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Handbook. The Hague Convention – Questions and Answers

*Proceedings held before Common Courts of Law
in cases initiated pursuant to the Hague
Convention on Civil Aspects of International Child
Abduction concluded in Hague on 25. October 1980.*

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Kancelaria Adwokacka Maciej Kryczka

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This Handbook is intended for parents who committed a “parental abduction” pursuant to the provisions of the Hague Convention, and as a consequence of this action are appearing before a Polish court of law.

This Handbook addresses the most frequently asked questions posed by parents who face proceedings held on the basis of the Hague Convention provisions.

- *To what age of a child the provisions of the Hague Convention apply?*
- *When a child abduction takes place pursuant to the Hague Convention?*
- *How to defend oneself against the return of a child abroad before the court of law?*

This Handbook has been written by lawyers Maciej Kryczka and Izabela Koleśnik, attorneys on a regular basis representing parents before courts of law in the Hague Convention cases. Don't hesitate to contact us and follow our work.

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Introduction

Handbook “The Hague Convention – Questions and Answers” is an intelligible review of the provisions of the Hague Convention on Civil Aspects of International Child Abduction concluded in Hague on 25. October 1980 (“The Hague Convention”) for parents who are faced with proceedings for the return of a child abroad in connection with its “abduction”. Questions discussed in this publication are most commonly raised by our clients during the course of such proceedings.

Increased mobility, simplified procedures for cross-border change of residence resulting in establishing formal and informal relationships out of which children are born has led to parental disputes over i.a. a child’s place of residence. The Hague Convention was concluded to prevent circumstances in which one parent, contrary to the will of the other, changes the place of residence of a child, by moving (or retention of) a minor to another state which adopted the Hague Convention. Should such “parental abduction” take place, a parent seeking the return of a child to its state of habitual residence prior to the abduction, can initiate proceedings to return a child pursuant to provisions of the Hague Convention.

The Handbook addresses common questions posed by parties to the court proceedings held in accordance with the Hague Convention. It must be observed that this Handbook is intended to develop and promote basic practical knowledge in regards to court proceedings held pursuant to the Hague Convention. However, it does not answer questions as to how to win a case before the court of law, as each and every case calls for individual

legal assessment. In principle, during court proceedings there are no universal solutions which, when applied, will guarantee a win for the reader.

This Handbook intentionally omits passages from the provisions of law, as they are easily accessible and each individual interested in a specific legal construction can find it online as easily as he came across this Handbook. The Hague Convention is an autonomic source of law based on which any court of law can allow or refuse a return of a minor abroad. The authors intentionally leave out other sources of law regarding parental abductions, ex. Council Regulation (EU) 2019/1111 of 25. June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters, and the matters of parental responsibility, and on international child abduction (so called Regulation Brussels III ter), which requires a separate review.

Enjoy the read.

What is the purpose of the Hague Convention?

The Hague Convention aims to counteract independent and arbitrary decisions of parents interested in the exercise of parental custody over a child by changing the place of its habitual residence contrary to the disposition of the other parent.

In principle, parents (should a competent court decide otherwise) bear the same rights to a child, also in the scope of parental custody, i.e. the right to decide about a child's place of habitual residence.

In the event of disputes between parents, cases regarding e.g. whereabouts of a child should be settled by a national authority pursuant to the law, and not by a parent based on his knowledge of facts..

The Convention shall be applied to cases of cross-border nature, i.e. family matters regarding two states as parties to the legal regulations. To this end, the Convention sets forth uniform factual standards and standards describing the mode of cooperation between the involved states.

To summarize, The Hague Convention aims to counteract negative effects of international child abduction by one parent, and lead to fast return to a factual and legal state of matters which was occurring prior to the unlawful action, i.e. child abduction.

What is the scope of Hague cases?

Proceedings held pursuant to the Hague Convention pertain to unlawful child abduction from its place of habitual residence to another state which ratified the Hague Convention. The Convention may be exercised when a child has not attained the age of 16.

List of all states which ratified the Hague Conventions can be found at: <https://www.gov.pl/web/stopuprowadzeniomdzieci/wykaz-panstw-z-ktorymi-polska-zwiazana-jest-konwencja-haska-i-innymi-regulacjami>

When a parental abduction takes place?

A parental abduction pursuant to the Hague Convention takes place when one parent independently and without the permission of the other parent decides to change the place of residence of a child or retain a child abroad.

Example

Parents are residing with a child in Spain. Both have full parental custody over the child (they mutually decide where the child habitually resides). One of the parents without the permission of the other travels with the child to Poland and does not return as requested by the other parent who remained in Spain. This is an example of a parental abduction pursuant to the provisions of the Hague Convention.

What is a place of habitual residence?

It is a State in which a child performs routinely its daily life activities. The place of habitual residence will therefore be a state in which the child remains for a certain period of time, enjoys education, has peers, performs other extracurricular activities (hobbies), has a place of domicile etc. In principle, in order to acknowledge child's place of habitual residence two premises have to be fulfilled:

1. Parent's decision on the residence of child in a given State,

and

2. Child's performance on a regular basis of daily activities listed i.a. above.

The interpretation of a term "place of habitual residence" shall be done with the observance of factual circumstances, i.e. physical presence of a child in the territory of ratifying state, as well as other factors which ascertain that such presence is not of temporary or occasional nature, and such presence points to a certain level of social and family integration in this state. Premises ascertaining the habituality of residence are primarily: long-term and uninterrupted stay in a place where a child's life takes place, and moreover, regular activities which cover its basic life needs occur. At the same time, there shall be no other parallel plac-

es intended for ascertaining such needs. Place of habitual residence is established on the basis of impartial premises, whereas the intent of establishing a place of residence shall not constitute a prerequisite for the existence of such place of habitual residence (see: judgment of the Supreme Court of 26th September 2000, I CKN 776/00; T. Świerczyński, *Basic concepts of the Hague Convention on the Civil Aspect of International Child Abduction*, “Transformation of Private Law” 2000).

Judicial practice of the European Union Court of Justice provides that during the establishment of a place of habitual residence, in particular, constant nature, lawfulness, conditions, reasons of stay and moving of family to a certain ratifying state, child’s citizenship, place and rules of schooling, knowledge of languages and family and social bonds in this state, have to be taken into consideration. The Court stresses the need to ascertain physical presence of a child on the territory of a state and other factors which exclude the presumption of the temporariness of stay, proving the child’s integration with his social and family environment. State court of law shall decide on a place of habitual residence in accordance with all essential premises of a given case (see: CJUE decisions of 2nd April 2009, C-523/07, and of 17th October 2018, C-393/18, dr Marcin Bielecki, *Judicial Practice in child return cases pursuant to the Convention on the Civil Aspect of International Child Abduction concluded in Hague on 25th October 1980*, The Institute of Justice, Family Law, Warsaw 2021).

Will the lack of parental permission for an abroad trip be always deemed as parental abduction?

It depends. If a parent:

1. does not enjoy parental custody rights,
2. has limited parental custody rights and does not have the right to decide on child's place of residence,
3. who is traveling has obtained the permission of competent court of law to travel abroad,

then in such circumstances the refusal of a parent to travel will not bring legal consequences, i.e. will be null and void. Lack of permission will be taken into consideration, if the refusing parent has the necessary parental rights and if the traveling parent obtains a permission from the court of law competent to the child's place of habitual residence.

Who takes part in a Hague Convention case

Parties to the proceedings are:

1. *Applicant* — a parent who applied for the return of unlawfully abducted child;
2. *Respondent* — a parent who unlawfully changed child's place of habitual residence;
3. *The Office of Regional Prosecutor* — forced participant. The Office of Regional Prosecutor, not an appointed prosecutor in person, takes part in the proceedings. Subsequently, during any future hearings The Office of Regional Prosecutor can be represented by different prosecutors in person;
4. *The Ombudsman for Children* — as requested by one of the participants. The Ombudsman for Children is entitled, but not necessarily, to join the proceedings. Similarly to The Office of Regional Prosecutor, the Ombudsman may be represented by an attorney in fact i.e. a solicitor or legal advisor. Subsequently, during any future proceedings the office of Ombudsman for Children may be represented by different attorneys in fact.

NOTE

The Regional Prosecutor and The Ombudsman for Children represent the child. Therefore, these authorities are not binded by the dispositions of parents and their idea of child's wellbeing. In practice, both The Regional Prosecutor and The Ombudsman

for Children, when asked by the court of law, present their independent opinion after the examination of evidence. The outcome of these examinations as decided by these authorities may lead to a conclusion that the interest of a child is to be returned to a country from which it was abducted.

NOTE

Court of Law is not binded by the opinion of parties, The Regional Prosecutor and/or The Ombudsman for Children.

Example

The Regional Prosecutor and the Ombudsman for Children apply for the return of a child abroad. The court, notwithstanding the opinion of these authorities, rejects the motion and decides to retain the child in Poland.

What is the procedure for initiating and holding proceedings in a Hague Convention case?

A parent who suspects that their child has been abducted can file through a central authority (in Poland it is the Ministry of Justice) an application for the return of a child to a State from which it has been abducted. The central authority of the state where the child had a place of habitual residence transmits it to the Polish central authority which subsequently transmits it to the Regional Court competent for the place of the child's whereabouts.

NOTE

Not every Regional Court in Poland has the jurisdiction (is competent) to hold Hague Convention cases. Pursuant to the Polish law on the territory of Poland the competent courts are the Regional Courts in:

- Białystok;
- Gdańsk;
- Katowice;
- Kraków;
- Lublin;
- Łódź;
- Poznań;
- Rzeszów;
- Szczecin;
- Warszawa;
- Wrocław.

The court of 2nd instance for the Hague cases is the **Appellate Court in Warsaw**, irregardless of which Regional Court held the case in the 1st instance.

What is the scope of Court's Judgment in the Hague Convention cases?

Proceedings held pursuant to the provision of the Hague Convention aim to establish the following facts:

1. What was the child's place of habitual residence;
2. Has the child been removed from its place of habitual residence in accordance with the law (as permitted by the other parent);
3. Is the return of a child to its place of habitual residence from which it was abducted in accordance with the principle of child's wellbeing?

NOTE

A Court in the Hague Convention proceedings does not investigate the parental competence of parties, i.e. does not establish which parent guarantees better exercise of parental custody over a child and does not decide on the place of habitual residence.

What are the premises of dismissing an application for the return of a child abroad irregardless of its unlawful abduction?

The Hague Convention proceedings are not of automatic nature. Court assessing the validity of the application for the return of a child must verify if there are no premises which may lead to the dismissal of the application.

In the Hague Convention there are five premises pursuant to which the Court may dismiss the application:

1. a party opposing the return shall establish that the applicant has not actually exercised his custody rights at the time of abduction during the abduction or consented to the abduction (art. 13, par. 1, subpar. a);
2. the opposing party shall establish that there is a grave risk that the return of a child would expose it to a physical or psychological harm or otherwise place the child in an intolerable situation (art. 13, par. 1, subpar. b);
3. a 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 (art. 13, par. 2);
4. an application for the return of a child has been filed with the competent national authority after one year since the date of abduction, and the child has settled in its new environment (art. 12. par. 2);
5. the return of a child is contradicted by the fundamental principles of the summoned state regarding the protection of human rights and fundamental freedoms (art. 20).

These premises may be narrowed down to two groups:

1. *Premises directly relating to the situation of a child in the State from which it has been abducted* (Health and safety: premises related to the security and health of the child as understood by its protection against violence, mistreatment, access to appropriate medical and health care).
2. *Premises directly relating to the political and economic conditions in the demanding State* (Safety and conflicts: key premises include safety and stability in the child's country of origin. Should there be military conflicts, wars or any other civil unrest, they may negatively influence the life and wellbeing of a child).

In practice, the most common premises for dismissal of application pursuant to the Hague Convention is proving the existence of **grieve hazard that child's return would expose it to physical or psychological harm, or would place it in intolerable situation, alternatively the child refuses to return and has attained an age and degree of maturity at which it is appropriate to take account of its views.**

Premises for dismissal are very general. Such construction applied by the legislative authorities is intentional as it allows for establishing in given conditions whether the return of a child is not in line with its well being or will, as far as a child's will is rational and adequate to its age and level of maturity.

What does it mean that the return of a child abroad will lead to grave risk of exposing a child to physical or psychological harm or otherwise will place a child in an intolerable situation?

As established in judicial decisions, the existence of grave risk of exposing a child to physical or psychological harm or otherwise placing it in intolerable situation shall mean that in the event of child's return abroad it would be exposed to the environment in which it can experience physical or psychological abuse, sexual molestation, and life and health threatening situation.

Important: there is no comprehensive list of premises or exemplary circumstances in which the return of a child abroad is contrary to its wellbeing. The general nature of terms listed in the paragraph allow for the presentation of an array of different arguments backing the dismissal of application.

As the Hague Convention does not limit the reasons for development or the hazard of intolerable situations, the opposing party may raise an argument of grievous danger not only for the child but also for the party itself. The Supreme Court highlights that art. 13, paragraph 1, sub-paragraph b) is binding also in situations in which there is a grave risk of violence towards parents, which consequently creates an intolerable situation for the child. It is worth adding that witnessing acts of violence by a child reflects on its psychological state and leads to visible developmental disorders and social attitudes.

Example

Parents have two children with whom they reside in Germany. Both of them enjoy full parental custody rights over their children (they collectively decide about children's place of habitual residence). Children have occasionally witnessed their father hitting the mother. The woman sought help, but local authorities did not provide any assistance whatsoever. The mother, concerned with hers and children's safety travels to Poland without her husband's permission and does not want to return to Germany as she is afraid of further acts of violence.

In such a scenario there is a grief risk of violence towards a parent, as well as it can't be ruled out that also children after returning to the state of habitual residence may experience acts of violence. In the case of children, the act of witnessing physical or psychological violence may be treated by the court as a premise for the dismissal of application.

IMPORTANT

In the response to an application, i.e. in the first official written response, all of the premises supporting the dismissal of application shall be raised. The arguments therein shall clearly describe the boundaries and the nature of current situation, which is then established by the court during evidence examination.

Is the court of law obliged to hear and consider the opinion of a child on its place of residence?

The hearing of a child during court proceedings relating directly to a minor seems to be obligatory. It results from a tendency to empower a minor in the proceedings, i.e. accepting the state of being an object, and not a subject of a case under parental law. Hearing and potentially taking into consideration the child's opinion results both from the international as well as national principles of law.

Importantly, a firm objection of a child, according to the Polish judicial practice, may be the sole basis for refusal of the application for the return of child to its place of habitual residence, if after the evaluation of its maturity the court will not have any doubts as to whether the child understands the consequences of returning to the State of habitual residence and what is the nature of arguments against such return.

NOTE

All rules of law applying to the hearing of a child state that court should (in certain events even must) hear a child if its mental development, health and level of maturity allows for it, with consideration of its reasonable wishes.

What does it mean? There is no legal age for a child which allows for its hearing. The decision is up to the Court and depends on a given case. However it has to be noted that the Court will not hear a 3 year old child as it recognizes its actual development and limited cognition.

Premises for hearing of a child do not depend on its age but on its mental development, health and level of maturity.

NOTE

The act of hearing a child does not automatically force taking into consideration of its will. The court may allow reasonable wishes of a child. The criteria for acknowledging child's will depend on an exact background of a specific case.

What does the hearing of a child look like?

There is no established procedure for holding a child hearing. There are some common events of repeatable nature:

- A child is heard outside of courtroom, in a so-called blue room which due its interior design features creates friendly environment;
- Hearing is held by the trial judge. The Judge does not wear a gown;
- Hearing is not an interrogation. Therefore, it is held in the form of a casual conversation in which the judge asks for circumstances important for the case.

Depending on the court:

- A psychologist who can ask questions may be present. Such a professional may then prepare an expert opinion which includes information on the truthfulness of a child's statement.
- In principle, only a trial judge is present during a hearing, and possibly a psychologist. In certain courts the attorneys in fact for parties may participate in such hearings. During a hearing they are seated in a separate room, where they watch the hearing by means of video equipment.
- The attorneys in fact may pose questions to a child, however, not directly. Parties who want to pose questions to a child communicate it to the judge who for the time of the hearing uses a headphone for the purpose of communication. In practice, Parties are posing questions via the judge, who then phrases it to a child.

Applicant has filed an application pursuant to the Hague Convention a year after his arrival in Poland. What does it mean?

In my legal practice I have encountered opinions of the parties that an Applicant can not file an application under the Hague Convention one year after his arrival with a child in Poland. Such opinion is invalid and not in line with the provisions of the Hague Convention.

An applicant may file an application for the return of a child after one year has passed since the arrival of a party with a child in Poland.

A term of one year does not hinder the possibility to file a petition, but causes the Court to establish whether a child has not adopted to its new environment, and thus establish grounds to dismiss the application.

What does the proceeding before the Court of first instance look like?

Pursuant to the provisions of law, a case held before the court of first instance shall be examined within 6 weeks. Such a term is of instructional nature. If the scope of evidence examination requires, it has to be noted that the reliability of the evidence examination may be obstructed by the instructional term of 6 weeks.

The first hearing of a case usually is limited to hearing of parties. The Court may decide to introduce mediation. If parties are unwilling to take part or mediation is ineffective, the court holds evidence examination.

During the course of proceedings the Court may hear the witnesses (during the hearing or in written form), admit the evidence prepared by court experts, hear a minor, file an application to foreign organs to obtain documentation on the situation of parties and a child, etc.

NOTE

There is no comprehensive list of court activities which the Court performs in order to establish the facts of a case. It has to be noted that evidence motions have to be related to the subject matter of the case. Should they have no relation whatsoever, the Court may dismiss it.

In the sole discretion of the trial Judge, the proceeding before the Court of first instance may take place on several hearings, even within 14 days. Due to the substantial workload of courts, this is not a rule. However, it has to be noted, that cases pursuant to the Hague Convention are intense and are dealt with on a faster basis than other hearings.

After evidence examination the Court of first instance examines the legal position of parties. **This is the stage when The Regional Prosecutor and The Ombudsman for Children present their stance.**

Subsequently, the Court issues a judgment to return a child abroad (maximal within 12 days after the decision becomes binding) or dismisses the application

The judgment is of zero-one nature, i.e. either a minor returns abroad or is retained in Poland.

The justification is prepared routinely by the Court and delivered to a party. The opposing party may file an appeal.

The appeal may also be filed by the Regional Prosecutor or the Ombudsman for Children.

Drafting and filing of an appeal pursuant to the rules of law causes the judgment of the Court of first instance to be inoperative, i.e. not legally binding, and the case then is transferred to the Court of second instance.

What does the proceeding in the Court of second instance look like?

In principle, the proceedings before the Court of second instance is limited only to one hearing which is not longer than one hour.

During the hearing the Court examines the appeal filed in writing, therefore, the Court has the knowledge of parties' argument before the hearing. The Court only allows parties to comment on the appeal.

The Appellate Court having verified the appeal may open a new evidence examination. However, in principle, it is the Court of first instance that holds evidence examination. In the period of time from the date of judgment of the Court of first instance to the date of hearing at the Court of second instance, new evidence may appear, e.g. new documents. In such an event this evidence shall be filed with the Court of second instance within a reasonable time prior to the hearing, so the Court has the possibility to examine such new evidence.

After the hearing, the Court may:

1. Amend the judgment of the Court of first instance and dismiss the application for the return of children abroad;
2. Dismiss the appeal and hold the judgment of the Court of first instance in force;
3. Reject the judgment of the Court of first appeal and order a new examination of the case. In practice, such a decision is made very rarely. Over the last years the Appellate Court only once has rejected the judgment and ordered a new examination of

a Hague Convention case. In the oral justification the Court stated that such a decision is the last resort and is based on the obvious errors committed during proceedings held by the Court of first instance.

Can a party to the proceeding lodge an appeal (complaint against the Law on Legal Fees in Civil Cases, Extraordinary Appeal?)

In the event of “loss” at the Appellate Court in Warsaw, a party has no right to file for a cassation or extraordinary appeal, i.e. is not entitled to lodge a cassation appeal individually or extraordinary appeal to The Supreme Court.

Authorities entitled to file and extraordinary appeal are:

1. The Prosecutor General;
2. The Ombudsman for Children;
3. The Commissioner for Human Rights.

These authorities may file such appeal within four months after the judgment becomes legally binding.

In order to have the entitled authority consider the extraordinary appeal, the opposing party needs to apply to such authority for filing such appeal to the Supreme Court.

In reality, parties who file such appeals are the parties to the ongoing proceedings who advocate the dismissal of an application for the return of a child abroad.

The fact of filing an appeal does not withhold the effectiveness of judgment.

I have won the Hague Convention case. What is next?

If the application for the return of a child abroad is upheld, it means there are negative premises referred to in the previous chapters of this Handbook.

Importantly, this does not shift the court jurisdiction to the Polish Courts for Family Law. A competent Court of Family Law for a child residing in Poland is still the competent court of a State from which the child has been abducted.

Example

Parents were residing together with children in the Netherlands. The father has abducted the children to Poland. The mother has filed an application for the return of children in the Netherlands pursuant to the Hague Convention. The Polish courts legally dismissed the application for the return. Nevertheless, the competent family court for the children will be the court in the Netherlands.

The authors of the guide

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On numerous occasions has provided expert opinion on national TV including Uwaga TVN, Interwencja Polsat, Alarm TVP, Sprawa dla Reportera programs on legal cases that were in the focus of national and international public opinion.

Izabela Koleśnik



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