept was used in earlier case law¹⁰⁹ to describe, "the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned."

The Court held that the description of inchoate rights above was imprecise, and the majority set down five criteria to identify the people possessing the strictly limited category of inchoate rights:

- (a) They must be undertaking the responsibilities, and thus enjoying the concomitant rights and powers entailed in the primary care of the child.
- (b) They must not be sharing those responsibilities with the person or persons having a legally recognised right to determine where the child shall live and how he/she shall be brought up. They would not then have the rights normally associated with looking after the child.
- (c) That person or persons must have either abandoned the child or delegated his primary care to them.
- (d) There must be some form of legal or official recognition of their position in the country of habitual residence.
- (e) There must be every reason to believe that, were they to seek the protection of the courts of that country, the status quo would be preserved for the time being, so that the long-term future of the child could be determined in those courts in accordance with his/her best interests, and not by the pre-emptive strike of abduction.

4.17.9. The current debate on Child Abduction rules in force

As discussed above, UK courts have been reluctant to find that an order to return a child to his or her Home State will amount to a breach of Article 8 of the European Convention on Human Rights ("EConvHR"). This was highlighted in particular in the 2011 case of *Re E (Children)(Abduction: Custody Appeal)*¹¹⁰ in which Baroness Hale and Lord Wilson issued a joint judgment clarifying what was, in their view, the correct interpretation of the *Neulinger and Shuruk v Switzerland*¹¹¹ judgment of the ECHR on the human rights implications of a return order under the Hague Convention on Child Abduction.

The *Neulinger* case had appeared to suggest that in order for the decision-making process in a Hague Convention on Child Abduction application to comply fully with Article 8 of the EConvHR, the court hearing the application would be expected to carry out an in-depth examination of the circumstances of the case.¹¹² Baroness Hale and Lord Wilson, however, took a narrow view and ruled that the case when properly interpreted in fact imported no requirement for a full assessment of what is in the best interests of the child, and

¹⁰⁸ *Re K (A Child) (Reunite International Child Abduction Centre intervening)* [2014] 2 Weekly Law Reports 1304; INCADAT cite HC/E/UKn 1259.

¹⁰⁹ *Re B (A Minor) (Abduction)* [1994] 2 Family Law Reports 249.

¹¹⁰ *Op. cit.*

¹¹¹ *Op. cit.*

¹¹² See comments of Walker, "The Impact of the Hague Abduction Convention on the Rights of the Family in the Case law of the European Court of Human Rights and the UN Human Rights Committee: the Danger of *Neulinger*" (2010) 6 *Journal of Private International Law* 649, in which she says, "If the strict rules under the Convention are not properly applied, and instead there is an immediate assessment of the substantive law (the best interests of the child), then the Convention will become seriously undermined." p. 681

that a proper application the Hague Convention on Child Abduction would be unlikely to constitute a breach of Article 8 of the EConvHR:

“[The Neulinger judgment recognises] that the guarantees in article 8 have to be interpreted and applied in the light of both the Hague Convention [on Child Abduction] and the United Nations Convention on the Rights of the Child: that all are designed with the best interests of the child as a primary consideration; that in every Hague Convention case where the question is raised, the national court does not order return automatically and mechanically but examines the particular child in order to ascertain whether a return would be in accordance with the Convention; but that is not the same as a full blown examination of the child’s future; and that it is, to say the least, unlikely that if the Hague Convention is properly applied, with whatever outcome, there will be a violation of the Article 8 rights of the child or of either of the parents.”¹¹³

Consistent with these sentiments, Judge Jean Paul Costa, the President of the ECHR stated explicitly at an address to the Franco-British-Irish Colloque on Family Law¹¹⁴ that Neulinger and Shuruk does not call into question the methodology of those national courts who take an explicitly restrictive approach to the permitted defences/exception in Article 13(b) of the Hague Convention on Child Abduction, nor does it signal a change of direction. Nevertheless, as other commentators have pointed out, the need to carry out “an in-depth examination” of matters is something which judicial authorities in certain jurisdictions are keen to adhere to.¹¹⁵

This is not to say that there may not be highly unusual cases where a return order could violate Article 8 on account of the abducting parent returning to face a real risk of torture or degrading treatment and where a child cannot be safely returned without that parent.¹¹⁶ Nor, as Baroness Hale noted in *Re D (Abduction: Rights of Custody)*,¹¹⁷ does it mean that human rights arguments are entirely irrelevant to Hague Convention on Child Abduction cases; for example, a State’s failure to enforce a return order expeditiously has been found to breach Article 8.¹¹⁸

4.17.10. Justifications for refusing to return a child relocated to United Kingdom

The position in the UK on the main goal of the Hague Convention on Child Abduction, as understood by the judiciary, is perhaps most succinctly summarised by the comments of Baroness Hale in *Re M (Abduction: Zimbabwe)*.¹¹⁹ Drawing on the text of the Pérez-Vera Report, she concludes that:

“the Convention is designed to protect the interests of children by securing their prompt return to the country from which they have wrongly been taken, but recognises some limited and precise circumstances when it will not be in their interests to do so.”

¹¹³ *Re E (Children)(Abduction: Custody Appeal)*, op. cit., at [26].

¹¹⁴ Which formed the basis of an article: “The Best Interests of the Child: Recent Case-law from the European Court of Human Rights” [2011] *International Family Law* 183.

¹¹⁵ See A. B. Wilkinson and K. McK. Norrie (eds.), *The Law Relating to Parent and Child in Scotland*, op. cit., p. 411 and reference to *X v Latvia* [2012] 1 *Family Law Reports* 860.

¹¹⁶ Alistair McDonald Q.C. (ed.), *Clarke, Hall and Morrison on Children*, op. cit., Division 5, section [362].

¹¹⁷ Op. cit.

¹¹⁸ See Alistair McDonald Q.C. (ed.), *Clarke, Hall and Morrison on Children*, op. cit., Division 5, section [360], with reference to various case law.

¹¹⁹ [2007] UK House of Lords 55 at [para 12].

Certainly in the UK, the resistance shown by the Supreme Court in recent years¹²⁰ to the need to conduct "in depth examinations" in to the situation of the child in question, as espoused by the European Court of Human Rights, suggests that the effectiveness of the return mechanism rather than the child's welfare is what ultimately remains paramount.¹²¹ In other words, the best interests of children are a primary concern of the Hague Convention on Child Abduction process, and this is secured by faithful application of the Hague Convention on Child Abduction itself, but this does not mean that an individual child's welfare is paramount in determining a Hague application in a given case.

In some of the most recent jurisprudence to examine the return mechanism, the courts have emphasised that other factors, in particular the best interests of the child, should not in any way take precedence over the return mechanism. As referred to above, it has nevertheless also been argued that the interests of the child are already taken into account by the Convention, both in the exceptions provided for and in the discretion afforded to the judge once an exception has been established. In *Re E (Children)(Abduction: Custody Appeal)*,¹²² it was said that the return application is not a proceeding in which the upbringing of the child is in issue but rather about where the child should be when that issue is decided. Moreover, the court does not,

"order return automatically or mechanically, but examines the particular circumstances of this particular child in order to ascertain whether a return would be in accordance with the Convention."¹²³

This, it is made clear, does not require a full blown assessment of the child's future. Furthermore, the application of Article 13(b) of the Hague Convention on Child Abduction is "by its very terms,...."of "restricted application"¹²⁴ and where there are disputed allegations of violence or abuse which cannot be objectively verified, the court is to be less concerned with this than the sufficiency of any protective measures which can be put in place to reduce the risk.¹²⁵

4.17.11. Criteria to assess the "best interest of the child"

As discussed above, the judgment of *Re E (Children)(Abduction: Custody Appeal)* in 2011 has been widely understood to have closed the door on any remaining suggestion that the ECHR case of *Neulinger* meant that Article 13 and Article 13(b) in particular are to be interpreted in light of the child's best interests.

Instead, where the return mechanism is sought to be avoided pursuant to Article 13(b) of the Hague Convention on Child Abduction, much jurisprudence has focused on the meaning of "grave risk", "physical or psychological harm" and "intolerable situation" featured in the wording of the Article itself. Cases are clearly addressed on a case by case basis, but some common patterns have nevertheless emerged which provide an indication of how the courts have attempted to ensure that the child's interests are best served.

In a case heard before the Scottish Court of Session, it was clarified that it is not enough to simply establish that this ground of refusal that it would be against the best interests of the child to be sent back; the matter before the court is restricted to determining

¹²⁰ As witnessed in cases such as *Re E (Children)(Abduction: Custody Appeal)*, *op. cit.*, and *Re S(A Child)(Abduction: Rights of Custody)*, *op. cit.*

¹²¹ See section II.2.1 of this report, above.

¹²² *Op. cit.*, at [para 13].

¹²³ *Op. cit.*, at [para 26].

¹²⁴ *Re E (Children)(Abduction: Custody Appeal)*, *op. cit.*, at [para 32].

¹²⁵ *Re E (Children)(Abduction: Custody Appeal)*, *op. cit.*, at [para 52].

whether or not the party opposing the return has established the existence of a grave risk of the kind specified.¹²⁶

For a child to be placed in an “intolerable situation” has been ruled as envisaging such extreme and compelling matters which have to bear some similarity to the grave risk of harm element.¹²⁷ A number of cases¹²⁸ have led to an Article 13(b) defence failing even where allegations of sexual abuse against the left-behind parent or partner of the taking parent have existed, especially where the court have been satisfied by the protections provided for by the authorities in the state of habitual residence. In the case of *Re M (Abduction: Intolerable Situation)*,¹²⁹ the mother had a genuine fear of physical harm by the father of the child (who had been convicted of the murder of a man who he believed to have had an affair with the mother, and who was due to be released from prison), but return was ordered since adequate protection could be provided by the authorities in Norway, the child’s state of habitual residence.

Similarly, in a 2012 Scottish case, it was ruled that to show that return would expose the child to discomfort and distress is not sufficient: “the word ‘intolerable’ shows something stronger than that is required.”¹³⁰

On the other hand, the suggestion that there is no realistic chance of an Article 13(b) defence being successful unless there has been violence or other specific abuse to the child is something which has been rejected.¹³¹ Return applications can even succeed where, according to a 2012 case,¹³² they are based on the respondent’s subjective perception of the risks of a return leading to an intolerable situation for the child. In that particular case, a refusal to return was based on clear evidence of the father’s recent alcohol and drug abuse, threats of suicide and serious violence against the mother, together with the mother’s resulting fragile psychological health and anticipated anxiety and depression in the event that she be required to return.

Courts are nevertheless keen to ensure that the respondent (taking) parent is not manipulating proceedings, and it has consistently been held that a non-return defence based on a grave risk of harm to the child should not succeed where such harm arises from the taking parent’s actions. In *C v C (Abduction: Custody Rights)*,¹³³ a mother who had wrongfully removed her child to England, refused to return to Australia if the child were sent back there; it was ruled that this would not amount to an intolerable position even though the mother’s presence was deemed necessary for the child’s welfare. It was famously said,¹³⁴

“If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied on by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four horses through the convention, at least in respect of applications relating to young children.”

¹²⁶ *Viola v Viola*, 1988 Scots Law Times, 7 at 10, per Lord McCluskey.

¹²⁷ Per Judge Bracewell in *Re N (Minors) (Abduction)* [1991] 1 Family Law Reports 413.

¹²⁸ For example, *Re S (A Minor) (Abduction)* [1999] 2 Family Court Reporter and *Re M (Abduction: Intolerable Situation)* [2000] 1 Family Law Reports 930, and others variously cited in Alistair McDonald Q.C. (ed.), *Clarke, Hall and Morrison on Children*, op. cit., Division 5, section [423]

¹²⁹ *Ibid.*

¹³⁰ *A, Petr*, 2012 Scots Law Times 370, per Lord Glennie at [47].

¹³¹ See 4.17.8. of this report, above.

¹³² *Re S (A Child) (Abduction: Rights of Custody)*, op. cit.

¹³³ [1989] 2 All England Law Reports 465.

¹³⁴ Per Lady Justice Butler-Sloss, *ibid.*, at 471.

4.17.12. Existing critics and comments on the legal rules in force

There is little known recent criticism of the existing domestic system, nor are there any known particular calls for reform. As has been discussed, it may be said that the UK judiciary has been keen to uphold the effectiveness of the Hague Convention on Child Abduction regime and has shown resistance to supposed attempts to introduce other considerations into the assessment of applications which might otherwise dilute the original objectives of the Convention.

The practical effectiveness of the system in England and Wales can be illustrated by the most recently collected global statistics: applications were resolved quicker, compared to global results, for every outcome. In 2008, judicial return orders took an average of 67 days, compared to 166 days globally; judicial refusals took 193 days compared to 286 days globally; and voluntary returns took 44 days on average compared to 121 days globally.¹³⁵

There is also evidence of the courts embracing the stricter time frames reinforced by Regulation 2201/2003, observance of which has been encouraged by the higher courts. In *Vigreux v Michel*,¹³⁶ the Court of Appeal emphasised that a failure to stick to time tables will not only result in English courts being in breach of their international obligations but will also represent,

“an unacceptable abnegation of the court's responsibility properly to address cases of international child abduction – a matter in which, in the past, we have taken legitimate pride.”¹³⁷

Feedback on the practical operation of the Hague Convention on Child Abduction can be found in the response of the England and Wales Central Authority (with contributions from the judiciary) to the Questionnaire Concerning the Practical Operation of the Hague Convention drawn up by the Permanent Bureau of the Hague Conference on Private International Law in 2010. The following represents a selection of the remarks provided:

It is noted that other Central Authorities which receive return requests often delay and spend time seeking evidence which relate to custody issues between the parents which should more appropriately be remitted to the court of the requesting state. There is a general concern that some States Parties place too much emphasis on welfare principles when determining a return application rather than on the question of summary return.¹³⁸

Communication between Central Authorities is said to stall when other Central Authorities fail to provide regular progress reports, in particular, in cases where the State concerned does not have officers specifically designated to work on the Hague Convention on Child Abduction, but rather those with other duties and responsibilities.¹³⁹

It would be helpful if, when receiving a return request from another Central Authority, that Authority could also provide a statement on the law on rights of custody in their State or territory in order to avoid delays in issuing proceedings.¹⁴⁰

In England and Wales, the left behind parent applying from outside England and Wales for the return of their child under the Child Abduction and Custody Act 1985 is entitled to non-means non-merits tested legal aid. Legal aid for the taking parent however, is subject to the normal means and merits tests. If they are found not to be eligible for legal aid, they may either pay privately for legal representation, act as a litigant in person or find pro

¹³⁵ See Hague Conference on Private International Law, see Lowe's 2011 Statistical Analysis, Part C, pp.187-188.

¹³⁶ [2006] England and Wales Court of Appeal Civil Division 630.

¹³⁷ *Ibid*, per Lord Justice Wall.

¹³⁸ *Ibid*, p. 7.

¹³⁹ *Ibid*, p. 7.

¹⁴⁰ *Ibid*, p. 7.

bono legal representation. It is noted that this difference between the left behind and taking parents reflects their circumstances, where, “prima facie, the child has been wrongfully removed or retained away from their country of habitual residence...”¹⁴¹

This disparity has, however, been criticised by the judiciary. In the 2010 case of *K (A Child)*,¹⁴² Lord Justice Thorpe said of an unrepresented mother who had brought her daughter to the UK from Poland, and who had had her legal aid funding withdrawn when it had been determined that she had a share in a property in Poland:¹⁴³

“...those who take these difficult decisions as to how public money should be spent in family law cases should ask themselves whether they have got the balance right in giving so much to the left behind parent, without any investigation of means or merit, and in withdrawing public funding for the defendant, on the ground that she may have an interest in a property in another jurisdiction, that may have value but which could not possibly be utilised to provide immediate funding for urgent litigation.”

In line with the requirements of Article 11(4) of Regulation 2201/2003 applying to European Member States, the England and Wales Central Authority states that it would be “good practice” for all States Parties to investigate, as part of enquiries concerning a non-return order, whether adequate arrangements can be made to secure the protection of the child after his or her return and that to facilitate this in all cases, it would be helpful for requesting States to,

“provide in general terms details of the protective measures which might be made available in their State and about what funding for legal advice and representation (if any) might be available to either parent if the requested State is of the view that protective measures are required.”¹⁴⁴

As to the application of exceptions by the judiciary in different States, it is commented that in some cases the exceptions are readily made out and a return refused when in other States, a defence based on similar facts is insufficient for a non-return order. It is again reiterated that judgment on the exceptions often follows a welfare enquiry which is better performed by the country of habitual residence.¹⁴⁵

Article 15 of the Hague Convention on Child Abduction (allowing the Contracting State to request that the applicant obtain a determination or decision from the Home State that the removal or retention was wrongful) receives particular criticism from the judicial contribution to the questionnaire response, it being noted that it seldom provides an effective route to a timely decision which satisfies the rules of natural justice. Better procedures are needed, it is said, to facilitate its use. The Scottish Central Authority points out that where foreign court insists on an Article 15 certificate, it is the left behind parent which must pay for this, and that it is usually an expensive process.

Finally, the overall view of Regulation 2201/2003 given by the Central Authority and judiciary in England and Wales is positive. It has reinforced the expectation of proceedings being concluded in a 6-week period (although this continues not to be consistently respected in some EU states). Article 11(4) of Regulation 2201/2003 has provided positive support for Article 13(b) of the Hague Convention. According to the Scottish Central Authority, Regulation 2201/2003 has enhanced the Hague Convention on Child Abduction overall.

There are no known reforms being considered by the UK Government to the civil law regime concerning cross border parental child abduction. However, proposals have recently been formulated in relation to criminal sanctions for child abduction. The Law Commission,

¹⁴¹ Ibid, p. 9.

¹⁴² [2010] England and Wales Court of Appeal Civil Division 1546.

¹⁴³ Ibid, per Lord Justice Thorpe at para [35].

¹⁴⁴ Questionnaire, op. cit., p.12.

¹⁴⁵ Questionnaire, op. cit., p.18.

a statutory independent body with a remit for formulating proposals to reform the law, announced on 20th November 2014 that it would be recommending, on the one hand, an increase of the maximum sentences for offences under sections 1 and 2 of the Child Abduction Act 1984¹⁴⁶ from 7 to 14 years; furthermore and in order to close the gap in the law highlighted in the case of *R (Nicolaou) v Redbridge Magistrates' Court*,¹⁴⁷ that the offence under section 1 be extended to cover cases of wrongful retention of a child abroad, in breach of the permission given by another parent (or other connected person) or the court.¹⁴⁸

¹⁴⁶ For more information, see section 4.17.5 above.

¹⁴⁷ *Op. cit.*

¹⁴⁸ This UK Report (and reference to all cited sources) substantively completed on 1 August 2014.

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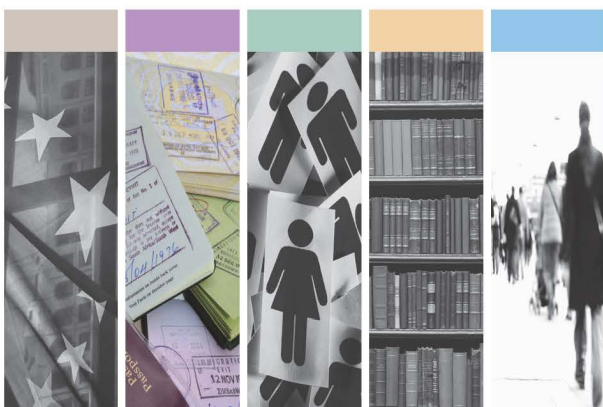
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