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IMPLICATIONS OF EUROPEAN UNION REGULATION

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

In the European Union (E.U.), a community composed of multicultural and multiethnic societies, where citizens move freely across borders, the abduction of children is a growing problem. Frequently, abductions occur among E.U. citizens, residents of a particular Member State, who decide either to wrongfully remove or illegally retain a child in the territory of another E.U. Member State. The Members that have witnessed an increased number of abduction cases are France, Germany, and the United Kingdom, while others, such as Greece and Portugal have dealt with fewer cases. Since all the Members are contracting parties to the 1980 Hague Convention on the Civil Aspects on International Child Abduction, E.U. citizens whose custody rights have been violated have extensively utilized the procedures established by this Convention.

However, as of March 1, 2005, any abduction cases involving E.U. Members will also be governed by a new Regulation adopted on November 27, 2003. Several of its key provisions on jurisdiction and returning children will take precedence over the equivalent provisions of the Hague Convention. The latter will continue to govern issues not dealt by the Regulation, as well as abduction cases involving E.U. Members and third countries that are also parties to the Convention.

One of the Regulation's objectives is to eventually eliminate the abduction of children in the Community through the abolition of *exequatur*,¹ so that decisions on access rights and the return of the child in one Member State will be automatically recognized and enforced in another Member State.

Another important step is the recognition and enforcement of the right of a child to retain contact with both parents. The European Commission anticipates that application of this Regulation by the Member States may have "a deterrent effect" on future abduction cases.²

I. Council Regulation (EC) No 2201/2003**A. Legal Basis**

The Council Regulation (EC) No 2201/2003 bears the title: *Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000*.³ Its legal basis is provided by articles 61(c) and 67(1). The first authorizes the Council to adopt measures in the area of judicial cooperation in civil matters, and the latter allows the Members States to share the right of initiative to introduce a new piece of legislation with the Commission for a limited period. The Regulation was based on a proposal from

¹ Many civil law countries require that in order for a foreign judgment to be enforced domestically, an *exequatur* must be issued. An *exequatur* proceeding is a requested court order declaring that a foreign judgment is enforceable. See Dahls' Law Dictionary, at 185.

² See COM(2002) 222 final.

³ OJ L338/1 (12/23/2003).

the Commission and on an initiative presented by France in 2000, regarding mutual enforcement of judgments on rights of access to children.

B. Scope

The scope of this Regulation is not limited to issues related to child abduction. In general, it intends to solve conflicting issues related to jurisdiction, recognition, and enforcement of judgments in family relations and questions of parental responsibility. Recognition and enforcement of judgments in family matters is an important aspect in the Union's effort to create a common judicial area in civil matters, based on trust and confidence in the judicial systems of its Members.

Protection of children and according respect to their basic rights are reflected in a number of provisions. Certain principles which are common to the legal systems and traditions of the Members, such as equality of all children before the law irrespective of marriage of parents and the best interest of the child, are recognized in the Preamble of the Regulation. Mention is also made to article 24 of the Charter of Fundamental Freedoms Protection, proclaimed in Nice in 2000, which recognizes three basic rights that are relevant and essential in abduction cases: children's voices and opinions must be heard on issues that are of concern to them; the child's best interest must be taken into consideration; and a child has the right to maintain a personal relationship and contact with both parents on a regular basis.

C. Definitions

Several of the terms and concepts used in the Regulation were modeled after the Hague Convention. Thus, "wrongful removal or retention" of a child occurs when:

- the removal or retention violates the rights of custody acquired by judgment or by operation of law or by an agreement of the Member State where the child had its habitual residence immediately prior to being removed or retained;
- the custody rights were actually exercised, either jointly or alone, at the time of removal or retention.

The term of "rights of custody" is defined as including the rights and duties relating to the care of a child and especially the right to determine the residence of the child. "Rights of access" include the right to take a child to a place other than his habitual residence for a limited period.

II. Critical Issues in Abduction Cases

A. Central Authority

The Members are required to designate one or more Central Authorities to ensure the smooth and effective application of the Regulation. These authorities may communicate through the European Judicial Network established in 2001.⁴ The Members must also forward the names, addresses, and means of communication for the Central Authorities, and the languages accepted for the communications, to the Commission within a 3-month period after this Regulation enters into force.⁵

⁴ By virtue of Decision No 2001/470/EC.

⁵ The Regulation enters into force on Aug. 1, 2004.

A parent whose custody rights have been violated may proceed either through the Central Authority of his residence or directly approach the central authority of the Member State where the child has been taken. The Central Authority is empowered to perform the following tasks:⁶

- collect and exchange information on the status of the child and on decision related to the child
- provide information and assistance to those who have custody rights
- facilitate communication between courts, especially in case a court has decided not to return a child under article 13 of the Hague Convention (In this case, a copy of the court's order on non-return and other documents must be transferred to the court in the Member State where the child has its habitual residence immediately prior to being wrongfully removed or retained.)
- facilitate communication between the court which has jurisdiction with another court, if the original court decides to transfer the case to a court in another Member State on the grounds that the child in question has a particular connection to the other State and the second court is better suited to hear the case.

III. Return of the Child⁷

Recital 17 of the Preamble clarifies that in case of wrongful removal or retention of a child, the provisions of the Hague Convention will continue to apply, as complemented by article 11 of the Regulation. A parent whose custody rights have been violated has the right to file an application to request the return of the child based on the Hague Convention. In this case, the Regulation imposes a number of procedural safeguards, which must be followed by the courts of the Member States. These require that:

- the child be given a chance to be heard during the proceedings, depending on his age and maturity;
- the court must act expeditiously in such proceedings based on national law provisions;
- the court should render its decision within 6 weeks after the application is filed before the court, unless it is impossible to do so;
- the court cannot refuse to return a child based on article 13b of the Hague Convention if it has been established that security measures have been taken to protect the child after his return;
- the court cannot refuse to return the child unless it has heard the person who requested the return of the child.

⁶ See art. 55 of the Regulation.

⁷ See art. 11 of the Regulation.

IV. Jurisdiction⁸

The Regulation establishes that the court of the Member State where the child had its habitual residence immediately prior to being illegally removed or retained, retains its jurisdiction, until the child acquires a habitual residence in another Member State and:

- the person with custody rights has acquiesced to the child's removal or retention; or
- the child has resided in that other Member State for a period of at least 1 year, after the person with custody rights has had or should have had the knowledge of the whereabouts of the child, and the child has settled in his new environment. In this case, a number of additional conditions must exist, including the requirement that no request to return the child has been filed within a year from the person with custody rights discovering the child's whereabouts; a request to return the child has been withdrawn, and others.

V. Enforceability of Judgments concerning Rights of Access and Judgments Requiring the Return of the Child⁹

An important innovation introduced by this Regulation is the abolition of *exequatur*, or the filing of a request in a domestic court to declare a foreign judgment enforceable. As a result, the rights of access granted in a judgment are recognized and enforceable automatically in another Member State, provided that the judge who decided on question of visitation rights has issued a certificate.¹⁰

The same applies to judicial orders for the return of the child; there is no requirement for a declaration of enforceability to be issued by a domestic court. The judge, who ordered the return of the child will issue a certificate of enforceability, provided that the following criteria are met:

- the child was given an opportunity to be heard, unless it was not appropriate due to the child's age;
- the parties involved had an opportunity to be heard; and
- the court that issued the order had taken into consideration the provisions of article 13 of the Hague Convention.

VI. Conclusion

As the EU moves into gradually establishing a common judicial area in civil matters, and as abduction of children becomes a more common phenomenon, especially in interstate marriages, the need to establish concise rules to resolve conflicts of jurisdiction at the EU level in cases of parental abduction and child retention has become apparent. Adoption of Regulation (EC) No 2201/2003 by the EU accomplishes three basic objectives: resolves a thorny conflict of jurisdiction matter, by determining that the court of the Member State where the child was habitually resident prior to being illegally removed or

⁸ See art. 10 of the Regulation.

⁹ See art. 40 of the Regulation.

¹⁰ The form of the certificate is appended to the Regulation.

retained, retains its jurisdiction until the child acquires a habitual residence in another Member State; recognizes the child's right to enjoy contact with both parents; and abolishes *exequatur* procedure through the automatic recognition and enforceability of access rights by all Members. However, whether or not the applicability of this Regulation, as of 2005, by EU Members will discourage future child abduction cases across the Community, as the Commission anticipates, remains to be seen.

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