| Chapter 12 |

Protection of the Rights of the Child Under the Auspices of the Hague Conference on Private Law

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ABSTRACT

In today's times of increasing globalisation and easy movement of people, the mobility of families between countries is very common. It is very important to secure the rights of the child as fully as possible in such situations. The most well-known convention constituting a substantive legal basis for a wide range of children's rights is the 1989 UN Convention on the Rights of the Child. However, this Convention alone would not be sufficient to guarantee the rights provided for therein, as well as to implement the principle of the best interests of the child in cross-border situations. The lack of international solutions common to states would result in the fact that in cross-border cases, different legal systems of individual countries in which the child resides or with which he/she has a certain relationship would apply.

The lack of regulation in this area would, therefore, cause legal uncertainty regarding the child's situation, expose him/her to the lack of necessary legal protection, and could lead to a violation of his/her rights. This state of affairs contributed to the creation of an international system of child protection under the Hague Conventions within the framework of the Hague Conference on Private Law. The most well-known and widely used conventions are the 1996 Convention and the 1980 Convention. These conventions harmonise the conflict-of-law and jurisdictional rules in cases involving children at the international level and, by creating a special return mechanism, address the situation of unlawful transfer of a child from one country to another without the consent of the parent in whose custody the child was also staying. Thanks to such solutions, the continuity of child protection and stabilisation of the child's legal situation is ensured. On the other hand, countries involved in the child's case may cooperate directly with each other to guarantee the child's legal protection and safety.

It is worth noting that cross-border situations in which the provisions of the Convention may apply can be very diverse. They may concern the ordinary movement of a child with his/her family, as well as cases of much greater dynamics and a high emotional load related to unlawful child abduction. The Conventions also regulate the situation of children who are left unaccompanied and do not have their habitual residence in the countries.

This article aims to show how the legal solutions contained in the two Hague Conventions of 1996 and 1980 contribute to the protection of the rights of the child and the best interests of the child in cross-border situations.

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KEYWORDS
1996 Hague Convention, 1980 Hague Convention, conflict of law rules, applicable law, cooperation between central authorities, habitual residence, right of access to the child's parents

1. Introduction

We live in times of high mobility and population movement. This creates various opportunities for citizens of individual countries to integrate into new environments, resulting from taking up work in other countries and starting a family in this way. In these circumstances, securing legal security for children from such international families and the realisation of their rights is necessary and should become a particular concern of every state authority. It is necessary to ensure the continuity of legal remedies taken for children and the mutual exchange of information between the countries in which the child resides, taking into account the best interests of the child. The Hague Conventions applicable in such situations, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition and Enforcement and Cooperation in Respect of Parental Responsibility and the 1980 Hague Convention on the Civil Aspects of International Child Abduction, are widely used international instruments that provide a basis for ensuring continuity of legal protection and ensure uniform standards of child protection.

The 1996 Hague Convention provides for uniform rules of jurisdiction and consistent rules on applicable law while taking into account the situation of the movement of a child between states. The 1980 Hague Convention introduces an international mechanism to ensure the rapid return of a child to his/her country of habitual residence in a situation where a child has been wrongfully removed or retained in another country without the consent of the person having custody over the child. The introduction of uniform rules at the convention level ensures consistent jurisdictional norms in the states parties to the convention, making it possible to avoid situations where proceedings in the same case are initiated and conducted before courts of two different states on the basis of different jurisdictional connecting factors provided for in national law. Moreover, the unification of the rules on applicable law provided for in the 1996 Convention, offering flexible solutions regarding the possibility of taking legal measures to protect the child in urgent situations, allows international legal solutions to be adapted to the current situation of a given child.

All the solutions provided for in the Hague Conventions are supported by a system of mutual cooperation between the interested States Parties to the Convention. Namely, the system of cooperation between central authorities introduced in both conventions enables quick communication between individual countries and provides real support for parties to proceedings in cross-border cases. The above solutions aim to ensure a stable legal situation for the child in a cross-border situation in which the child moves to another country, as well as the implementation of children's rights under the UN Convention on the Rights of the Child.

It is worth noting that the range of measures covered by the 1996 Hague Convention is wide, including both civil and public law measures concerning the person or property of a child. This instrument covers issues related to both parental authority and representation of the child, as well as those related to the placement of the child in foster care in another state, a party to the Convention, or temporary or necessary measures aimed at securing the child's situation.

In addition, the solutions provided for in the 1980 Hague Convention also allow the quick return of the child in the event of unlawful removal or retention in a country other than the country of his/her previous habitual residence. Furthermore, they ensure contact with both parents.

The wide scope of application of both conventions, as well as the mutual exchange of experience in their application within the framework of an international organisation such as the Hague Conference on Private Law, allows the countries applying the Convention to discuss current problems, exchange good practices, as well as cooperation between states in specific cases.

This article presents the basic institutions and legal solutions contained in both these Conventions. At the same time, it should be emphasised that the regulatory area covered by these Conventions is also the subject of the EU regulation Brussels IIb,[1] which provides for even closer cooperation between the Member States of the European Union in the areas covered by the Hague Conventions.

1.1. Protection of the Rights of the Child in the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, The Hague, 19 October 1996

The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, done at The Hague on 19 October 1996, is the principal instrument for cooperation within the framework of the Hague Conference on Private Law. It contains uniform principles of private international law in matters of parental responsibility. It is the most widely ratified instrument of international law in the field of parental responsibility, covering a wide range of issues related to the protection of the child. Its main objective is to establish common legal regulations and ensure cooperation between States Parties in such a way that minors can be provided with legal remedies while eliminating delays caused by additional procedures.[2] This strengthens the protection of children in international cases and avoids conflicts between Member States' systems with regard to jurisdiction, applicable law, recognition, and enforcement of child protection measures.

More specifically, in international affairs between states that are parties to the Convention, it aims to define: the country whose authorities are competent to take

1 Council of the European Union, 2019.
2 Przytuła-Pieniążek, 2022, pp. 101–118.

measures aimed at protecting the person or property of the child; the law applicable by these bodies in the exercise of their jurisdiction in matters covered by the Convention; the law applicable to matters of parental responsibility; establishing cooperation between the authorities of the Contracting States necessary to achieve the objectives of the Convention (Article 1).

In the preamble, the Convention emphasises that the best interests of the child should be a priority. Its provisions take into account the provisions of the United Nations Convention of 20 November 1989 on the Rights of the Child. Like the UN Convention on the Rights of the Child, the 1996 Hague Convention applies to children from birth until they reach the age of 18. Such a procedure was aimed at leaving the issue of regulating the legal situation of the *nasciturus* in their national law to the discretion of the States Parties, leaving this issue outside the scope of the Convention's regulations and, thus, departing from a uniform approach in this matter.

As far as the scope of application of the 1996 Hague Convention is concerned, it applies to cases concerning measures for the protection of children, which should be understood (Article 3): the granting, exercising, and partial or total deprivation of parental responsibility, as well as its transfer; custody, including custody of the child and, in particular, the right to decide on the child's place of residence as well as the right to personal access, including the right to take the child for a limited period of time to a place other than the place of habitual residence; guardianship and other similar institutions; designation and scope of tasks of the person or entity who is responsible for the person or property of the child, represents him or her, or provides him or her with assistance; placing the child in a foster family or care facility or caring for him or her by a kafala or other similar institution; supervision of the child's care by public authorities by any person who is responsible for the child; management, protection, or disposal of the child's property.

In order to ensure uniform application of the 1996 Hague Convention in all countries applying it, the Convention introduced a definition of the concept of parental responsibility. Namely, parental responsibility within the meaning of the Convention should be understood as parental responsibility or any other similar relationship of authority that defines the rights and obligations of parents, guardians, or other statutory representatives in relation to the person or property of the child. Therefore, under the Convention, this definition takes on an autonomous character and is detached from the definition in national law.

To avoid doubt, the Convention clearly indicates in which cases it does not apply. These include matters concerning: establishing and denying paternity;[3] adoption decisions and measures to prepare for adoption, as well as annulment and revocation of adoption; the child's surname and first name; confirmation of age; maintenance obligations; trusts and inheritance; social insurance; public funds of a general nature in matters of education and health; decisions on the right to asylum and migration.

Taking the above into account, it can be indicated that the Convention will apply to children: who have international custody or contact parental disputes; who are abducted abroad (including in those countries that are not party to the 1980 Hague Convention on the Civil Aspects of International Child Abduction); who have been placed abroad as part of alternative forms of guardianship, and which do not fall within the definition of adoption and therefore do not fall within the scope of the 1993 Hague Convention on Intercountry Adoption; that are subject to cross-border trafficking and other forms of exploitation, including sexual exploitation; refugees or unaccompanied minors; children who move abroad with their families.

The 1996 Hague Convention contains jurisdictional norms that unify the rules of jurisdiction in the States Parties, allowing for the limitation of situations in which the authorities of two different States Parties could decide on the same matter. The primary connecting factor in matters falling within the scope of the Convention is the child's habitual residence. This means that the authorities of the state party in which the child has his/her habitual residence are competent (have international jurisdiction) to take measures aimed at protecting the child. It should be emphasised that the connecting factor of habitual residence is a connecting factor commonly used in the Hague Conventions concerning children. The Convention does not contain a definition of the concept of habitual residence, leaving these issues to be determined by the authorities applying the Convention on the basis of all the circumstances of the case. The connecting factor of the child's habitual residence takes into account the best interests of the child in the context of the possibility of hearing the case for the application of protection measures by the court located closest to the child. Therefore, the application of the connecting factor of the child's habitual residence is a matter of making certain factual findings on the part of the court, which applies its own law. In the absence of a conventional definition of the concept of habitual residence of a child, the literature indicates the criteria formulated in the interpretation of

3 Lagarde, 1998, pp. 578–579, observes that the conflict-of-law rules of the Convention do not apply to marital status (e.g. paternity as a result of the recognition of a child), which will be preliminary to the emergence of parental responsibility by operation of law and its recognition in the other Convention States under Article 16. At the same time, it stresses that "it would not be unreasonable" for the jurisdiction of law on this preliminary issue to be determined by the conflict-of-law rules of the child's country of habitual residence (that is to say, *legis causae*) and not by the forum's conflict-of-law law (para. 102). Theoretically, the author's position is divergent from the approach generally accepted in Polish doctrine, mainly due to ensuring uniformity of decisions in the same cases (i.e. the resolution of the preliminary issue signalled above on the basis of the applicable law indicated in the forum's conflict-of-law rules).

this concept adopted by the Court of Justice of the European Union in the context of Article 8 of the EU Brussels IIa Regulation,[4] which concerns jurisdiction in the field of parental responsibility.[5] This position is justified by the objective pursued by both acts, which is to protect the best interests of the child. The concept in question should be interpreted in light of that objective.[6] Thus, according to that view, it must be assumed that in order to determine the child's habitual residence in the context of the Convention, it is necessary to locate the place where the child is integrated to a certain extent into the social and family environment. In doing so, account should be taken, in particular, of the duration, legality, conditions, and reasons for the stay in the territory of the State concerned and of the family moving to that State, as well as the nationality of the child, the place and conditions of attendance at school, the knowledge of languages, and the family and social relations maintained by the child in that State.

In addition, the materials issued by the Permanent Office of the Hague Conference on Private International Law provide the following guidelines to determine whether there has been a change in the habitual residence of a child. First, if there are circumstances in the present situation which clearly indicate the parents' intention to start a new life in another State, it is, in principle, legitimate to consider that the child's previous habitual residence has changed to that of another State.[7] The circumstances referred to here may include, for example, the purchase by the parents of an apartment in the territory of that other State, the fact that they both have a job in that State, or the enrolment of the child in a school located in the territory of that State.[8] Second, if the move to another country is definitive or potentially definitive, it can also be assumed that the child's habitual residence has changed, even if a short period of time has elapsed since the child moved to that other State. If, on the other hand, the move is temporary, even if it is a long period of residence in another State, it is justified to consider that there has been no change in the child's habitual residence.[9]

Therefore, the determination of the "habitual residence" is related to the determination of the competent jurisdiction of the court and is, therefore, of fundamental importance for the consideration of the minor's case. The States Parties to the 1996 Hague Convention must, therefore, decide on their jurisdiction on the basis of domestic law while taking into account the overarching objective of the Convention. At the

4 Council of the European Union, 2003.

5 See judgments: CJEU of 2.4.2009, C-523/07, *A.*, ECLI:EU:C:2009:225, para. 44; CJEU, 22.12.2010, C-497/10, *Barbara Mercredi v. Richard Chaffe*, ECLI:EU:C:2010:829, para. 56; and 9.10.2014, C-376/14, *C. v. M.*, ECLI:EU:C:2014:2268, paras. 50 et seq., can also be applied to the child's habitual residence within the meaning of the Convention. See: Hamou 2015, pp. 277–279.

6 Carpaneto, 2019, pp. 265–285.

7 The Hague Conference on Private International Law Permanent Bureau, 2014, p. 177 (further: Manuel pratique).

8 See: Gallant, 2004, p. 235.

9 As is the case law in many countries; See: Manuel pratique, p. 177.

same time, the literature indicates that a child obtains habitual residence in a given country if he/she was moved there as a result of legal removal.[10]

10 Przytuła-Pieniążek, 2022. In the example of England, which, after leaving the EU in place of the previously applicable EU Regulation 2201/2003, applies the Hague Convention of 1996, it is possible to point to national case law concerning the conditions for establishing habitual residence. Thus, in Re *B* (*a minor*) (*habitual residence*) [2016] EWHC 2174, Judge Hayden set out thirteen conditions on the basis of which a child's habitual residence should be determined in the context of proceedings for the custody of minors. They can be presented as follows:
'(1) the child's habitual residence corresponds to a place which reflects a certain degree of integration of the child into the social and family environment;
(2) the factual investigation must concentrate entirely on the circumstances of the child's life which are likely to illuminate his/her habitual residence;
(3) the "best interests of the child" should be taken into account, in particular, the criterion of proximity, which in this context means the practical link between the child and the country concerned;
4) a parent may unilaterally cause a change in the child's habitual residence by transferring the child to another jurisdiction without the consent of the other parent;
5) usually, but not necessarily, the child will have the same habitual residence as his/her parents who are caring for him. Such an interpretation is more likely the younger the child is. However, it is largely about the child's usual place of residence, so the most important thing is to examine the degree of integration of the child;
6) the intention of the parents is important but not conclusive;
7) it is unlikely that the child will not have a habitual residence because, usually, the child loses his/her habitual residence when he/she acquires a new one;
8) when assessing whether the child has lost his previous habitual residence and gained a new one, the court must consider the degree of integration that the child had with the country in which he/she lived before the move. However, in the case of *Re M* [2020], the Court of Appeals referred to Condition No. 8 presented by Judge *Hayden* concerning the consideration of the degree of integration of the child with the state before moving. The Court of Appeals stated that the application of this condition 'could distract the court's attention from the basic activities related to the analysis of the child's situation on the date relevant to the purpose of determining jurisdiction or (...) whether the detention of the case was unlawful'. Therefore, it was recommended to omit this premise.
9) the stability of the child's place of residence is important as opposed to its permanence. This stability is measured qualitatively and not quantitatively, in the sense that it concerns the integration of the child into the environment, and is not a simple measurement of the time that the child spends in a given country;
10) an important question is whether the child has achieved the required degree of integration in the social and family environment. It is not necessary for the child to be fully integrated before his/her habitual residence can be established;
11) the required degree of integration may, in certain circumstances, develop quite rapidly, as was provided for in the Brussels IIa Regulation (a period of 3 months). It is also possible to acquire a new habitual residence in one day. Lord *Wilson*, in the case of *Re B*, referred to the "first roots" representing the required degree of integration, which a child can "grow" quite quickly after moving;
12) the place of permanent residence was a factual issue focused on the child's situation, and the goals and intentions of the parents were only one of the important factors. What was important was the stability of the place of habitual residence, not its permanent character. There was no requirement for the child to reside in the country for a certain period of time, let alone the parents' intention to live in the country permanently;
13) structure of the Regulation. Brussels IIa points out that it is in the best interests of the child to have a habitual residence and, therefore, it is highly unlikely, although possible, that the child may not have a habitual residence'.

At the same time, the 1996 Hague Convention introduces the principle of a change of jurisdiction in the event of a change of habitual residence of a child. This means that even if the child's habitual residence has changed in the course of the court proceedings, that court loses jurisdiction to hear the case in favour of the court of the country in which the child has acquired his habitual residence. Therefore, the Convention does not implement the principle of *perpetuatio jurisdictionis*, which is commonly applied in the systems of many states, including instruments of international (European) law. This regulation differs from the one that was in force under Regulation 2201/2003 Brussels II bis and now under Regulation 2019/1111 Brussels II ter. When considering the issue of a change in the child's habitual residence during the course of proceedings on parental responsibility, the Court of Justice of the EU, in the judgment of 14 July 2022, C-572/21, indicated that Article 8 para. 1 in conjunction with Article 61(a) of Regulation No 2201/2003 must be interpreted as meaning that a court of a Member State seised of a dispute concerning parental responsibility does not retain jurisdiction to rule on that dispute under Article 8 para. 1 if the child's habitual residence has been lawfully transferred in the course of the proceedings to the territory of a third country party to the Hague Convention. This means that the court hearing a case of parental responsibility will lose jurisdiction if, in the course of the proceedings, the child moves to another country where he/she will have a new habitual residence.

Due to the lack of a definition of habitual residence within the meaning of the 1996 Hague Convention, in practice, the assessment of the moment of occurrence of the habitual residence condition is questionable (the doctrine mentions the moment of filing an action, the date of the hearing, the moment of issuance of a ruling or

intervention by the competent authorities).[11] Given the departing from the principle of *perpetuatio jurisdictionis* in order to remove doubts that may arise as to the applicability of protection measures taken within a given jurisdiction after the child's habitual residence has been transferred to another State, Article 14 of the Convention clearly specifies that measures taken by the authorities in accordance with Articles 5-10 shall remain in force even if, as a result of a change in circumstances, the grounds for the child remain in force, on the basis of which jurisdiction was determined. They remain in force until measures are taken by the authorities of the State that has

11 Anna Przytuła-Pieniążek, analysing examples of the jurisprudence of English courts in the context of habitual residence under the 1996 Hague Convention, indicates that two positions are visible in the examples of judgments shown. Firstly, the one that indicates the assessment of whether the child has his/her habitual residence in a given country on the date of filing the action. However, such a position follows directly from the Brussels IIa Regulation, more specifically, from Article 8, and it should be remembered that the United Kingdom ceased to apply this regulation after the end of the transition period. The second way is to depart from the practice used when applying the regulation and to state that the appropriate moment to assess whether a child has a habitual residence in a given country is the day of the hearing. This position results from the lack of continuation of the principle *of perpetuatio fori* and has been applied in the most recent case law of the courts of England and Wales. Nevertheless, the most dangerous thing is to allow for a completely different interpretation of the regulations, and the lack of tools for control or harmonisation of interpretations does not inspire optimism. The presentation of Judge Lieven's view in this article marks a third, unexplored path. The indication that it would be possible to determine the date of determining the child's habitual residence on the day of the police intervention is not supported by any regulations. At the same time, it is worth noting that in the judgment issued in the case X *(A Child) X (A Child) (Jurisdiction and Habitual Residence Issue)* [2021] EWFC B81. of 30.11.2021, HHJ *Jonathan Bennett* indicated, as was the case in *the Warrington case*, that the determination of the habitual residence falls on the day of the court hearing. However, it was emphasised that determining when the place of habitual residence is determined is extremely important for the cases under consideration because many months may pass between the date of filing the action and the date of the hearing, during which the child's habitual residence may change. Przytuła-Pieniążek, 2022.

jurisdiction.[12] This means that measures to protect the person or property of the child taken by the competent authority remain within their limits until the authorities that have become competent in light of the new circumstances amend, replace, or repeal those measures. This rule is designed to ensure the continuity of the protection of the child but does not apply to the necessary protection measures referred to in Article 11 and temporary measures referred to in Article 12. The issue of the time limits of the binding force of measures belonging to the latter two categories is regulated separately, respectively in Articles 11 paras. 2 and 3 and Articles 12 paras. 2 and 3.[13] In principle, they are to apply until the protection measures taken by the authorities of the State having jurisdiction under Articles 5 to 10 of the Convention are recognised or, where the child has a habitual residence in a State not Party to the Convention, another relevant authority is recognised. In the case of interim measures, their scope is limited to the territory of the State concerned.

At the same time, Article 5 introduces the general principle that the authorities of the Contracting State in which the children are relocated as a result of the relocation have jurisdiction over refugee children and children who have been displaced abroad as a result of riots in their country (Article 6).

The Convention introduces exceptions to the general principle of basing jurisdiction on the connecting factor of the child's habitual residence, which, due to the fact that they constitute a departure from the general rule, require a restrictive interpretation. They concern situations such as: a) child abduction – Article 6; b) assumption of jurisdiction – Articles 8 and 9; c) the possibility of adjudicating on measures to protect the child in proceedings for divorce, separation, or annulment of marriage – Article

12 It is worth noting that P. Lagarde, gives, as an example of the application of Article 14, a situation in which 'the maintenance of the measure in force is necessary to ensure the permanence of protection', e.g. that the guardian, appointed in the child's habitual residence, continues to perform his/her function after a change in the child's habitual residence entails a change of jurisdiction. He also gives the example of granting parental responsibility by operation of the law of the child's new habitual residence to a person other than the one indicated by the protection measure taken in the country of previous residence. The author emphasises that 'legal certainty requires that an appropriate protection measure be taken in the country of new habitual residence in order to extinguish the function of the first person', i.e. that the measure issued earlier is effective by that time. However, the occurrence of such desirable effects already results from other provisions of the Convention, i.e. Articles 23 et seq. (first example) and Articles 16 paras. 3 and 18 of the Convention (second example). Doubts are also raised by the claim that the principle of *ex lege* recognition under Article 23 para. 1 would not be sufficient to guarantee the result described in Article 14, because it 'ensures the recognition of measures that are in force', and the provision in question resolves the question of whether the measure remains in force after the circumstances of the case have changed. This explanation is not convincing, as recognition by operation of foreign law of a judgment under Article 23 et al. does not depend on the whether circumstances at the time of the ruling there are still circumstances that previously justified the jurisdiction of the courts of the country of origin of the measure Lagarde, 1998, pp. 571-573.

13 Lagarde, 1998, pp. 570–572; Lagarde, 1997, p. 217; Manuel Pratique, pp. 85–86.

10; d) the possibility of adjudicating protection measures in urgent cases – Article 11; e) the possibility of adjudicating temporary protection measures – Article 12.

For cases concerning wrongful child removal or retention, the Convention clarifies in Article 6 para. 2 that the abduction or retention of a child is considered unlawful:

> '(a) where this has affected the custody right conferred on a person, authority, or other entity, exercised jointly or individually, in accordance with national law, in which the child had his habitual residence immediately before the removal or retention, and
> (b) if, at the time of the removal or retention, the right was, in fact, exercised jointly or individually or would have been exercised in the absence of the removal or retention.'

In the case of wrongful removal or retention of a child in a State other than the State of habitual residence, the principle of basing jurisdiction on the connecting factor of habitual residence is limited. This means that if, as a result of wrongful removal or retention, a child acquires habitual residence in that State, the authorities of that State do not automatically acquire jurisdiction over the measures of protection relating to that child under the Convention. In this situation, special regulations resulting from Article 6 of the 1996 Hague Convention apply; jurisdiction in these cases is vested in the authorities of the country in which the child had his/her habitual residence before the wrongful removal or retention, i.e. the Convention introduces the principle of maintaining the existing jurisdiction of the State prior to the wrongful removal or retention. On the other hand, the authorities of the State to which the child has been wrongfully removed or retained have jurisdiction over cases concerning measures to protect the child in a situation where the child acquires habitual residence in that State and at least one of the following conditions occurs: a) any person, body, or other entity entitled to custody has authorised the abduction or retention, or b) the child has been in that other State for at least one year after the person, authority, or other entity entitled to custody knew or should have known his/her whereabouts, any return application made during this period is no longer processed, and the child has adapted to the new circumstances.[14]

As long as the authorities of the State of habitual residence of the child retain their jurisdiction prior to the wrongful removal or retention, the authorities of the Contracting State to which the child has been removed or retained may take only urgent measures necessary to protect the person or property of the child, in accordance with Article 11 of the Convention.

Another exception to the general rule of jurisdiction based on the connecting factor of the child's habitual residence is the possibility of transferring or taking over jurisdiction by the authority of the country where the child does not have his/her

14 Article 7 para. 1 points a) and b).

habitual residence if it is better able to assess the best interests of the child in a particular case. After all, the best interests of the child are the principle in light of which all provisions of the Convention should be interpreted. Hence, the jurisdictional provisions have been shaped in such a way as to enable the case to be considered by the authority of the country in which the child does not have his/her habitual residence if it is justified in the best interests of the child. In this situation, the Convention provides for two solutions – the possibility of requesting the authority of the State, which is not the child's habitual residence, to assume jurisdiction (Article 8) and the possibility for the authority of the State, which is not the habitual residence of the child but with which the child has a relationship, to apply for the transfer of jurisdiction to the State in which the child has his habitual residence (Article 9).

The 1996 Hague Convention specifies the criteria for the transfer of jurisdiction to another state to be possible. Namely, the authorities of the State to which the authority of the State having jurisdiction on the basis of the connecting factor of habitual residence may apply in order to assume jurisdiction or which may apply to the State where the child has his habitual residence for the transfer of jurisdiction are: a) the country of which the child is a national, b) the country where the child's property is located, c) the country to which the petition for divorce or separation of the child's parents or for the annulment of their marriage was filed, d) the country with which the child has a close relationship.[15]

The indicated prerequisites are derived from the assumption that the court best placed to hear a case in the field of protection measures is the country with which the child has the closest relationship (such as the child's habitual residence) or another country with which the child demonstrates a relationship through citizenship, the location of the child's property, an ongoing matrimonial case between the child's parents, or another type of close relationship. In the situations described in Articles 8 and 9, the relevant authorities of the Contracting States concerned shall contact each other directly or through a central authority or ask the parties to submit a request to that effect.

A condition for the effective assumption of jurisdiction by a court of a State which is not the child's habitual residence is that such transfer serves the best interests of the child.

A specific jurisdictional basis, which is a derogation from the general principle of jurisdiction, is the possibility for the authority having jurisdiction to hear a case for divorce, legal separation, or annulment of marriage between the child's parents to take measures to protect the child. The condition is that the law of the country in question allows for the recognition of protection measures in proceedings in the indicated matrimonial cases.

Another basis for considering a case concerning measures for the protection of a child is that one of the parents has a habitual residence in a given country – if that parent has parental responsibility and this jurisdiction has been recognised by the

15 Article 8 para. 2 points a)–d).

parents or another person with parental responsibility. As in the case of the transfer of jurisdiction under Articles 8 and 9, a positive assessment is needed that the examination of a case in the field of child protection measures in matrimonial proceedings is in the best interests of the child.

A further exception to the rule of jurisdiction based on the habitual residence of a child is the possibility for any Contracting State in whose territory the child or its property is located to take the necessary protection measures in urgent situations. These measures shall remain in force until protection measures have been taken by the authorities having jurisdiction in accordance with Articles 5 to 10 – that is, the authorities of the child's habitual residence, by the authorities having jurisdiction under the transfer, as well as by the authorities having jurisdiction in matrimonial matters of the child's parents. In the case of issuing measures when the child does not have his/her habitual residence in the territory of a Contracting State, these measures cease to be effective if measures taken by the authorities of another State are recognised in each of the Contracting States in accordance with the requirements of the situation.

The 1996 Hague Convention also provides for temporary protection measures (Article 12). The application of such measures also requires the presence of the child or his/her property in the given State; however, the protection measures taken are temporary and apply only in the territories of the country in which they are taken. This means that these measures are not subject to recognition and enforcement under the provisions of the Convention. The Convention provides that they cease to apply when protection measures are taken by the authorities of the State having jurisdiction under Articles 5-10 in a situation where the child is habitually resident in the territory of a Contracting State. In a situation where the child does not have his/her habitual residence in any of the Contracting States, these measures cease to be effective if the measures are accepted in accordance with the requirement of situations taken by the authorities of another State.

In order to exclude parallel proceedings, Article 13 of the Convention imposes an obligation to refrain from taking protective measures in respect of the child or his/her property if, at the time of initiating the proceedings, an application for similar measures had already been submitted to the authorities of another Contracting State having jurisdiction under Articles 5-10 of the Convention.

In addition to the rules on jurisdiction, the 1996 Hague Convention also contains rules on applicable law. Within the meaning of the Convention, the term "applicable law" should be understood as all the provisions in force in the State, excluding conflict-of-law rules. This is a very important explanation because there are also voices in the doctrine that a reference to the legal system of a given state may also mean a reference to the conflict-of-law rules of that State. The applicable law indicated by the Convention connecting factors will apply even if it is the law of a State that is not a party to the Convention. The possibility of departing from the applicable law occurs in a situation where it is contrary to the legal order, taking into account the best interests of the child.

Regulations concerning the applicable law are contained in Article 15 of the Convention. According to this provision, in exercising the jurisdiction conferred in accordance with the provisions of Chapter II, the authorities of a Contracting State shall apply the provisions of their own law. However, if the protection of the person or property of the child so requires, they may, exceptionally, apply or take into account the law of another country with which the situation is closely linked. In the event of a change of habitual residence of a child to a residence in another Contracting State, the law of that other State, from the moment of the change, shall determine the conditions for the application of the measures taken in the State of former habitual residence.

The phrase 'in the exercise of jurisdiction conferred in accordance with the provisions of Chapter II' should not be taken literally. If, therefore, in a given case, the court's jurisdiction to take measures to protect the person or property of the child arises from the provisions of the Brussels IIb Regulation, Article 15 of the Convention is applicable. Such an interpretation of the provision in question is justified by the consideration of one of the main objectives expressly mentioned in the preamble, which the provisions of the Convention are intended to serve. Namely, the point is to 'avoid collisions between (...) legal systems with regard to (...) the law applicable' to parental responsibility and measures for the protection of children (taken by a judicial or administrative authority).[16]

Therefore, the rule adopted in the Convention is that these authorities apply their own law. The abovementioned regulation expresses the principle of the relationship between the competence of the authority and the jurisdiction of the law (fr. *lien entre la compétence et la loi applicable).* Measures aimed at the protection of the person or property of the child (taken by a judicial or administrative authority) include necessary measures taken in urgent cases and interim measures.[17] In this context, the literature writes about the jurisdiction of law derived from the international jurisdiction of the courts of a given State.[18] Thus, in light of the principle set out in Article 15 para. 1 of the 1996 Hague Convention, if the jurisdiction in the case rests with the Polish authority, then as far as the measures for the protection of the child are concerned, that authority applies Polish law.

16 See: Manuel Pratique, p. 91, fn. 251; on the broad understanding of the analysed wording – see also: Lowe and Nicholls, 2012, p. 58; Siehr, 2012, p. 77; Godechot-Patris and Lequette, 2012, para. 142–143; Devers, 2003, point 533.72. In the literature, it is argued that if a literal interpretation of Article 15(1) of the Convention were adopted, there would be a gap in those situations in which the basis for the court's competence to take measures to protect the child is another normative act, such as the aforementioned Brussels IIa Regulation. This would mean that in such cases, the above-described objective cannot be achieved by means of the Convention (see: Mostowik, 2014a, pp. 167–168; P. Mostowik, 2014b, p. 350; Ibid., in: Poczobut, 2017, pp. 870–871). In order to fill the gap, it would be necessary to look for an appropriate conflict-of-law rule in other sources of private international law, in particular in domestic normative acts. Furthermore, it should be noted that Articles 56 and 59 of the Polish Private International Law (Consol. Journal of Laws of 2023, item 503) cover only a reference to the 1996 Hague Convention and a regulation relating to the amendment of the statute.

17 Lagarde, 1997, p. 217; Lagarde, 1998, p. 16; Gallant, 2004, p. 44, 240; Revillard, 2011, pp. 29–47.

18 Mostowik, 2014a, p. 311.

These provisions are not absolute because, in a situation where the protection of a child or his/her property requires it exceptionally, the law of another country with which the situation is closely related may be applied or taken into account (Article 15). This is a derogation from the principle of the relationship between the competence of the authority and the jurisdiction of the law and constitutes the so-called corrective rule, allowing for the primacy of the best interests of the child to be taken into account. It is not based on the principle of the closest relationship but on the primacy of the good of the child being satisfied with the child's relationship with a given state, about which it is sufficient to be close.

The above solution is exceptional, so it is necessary to exercise restraint in reaching for it.[19] It offers the possibility for the authority to apply or take into account exceptionally the law of another country with which the situation is closely related if the protection of the child so requires. Examples of such a close relationship may be the child's former habitual residence, the place where the child's family members who intend to take care of the child live, the place where the parent who has the right of personal access to the child live, or the place where the child regularly visits members of his/her extended family.[20] Another example concerns the sale of immovable property belonging to a child, in which the court of the child's habitual residence may, for reasons of protection of the best interests of the child, apply the law of the place where the immovable property is situated, which requires authorisation for such a sale, and issue that authorisation on the basis of that law, even if the *lex fori* does not provide for a similar requirement.[21] And the opposite situation, concerning the example illustrating the possibility of taking into account the law of a *non-fori* State, is a case in which the authority examining a request for permission to sell a child's property located abroad takes into account *lege rei sitae* to justify its refusal to grant such a request.[22] In his Explanatory Report, P. Lagarde also cites, by way of example, a situation in which it may be appropriate to apply or at least to take account of the law of the child's mother tongue in respect of measures for the protection of the child. Namely, such a solution, as justified by the interest of the child, comes into play, m.in. in the case where the child in question is to return to his/her home country within a short period of time. In such a situation, the court should seek to avoid the application of such protection measures which can then not be enforced in the child's home State.[23] Another example of the application of this provision in the literature is a situation where the child is not related to the country of the envisaged new place of habitual residence through some additional circumstance, such as citizenship. In

19 Lagarde, 1998, p. 574; Bucher, 2003, p. 187; Manuel Pratique, p. 91.
20 Lagarde, 1998, p. 179.
21 Lagarde, 1998, p. 574; Lagarde, 1997, p. 217 and next; Lagarde, 1998, p; 16. See also: Clive, 1998, pp. 179–180; Bucher, 2003, pp. 186–187; Pirrung, 2012, p. 72.
22 Devers, 2003, point 533.71.
23 Lagarde, 1998, p. 574.

such a case, consideration of the child's welfare may speak in favour of the application of this law.[24] Taking into account the law of a State other than the *fori* State may also consist when using the terminology adopted in this law when drafting the ruling.[25]

In the event of a change of habitual residence, the law of that other country will apply from the moment of that change and, according to that law, the conditions for the application of the measures in the country of the former habitual residence will apply. It also adds, per Article 15(2), that the solutions contained in the more recent Convention are more flexible. The author also emphasises that the relationship of authority in relation to the child existing by operation of law – with the clarification that it is about its granting and expiration – is subject to the law of the child's habitual residence and not to the law of the child's homeland, which was the case against the background of previous conventions. Therefore, it signals the introduction of various conflict-of-law constructions, i.e. the jurisdiction of *legis fori* derived from the exercise of jurisdiction and jurisdiction based on this personal connecting factor concerning the child.[26]

The manner in which child protection measures are to be enforced in the event of a subsequent change in circumstances justifying the jurisdiction of the authority is laid down in Article 15 para. 3 of the 1996 Hague Convention. In accordance with Article 15 para. 3, from the moment of the change of the child's habitual residence to that of another Convention State, the manner in which measures taken in the State of the child's former habitual residence are to be implemented is governed by the law of the child's new habitual residence. This issue must be distinguished from the question of the existence of a measure to protect the child after the circumstances on which the jurisdiction is based have changed. The solution contained in Article 15 para. 3 covers only those situations in which the child's habitual residence has been changed to a residence in another Convention State. The concept of the manner of implementation (conditions of application) of child protection measures is not defined in the Convention. However, the materials issued by the Permanent Office of the Hague Conference on Private International Law indicate that the issue of the manner in which child protection measures should be implemented in the country to which the child has moved includes, in particular, the question of whether the guardian appointed in the country of the child's former habitual residence may independently perform a given legal act on behalf of the latter or whether it is required to obtain permission from the child Court.[27]

In the face of a change in the statute, there may be a risk of weakening the action or even degeneration of the measure taken in the country of the child's former habitual residence. In such cases, recourse to the method of adjustment comes into play. If, however, it is impossible to overcome difficulties in this way, a new measure

24 Bucher, 2003, p. 187.
25 Manuel pratique, p. 91; Lowe and Nicholls, 2012, p. 58.
26 Mostowik, 2014a, p. 131.
27 Lagarde, 1998, p. 574; Manuel Pratique, p. 92; Lagarde, 1997, p. 217; Lagarde, 1998, p. 16; Clive, 1998, p. 180; Gallant, 2004, p. 243; Lowe and Nicholls, 2012, p. 58.

of protection can be taken.[28] Per the instruments of international cooperation, such as the one provided for in Article 34 of the 1996 Hague Convention, the competent authority applies to the relevant authority of another Convention State in order to obtain the information necessary for the protection of the child (in the context under consideration, this is in particular information which makes it possible to establish in detail the reasons for the measure in question in the country of the child's former habitual residence) and what function the product was supposed to perform.

The Convention distinguishes between the issues of creation, termination, and exercise of parental responsibility.[29] In the event of liability arising or ceasing to exist by operation of law (without the participation of a judicial or administrative authority), it is subject to the law of the country of the child's habitual residence. Furthermore, a situation where parental responsibility arises or ceases by virtue of an agreement or unilateral legal act, without the participation of a judicial or administrative authority, is subject to the law of the child's countries of habitual residence from the moment the agreement or unilateral legal act becomes effective.

The term 'without the participation of a judicial or administrative authority' should be understood as the lack of the so-called active intervention of the authority, i.e. intervention consisting in the decision made by the authority after examining the merits of the case. Thus, the creation or cessation of parental responsibility referred to in Article 16 para. 1 occurs both when no interference by a judicial or administrative authority is necessary for such an effect to occur, and when the role of the competent authority is limited solely to registering the declarations of the parents whose parental responsibility arises by operation of law, or accepting an appropriate notification from them.[30] If the participation of the authority is active, i.e. when it consists in issuing a decision preceded by an assessment of the merits of the case, then it should be assumed that it is a measure to protect the child (taken by an administrative or judicial authority), and therefore the conflict-of-law rule under Article 15 should apply.[31] Under Article 16 para. 2, an agreement between parents on custody or access rights to a child should be classified as an "agreement". Whereas a unilateral legal act within the meaning of the norm in question is, for example, a will in which the only surviving parent indicates a guardian for the child.

At the same time, parental responsibility established under the law of the child's country of habitual residence continues even after the child's habitual residence has changed to another state. However, the granting of parental responsibility to a person who has not previously been entitled to such responsibility is governed by

28 Lagarde, 1998, p. 574; Manuel pratique, p. 93.

29 Article 16 of the Convention.

30 Lagarde, 1998, pp. 576–578; Manuel pratique, p. 95.

31 See: Manuel pratique, p. 95. As is apparent from Lagarde Report, when determining – at the qualification stage – whether the participation of an authority is necessary for parental responsibility to arise or cease to exist, and if so, whether it is participation in the so-called active intervention, one must be guided by the provisions of substantive *legis causae*, Lagarde, 1998, pp. 576–578.

the law of the country of the new habitual residence. On the other hand, according to Article 17 of the 1996 Hague Convention, the exercise of parental responsibility is governed by the law of the child's country of habitual residence. In the event of a change in the child's habitual residence, he/she is subject to the law of the country of the new habitual residence. It is, therefore, important to distinguish between the issue of exercise and the question of the existence of parental responsibility (movable conflict). This distinction becomes particularly important in the case of a change in the child's habitual residence. With regard to the exercise of parental responsibility arising in the abovementioned manner, the principle of variability of the statute has been adopted. Thus, a person who, according to the law indicated by the authoritative conflict-of-law rule under Article 16 paras. 1 or 2, is entitled to parental responsibility, retains his/her status in the event of a change in the child's habitual residence, on the basis of the norm in Article 16 para. 3. However, whether that person, as one of the two persons exercising parental responsibility, may independently bring an action on behalf of the child or whether a prior agreement with the other holder of parental responsibility is required in order to do so, is determined by the law of the child's new habitual residence, in accordance with the principle of jurisdiction of each statute expressed in Article 17. Similarly, regarding the possible requirement of the consent of the other person (all other persons) exercising parental responsibility to subject the child to surgical intervention in a situation other than an emergency, the new statute is authoritative.[32]

At the same time, in the Explanatory Report, P. Lagarde points out that,

> 'according to the law laid down in Article 17 para. 2, it is necessary to assess whether a person whose parental responsibility arose without the (active) participation of a judicial or administrative authority under the law of the child's former habitual residence may, after changing the child's habitual residence, perform a given legal act independently or only with the permission of the competent authority.'

However, this example raises doubts as to the fact that such authorisation is a measure for the protection of the child (taken by a judicial or administrative authority) to which the Convention generally provides for *legis fori* jurisdiction.[33] The issue of the possibility for a parent to submit a declaration of rejection of inheritance on behalf of a minor child without the permission of the court should be considered as part of the issue of exercising parental responsibility within the meaning of Article 17. The above issue is not covered by the exclusion under Article 4(f) because it is 'a matter concerning parental responsibility, not inheritance'. Also, the issue of requiring the parent to obtain permission from the family court to perform certain activities of

32 See: Manuel Pratique, p. 97.
33 Article 15 para. 1 of the Convention.

administering the property on behalf of the minor child falls within the scope of application of the regulation under Article 17 of the 1996 Hague Convention.

Against the background of the regulations under Article 17, the issue of possible intervention of the public policy clause is also considered in the literature. The subject of attention is, in particular, a situation where the law applicable to the exercise of parental responsibility allows the use of corporal punishment against a child.[34] At the same time, under Article 18 of the 1996 Hague Convention, parental responsibility provided for in Article 16 may be revoked and the conditions for its exercise altered by measures taken on the basis of the Convention. The order in question indicates that the fact that parental responsibility arose without the (active) participation of a judicial or administrative authority does not preclude the application of a child protection measure consisting in its withdrawal or change of the conditions under which it is exercised.

Article 19 of the Convention also provides for the protection of a third party who, in good faith, has entered into a legal transaction with a person acting as the child's legal representative. It is based on the assumption that a third party may, in certain circumstances, reasonably assume, albeit erroneous in light of the provisions of Articles 15, 16, or 17 thereof (whichever *is* applicable), that, in a given case, the question of competence to act as a child's legal representative is subject to the legal regime in force in the country in which the act was carried out.[35] Their protection is conditioned by the following premises:

1. The legal transaction was made with a person who, according to the law of the place where the transaction was performed, would be entitled to act as the statutory representative of the child.
2. The third-party acted in good faith, i.e. it did not know and could not be expected to know that parental responsibility, under the Convention, is governed by a law other than the law of the place where the legal transaction was performed (the measure of diligence that the third party should exercise in determining the jurisdiction of the law in this respect depends on the gravity of the legal transaction).[36]
3. The legal transaction was carried out between persons present in the territory of the same State.[37]

If all of the conditions described above are met, the validity of the legal transaction cannot be questioned, nor can a third party be held liable solely on the ground that it is governed by the applicable law under the Convention. The person acting as the

34 See: Lowe, 2002, p. 62; Twardoch, 2018, pp. 1081–1084.
35 Lagarde, 1998, p. 582; Lowe, 2002, p. 65; Manuel pratique, p. 175.
36 Lagarde, 1998, p. 582; Lowe and Nicholls, 2012, p. 65.
37 As is apparent from Lagarde Report, in the case of legal transactions between persons located in different States, the third party is required to exercise greater diligence in determining the jurisdiction of the law on parental responsibility. See: Lagarde, 1998, p. 582.

child's legal representative is not entitled to act in such a capacity (at all or to a certain extent).[38]

The Convention also regulates the rules for the recognition and enforcement of protection measures taken in other States Parties. It introduces the principle that the recognition of protection measures taken in one of the Contracting States takes place by operation of law in other Contracting States. This means automatic recognition of these protection measures. For this purpose, the law of the country in which the document is subject to recognition should not provide for any additional procedures leading to obtaining a ruling stating that a given measure is subject to recognition in the territory of another Contracting State.

In order to ensure basic procedural safeguards for the parties and the right to be heard for the child, as well as the jurisdictional bases provided for in the Convention, the Convention provides for the possibility of refusing recognition of a given protection measure. The Convention provides for common grounds for refusal of recognition of protection measures common to all Contracting States. Consequently, it is not possible to invoke grounds not provided for in the Convention and existing in the legal system of the country in which the legal measure is presented for recognition. This also creates predictability and legal certainty as to the recognition of protection measures in the other Contracting States. The grounds for refusal of recognition listed in Article 23 para. 2, according to which refusal of recognition is possible, are: a) if the measure was taken by an authority whose jurisdiction was not based on the grounds provided for in Chapter II of the Convention; b) if the measure has been taken, except in cases of urgency, in the context of judicial or administrative proceedings, without giving the child the opportunity to hear it, thereby violating the essential principles of the requested State; c) at the request of any person alleging that the measure violates his/her parental responsibility, if the measure has been taken, except in cases of urgency, without that person being given the opportunity to be heard; d) if recognition is manifestly contrary to the public policy of the requested State, the best interests of the child must be taken into account; e) if the measure is incompatible with a measure subsequently taken in the child's country of habitual residence that is not a party to the Convention, provided that the latter measure fulfils the conditions necessary for recognition in the requested State; f) if the assurance set out in Article 33, i.e. introducing the requirement of consultation and consent of the requested State to place the child in a foster family or care facility in another Contracting State, has not been complied with.

Notwithstanding the foregoing, any person concerned may apply to the competent authorities of a Contracting State for a decision on the recognition or refusal of recognition of a measure taken in another Contracting State. The procedure, in this case, is determined by the regulations of the requested State. This means that the 1996 Hague Convention only unifies the grounds for refusal to recognise protection measures and leaves the procedural requirements and further proceedings to

38 Twardoch, 2018, pp. 1081–1084.

the Contracting States. The advantage of obtaining a decision on the recognition or refusal of recognition of a given protection measure is that it obtains legal certainty in this respect in a given country and is binding on the other authorities of that State in the proceedings before which the parties invoke the given protection measure.

The Convention provides for the principle that the authority of the requested State is bound by the findings of fact on the basis of which the authority of the State that took the measure established its jurisdiction. This means that a different assessment of the facts and, on that basis, the assumption of a lack of jurisdiction on the part of the authorities which applied the protection measure in question, which is then subject to recognition in another contracting state, cannot be invoked as a ground for refusal to recognise a given measure.

As regards the protection measures that are enforceable, the 1996 Hague Convention requires that they be enforceable in another Contracting State or registered in that State. This means that, unlike measures subject only to the recognition that the enforcement of the protection measure can take place after a prior exequatur procedure, declaring the enforceability of a judgment in a given country means that no other authority of that State to which a protection measure is presented for enforcement may apply the grounds for refusal in the proceedings before it.

Refusal to execute may be made only on the basis of the grounds indicated in Article 23, i.e. the same ones that apply to refusal of recognition. At the same time, the Convention prohibits a substantive review of a measure subject to the procedure of declaring enforceability. This means that the legitimacy of a given measure may be subject to instance review only in the Contracting State in which the decision on the measure was issued as part of instance review.

The law of the Executing State shall apply to the enforcement of protective measures taken in another Contracting State which have been declared enforceable or which have been subject to registration for enforcement in another Contracting State and shall be enforced in accordance with the same conditions as national decisions, taking into account the best interests of the child. Such a solution guarantees, on the one hand, that the grounds for refusal to recognise and enforce judgments are harmonised in all the Contracting States and, on the other hand, that the enforcement of those measures for the protection of the child or his/her property arising from a judgment issued in another Contracting State on the basis of the law of the country of its enforcement allows that decision to be incorporated into the legal system of that State.

The Convention also establishes a reciprocal system of cooperation between the Contracting States in order to achieve the objectives of the Convention. To this end, each country designates its own central authority. The central authorities of the individual Contracting States are obliged to cooperate with each other and promote cooperation between the competent authorities in the States for the implementation of the tasks of the Convention. The central authorities provide information about their legislation as well as about services aimed at protecting children. They may act directly or through relevant public authorities or other entities. They may assist

in facilitating contacts and providing assistance provided for in Articles 8 and 9 of the Convention, facilitating agreements by conciliation or mediation concerning the protection of the person or property of the child, as well as establishing the child's residence at the request of another competent authority of the Contracting State, if there is a possibility that the child is in the territory of the requested State and is in need of protection.

At the request of the central authority or other competent authority with which the child has a close relationship, the central authority of the child's habitual residence or in which the child is present may, directly or through other public authorities or competent bodies: provide a report on the child's situation; ask the competent authority in your country to investigate the need for measures to protect the child or his/her property.

Article 33 of the 1996 Hague Convention also regulates situations where a child is placed in an educational institution or a kafala care or similar institution in another Contracting State. The provision requires consultation with the central authority or competent authority in that State, to that end, by ordering that it be provided with a report on the child and a statement of reasons for the placement or custody proposal. A decision on placement may be made only if the central authority or other competent authority in the requested State agrees to it.

The Convention also applies in a situation where it is necessary to obtain information from an authority of another Contracting State in order to take a measure to protect a child or his/her property.

The Convention also emphasises the importance of maintaining contact between the child and his/her parents. It provides for the facilitation of evidence in the form of the possibility of collecting evidence. Namely, at the request of a parent residing in that country and wishing to obtain or retain the right of personal access, the authorities of that country may collect evidence and comment on the parent's ability to exercise the right of personal access and the conditions under which he/she could exercise it. The authority with jurisdiction should take into account these motions and evidence when deciding on the right of access.

An important issue in the area of cooperation between contracting states is the possibility of concluding agreements. It seems that these agreements should be more far-reaching than the content of the Convention and contribute to the improvement of cooperation between individual States. It is worth noting that it is up to the decision of the Contracting State whether to make the intermediation of the central authority an obligatory element of communication between the Contracting States. The flow of information between States is then controlled in the performance of the tasks provided for in the Convention.

The Convention also provides for the possibility of issuing a certificate of entitlement to the person exercising parental responsibility or to whom the person or property of the child has been entrusted. This certificate can be issued by the authorities of the country where the child has his/her habitual residence or the country where the protection measure has been taken.

The Convention exempts documents issued on its basis from legalisation. The Convention is without prejudice to the 1980 Convention on the Civil Aspects of International Child Abduction.

In conclusion, the 1996 Hague Convention aims to introduce solutions leading to the unification of the rules for the recognition and enforcement of measures for the protection of children and their property, as well as the harmonisation of jurisdictional rules and conflict-of-law rules. This legislation serves to exercise parental responsibility in all Contracting States, increasing the guarantees of legal certainty and protection of the child in cross-border situations. At the same time, it contains detailed regulations on jurisdictional provisions in the event of unlawful child abduction or retention in a country other than the country of the child's current residence.

1.2. The 1980 Hague Convention on the Civil Aspects of International Child Abduction

An important legal instrument to ensure and strengthen the protection of the rights of the child is the 1980 Hague Convention on the Civil Aspects of International Child Abduction, done in The Hague on 25 October 1980. Its essence is the implementation of the following goals: ensuring the immediate return of children wrongfully removed or retained ensuring respect for the right to care and visitation as defined by the legislation of one of the Contracting States in other Contracting States.

As in the case of the 1996 Hague Convention, the main principle of the 1980 Hague Convention is the best interests of the child, and its purpose is to protect the child at the international level against the harmful effects resulting from the wrongful removal or retention of a child. The Contracting States have laid down in the Convention the procedure to be followed to ensure the immediate return of the child to the State of his/her habitual residence. Thus, as follows from the above objectives of the 1980 Hague Convention, it implements the right of the child to maintain contact with both parents, which is guaranteed by the UN Convention on the Rights of the Child 1989. Due to the fact that the separation of the child from his/her parent, unjustified by the best interests of the child, is an undesirable situation, the States Parties to the Convention undertook to use the available emergency procedures in order to obtain the return of the child. The 1980 Hague Convention applies to children until they reach the age of 16 (after which the Convention ceases to apply) and when the child is habitually resident in the Contracting State immediately before the violation of custody or visitation rights.

At the same time, the Convention clarifies that the right to custody should be understood as the right to custody of the child; particularly, the right to decide on the child's place of residence and the right to visit should be understood as the right to take the child for a limited period of time to a place other than the place of his/her permanent residence.

Within the meaning of the 1980 Hague Convention,[39] wrongful child removal or retention occurs if: there has been a violation of the right to custody and the right

39 Art. 3 of the Convention.

to custody granted to a specific person, institution, or other organisation, exercised jointly or individually, under the legislation of the country in which the child was habitually resident immediately before the removal or retention, and at the time of the abduction or retention, these rights were effectively exercised jointly or individually or would have been exercised if the abduction or retention had not occurred.

At the same time, the right to custody may result, in particular, by operation of the law itself, from a judicial or administrative decision or from a settlement having legal force in light of the provisions of the legislation of that country. Furthermore, it follows from Article 14 that, when determining whether there has been wrongful removal or retention, the relevant authority of the requested State may directly take into account the provisions of legislation and judicial or administrative decisions, formally recognised or not recognised in the country of habitual residence of the child, without applying separate procedures to determine the jurisdiction of this legislation or to recognise decisions that would otherwise apply. Additionally, the competent authorities of the requested State may require the production of a judgment or declaration originating from the country of the child's habitual residence stating that the removal or retention was unlawful within the meaning of Article 3 of the Convention if such a decision or declaration can be obtained in that State.

As already mentioned, the purpose of the 1980 Hague Convention is to ensure the prompt return of a child wrongfully removed or retained to his/her country of habitual residence. Therefore, it grants jurisdiction to the authorities of the requested State only in cases concerning return. Such a solution is to counteract the legalisation of unlawful abduction by the authorities of the requested State. Only a finding that the return of the child is not justified, in light of the premises contained in Articles 12 and 13, causes the requested country to become the country of the child's habitual residence, which has jurisdiction to adjudicate on matters of parental responsibility. This is reflected in Article 16 of the Convention, from which it follows that the competent authorities of the requested State will not be able to decide on the substance of the right to custody of the child until it is established that the requirements set out in this Convention will not be met or if, within a reasonable time after this notification, an application for the return of the child has been submitted.[40] Similarly, the mere fact that a custody decision was made in the requested State or may be recognised in the requested State cannot in itself justify a refusal to return the child. Such a decision has an evidential effect, and the authorities of the requested State may take into account the reasons for issuing such a decision.

As with the 1996 Hague Convention, the 1980 Hague Convention is based on the cooperation of the Contracting States through a system of central authorities. Each Contracting State is obliged to designate a central authority to carry out its obligations

40 Zombory pointed out that the Convention allows only to take into account to a limited extent the specific situation of the individual child, which is the subject of today's approach to children's rights, in particular where the principle of the best interests of the child requires. See: Zombory, 2023, pp. 217–237.

under the Convention. The central authorities should cooperate with each other and promote cooperation between the competent authorities in their respective countries to ensure the prompt return of children and to achieve the other objectives of this Convention. The 1980 Hague Convention indicates examples of activities of central authorities that are important from the point of view of achieving the objectives of the Convention. Thus, central authorities, directly or through other units, should take all measures to: determining the whereabouts of the wrongfully abducted or detained child; prevent further risk to the child or further harm to the parties concerned by taking or causing interim measures; ensuring the voluntary return of the child or bringing about an amicable settlement of the dispute; if necessary, exchange of information about the child's social situation; provide information of a general nature concerning the provisions of their country's legislation relating to the application of the Convention; initiate or facilitate judicial or administrative proceedings to obtain the return of the child and, where applicable, establish or effectively exercise visitation rights; granting or facilitating legal and judicial aid, where appropriate, including the participation of a lawyer and legal adviser. take the necessary measures to ensure the child's safe return; inform each other about the functioning of the Convention and, as far as possible, remove any obstacles created by its application.

In addition to indicating the competencies of the central authorities, the Convention also regulates the detailed procedure to be followed in the case of wrongful child abduction.

It follows from Article 8 of the Convention that any person or institution which maintains that a child has been removed or retained in breach of custody rights may request the central authority of the child's habitual residence or the central authority of any other Contracting State for assistance in ensuring the return of the child.

The application for the return of the child contains information on the identity of the applicant, the child, and the person who is alleged to have abducted or retained the child; the date of birth of the child; the grounds relied on by the applicant to request the return of the child; all available information on the child's whereabouts; and the identity of the person who is presumed to be staying with the child. The application must be accompanied or supplemented by certified copies of the decision or settlement useful for the case, a certificate or certified benefit from the central authority or other competent authority of the country of habitual residence of the child, or a competent person, concerning the provisions of the legislation of that country in this respect.

The 1980 Hague Convention introduces an obligation to forward the application for the return of the child if the central authority has grounds to believe that the child is staying in another Contracting State. The central authority of the requesting country should be informed of this fact. Furthermore, the central authority of the country where the child is located should take action or cause action to be taken to ensure the voluntary return of the child.

The Convention, due to the need for applying quick procedures in proceedings aimed at obtaining the return of a child, specifies the deadlines for these proceedings

in order to ensure a uniform standard of the length of proceedings. Namely, the Convention in Article 11 indicates that all actions taken to return the child should be taken immediately. If, however, the relevant judicial or administrative authority does not take action within six weeks from the date of receipt of the request, then the applicant or the central authority of the requesting State (on its own initiative or at the request of the requesting State) may request a statement of the reasons for the delay. The reply shall be forwarded to the applicant or the central authority of the requesting State.

The purpose of the 1980 Hague Convention is to obtain the immediate return of a child wrongfully removed or retained to the country of his/her habitual residence. Therefore, the essence of the Convention and the mechanism provided for in it to ensure the return of the child is to restore the state from before the unlawful removal or retention. However, the guiding principle of the Convention, as well as other instruments of international law regulating issues concerning children, is the compliance of all actions taken on the basis of these instruments with the principle of the best interests of the child. Therefore, there are also situations where the best interests of the child, despite the fact that he/she has been unlawfully removed or retained with another Contracting State, speak in favour of his/her non-return to the country of his/her habitual residence.

Exceptions to the order for the return of a child to the country of his/her habitual residence prior to wrongful removal or retention are set out in Articles 12 and 13 of the Convention.

Namely, it follows from Article 12 that if a child has been wrongfully removed or retained and at the time of receipt of the application to the relevant authority of the country where the child is located, a period of less than one year has elapsed from the date of removal or retention, his/her immediate return is ordered. As such, in a situation where the application for the return of the child was filed after one year from the abduction or retention, there is no obligation to order the return of the child. This is due to the fact that during this period of time, the child could have settled in the new country and integrated with the social, family, and cultural environment of the country. In this situation, the fact of the child's integration with the new state, on the one hand, and the failure of the entitled person to submit an appropriate application for the return of the child for a period of one year, on the other, allows us to conclude that the return of the child was not a priority for that person and, in fact, *per facta concludentia*, he/she consented to the unlawful removal or retention. Thus, the failure to take appropriate legal measures by the entitled person (i.e. the person whose right to custody of the child has been violated) renders his/her application for the return of the child ineffective. However, the Convention is flexible regarding this one-year period, indicating that the relevant judicial or administrative authority may order the return of the child even after one year unless it has been established that the child has already adapted to the new environment.

The Convention also introduces the possibility of suspending proceedings or rejecting the application if there are grounds to believe that the child has been taken to another country.

Further grounds for refusal to return a child to the country of his/her habitual residence are found in Article 13 of the 1980 Hague Convention.

These grounds are independent of the period in which the child has been wrongfully removed or retained in another country. Thus, according to this provision, there is no obligation to order the return of the child if the person or institution opposing the surrender proves that: a) the person, institution, or organisation caring for the child did not actually exercise custody at the time of the removal or retention or subsequently consented to the removal or retention, b) there is a serious risk that the return of the child would expose him/her to physical or psychological harm or in any way put him/her at a disadvantage, c) the child opposes the return and that he/she has reached a level of maturity at which it is appropriate to take his/her opinion into account, d) in accordance with Article 12 of the Convention, the return of the child would not be permissible in light of the fundamental principles of the requested State concerning the protection of human rights and fundamental freedoms.

At the same time, when assessing the circumstances listed in Article 13, the interpretation of the provisions of the 1980 Hague Convention should be made in each case, taking into account the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR), which consistently assumes that exceptions to the so-called principle of return under the 1980 Hague Convention should be interpreted strictly, and the circumstances presented before the national court should objectively exclude the possibility of the child's return to the of the State Party to the Convention from which the abducted was carried away. As it is accepted in the jurisprudence of the ECtHR issued on the basis of Article 13 para. 1 point b) of the Convention, the damage referred to in this provision cannot arise solely due to the separation (however difficult for the child) from the parent who is responsible for the unlawful removal or retention of the child. At the same time, the consideration of the directives for the systemic interpretation of the Convention leads to the conclusion that the exception regulated in Article 13 para. 1 point a) of the Convention cannot be understood in such a way that the actual failure to exercise custody by the applicant, caused by the abduction of a minor, could justify a refusal to order the return of the child.[41]

The application of the provisions of the 1980 Hague Convention is also the subject of extensive jurisprudence of the ECtHR issued on the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which indicated that the procedure on the application under the Hague Convention is of an urgent nature. The ECtHR pointed out that although the six-week time limit set out in Article 11 of the 1980 Hague Convention and Article 11 of EU Regulation 2201/2003 on the recognition of judgments (applicable to both first-instance and appeal proceedings) was procedural in nature, exceeding it by approximately twenty-six weeks (in

41 See: Pérez-Vera, 1991, para. 115.

the absence of any circumstances capable of exempting national courts from the obligation to strictly comply with it) infringed the urgency requirement of the situation and was not consistent with the positive obligation to act quickly in the proceedings for the return of children.

Within the framework of the application of the 1980 Hague Convention, the child's expression of will to remain or consent to return is also not binding on the court. It is up to the court on the merits to assess in this respect, taking into account the circumstances of the specific case, including the maturity of the minor child, his/her attitude towards both parents, the correctness of contacts, emotional bonds, as well as independence in expressing views and his/her own will, and in particular the scope of possible influence of the parent under whose actual authority he/she remains. The child's welfare should always be assessed objectively in the realities of a specific case.[42]

Considering the application of the Convention in the context of Article 8 of the European Convention on Human Rights (ECHR), the Court pointed out that this provision is primarily intended to protect individuals against the arbitrary action of public authorities. In addition, there are positive obligations inherent in effective "respect" for family life. However, the boundaries between positive and negative obligations under these provisions are not subject to a precise definition. Nevertheless, the applicable rules are similar. In both contexts, the need to find a balance between the conflicting interests of individuals and the community as a whole must be taken into account; in both contexts, the State retains a certain margin of discretion[43]. At the same time, the Court reiterated that the 1980 Hague Convention must be applied in accordance with the rules of international law, particularly in the case of international protection of human rights. The Court held that, in the case of international child abduction, the positive obligations which Article 8 of the Convention imposes on the Contracting Parties must be interpreted in light of the Hague Convention of 25 October 1980 concerning the Civil Aspects of International Child Abduction[44] and the Convention of the Rights of the Child Act of 20 November 1989,[45] which gives the best interests of the child the utmost importance.[46] The Court also found that the present case concerns the return of a child from one EU Member State to another. In relations between EU countries, the provisions on child abduction contained in the Brussels IIa Regulation complement the provisions of the 1980 Hague Convention. Both provisions

42 Order of the Supreme Court – Civil Chamber of 14 January 2021 I CSKP 35/21.

43 See: i.a. *M.A. v. Austria*, No. 4097/13, Art. 104; *Raw and Others v. France*, No. 10131/11, Art. 78; *Maire v. Portugal*, No. 48206/99, Art 69; *Sylvester v. Austria*, Nos. 36812/97 and 40104/98, Art. 55; and *Ignaccolo-Zenide v. Romania*, No. 31679/96, Art. 94.

44 See: i.a. *Ignaccolo-Zenide*, Art. 95.

45 See for example: *Maire v. Portugal*, Art. 72.

46 See: *Raw and Others v. France*, Art. 82; *Neulinger and Shuruk v. Switzerland* [WI], No. 41615/07, Arts. 49-56 and 137; and *X v. Latvia*, [WI], No. 27853/09, para. 93 and 96.

are based on the approach that in all provisions concerning children, their interests are of the utmost importance.[47]

At the same time, it follows from Article 18 of the 1980 Hague Convention that an order for the return of a child may be issued at any time. It should also be emphasised that the decision ordering the return of the child does not violate the right to custody. As indicated earlier – Article 16, in principle, excludes the possibility of adjudicating on the return of the child by the authorities of the country to which the child was abducted. The main purpose of the Convention is to restore the state before the abduction and, thus, in principle, also to restore contact with both parents.

The 1980 Hague Convention also provides that a request for the organisation or protection of the effective exercise of visitation rights may be addressed to the central authority of a Contracting State.

The central authorities are obliged to cooperate to ensure the peaceful exercise of the right of visitation and meet all conditions related to the exercise of this right, as well as the obligation to take all possible measures to remove obstacles to the exercise of this right.

The central authorities may, directly or through an intermediary, initiate or support legal proceedings for the organisation or protection of visitation rights and the conditions on which the exercise of that right may depend.

As far as detailed legal arrangements are concerned, the 1980 Hague Convention, following the example of many international instruments, prohibits the requirement of any security deposit or any deposit to secure the costs of judicial or administrative proceedings as defined in this Convention. Nor does the 1980 Hague Convention require legalisation or any other similar formality in the context of actions taken under the Convention.

The Convention also regulates the translation requirements for documents submitted to the central authority. Namely, they should be provided in the original language, together with a translation into the language of the country concerned, and if this would be difficult, into English or French (a given country may object to the use of one of these languages).

The Convention guarantees, in matters related to the application of the Convention, the right to judicial or legal assistance for citizens of Contracting States or persons who are permanent resident in these States.

It should be emphasised that both of the presented conventions are of great importance for the implementation of children's rights in international trade – in the

47 See: *X v. Latvia*, cited above, Arts. 96-97, and *M.A. v. Austria*, cited above, Arts. 112–114. See also Župan, 2017, pp. 213–229, where is pointed out that the best interests of the child principle was significantly advanced by the introduction of a new methodology of adjudication in cross-border child-related issues, which entails more flexibility and requires sensitivity to the needs and interests of children in each case. Implementing the best-interests principle allows a more holistic approach to decisions relating to children in cross-border protection and involves the proactive power of interpretation of the adjudicatory authority.

context of maintaining the continuity of protection measures as well as counteracting unlawful child abduction and maintaining contact with both parents. The wide territorial scope of both instruments, as well as the cooperation of the States Parties to the Convention within the HCCH, allows for the unification of child protection standards in the indicated areas.

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