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POLAND

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction*The Hague Convention*

The Republic of Poland ratified the Hague Convention on Civil Aspects of International Child Abduction (hereinafter the Hague Convention) on July 6, 1992, with reservations as to article 26, paragraph 3 of the Convention.¹ Pursuant to its provisions, the Convention came into force in Poland on November 1, 1992.² However, the publication of the text of the Hague Convention in *Dziennik Ustaw* (the official Polish gazette), as required by Polish law, was delayed for several years after its ratification. The Convention, together with its Polish translation, was published in *Dziennik Ustaw* No. 108 on September 25, 1995, thereby removing any doubt concerning the Convention's binding effect on all Polish courts, government authorities, and citizens.

The Hague Convention is binding only between contracting states. In the Declaration on Accession of Poland to the Hague Convention, the Polish Ministry of Foreign Affairs declared that pursuant to article 38 of the Hague Convention, the following contracting states had expressed their acceptance of the accession of the Republic of Poland to the Hague Convention: Holland, the United States of America, Luxembourg, and the United Kingdom of Great Britain and Northern Ireland. Between the United States and Poland, the Hague Convention became binding immediately on November 1, 1992.³ Information on the states that joined the Hague Convention can be obtained in the Department of Laws and Treaties of the Ministry of Foreign Affairs in Poland.

Due to the relatively short time span of the application of the Hague Convention by Polish courts, there are very few court cases available that have applied the Hague Convention. Generally accessible materials consist of the text of the two Polish Supreme Court decisions and an analysis of 12 district court decisions in a scholarly article by W. Skierkowska. There are relatively few scholarly legal publications on the topic of the Hague Convention. Except for several publications on various aspects of the Hague Convention, cited in this report, there are no comprehensive analyses of its application in the Polish legal system.

The Hague Convention uses different terminology than Polish domestic law, *e.g.*, "wrongful removal or retention of a child" (*bezprawne uprowadzenie lub zatrzymanie dziecka*), "rights of custody and of access" (*prawa do opieki i odwiedzin*), etc. Although these terms are defined in the text of the Hague Convention, their application in the Polish domestic legal system may cause some problems. During the short time since the application of the Hague Convention in Poland, neither jurisprudence nor

¹ See *Oswiadczenie Rządowe z dnia 17 maja 1995 r. w sprawie przystąpienia Rzeczypospolitej Polskiej do Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę*, sporządzonej w Hadze dnia 25 października 1980 r. [The Government Declaration of May 17, 1995, on the Accession of the Republic of Poland to the Convention on Civil Aspects of International Child Abduction, Done in The Hague on October 25, 1980, [hereinafter the Declaration], *Dziennik Ustaw* [Polish official gazette [hereinafter Dz.U.], No. 108, item 529 (1995). The text of the Hague Convention was published in Dz.U. No. 108, item 528 (1995).

² See also Ciszewski, J., *Konwencja dotycząca cywilnych aspektów uprowadzenia dziecka za granicę* [The Convention on Civil Aspects of International Child Abduction [hereinafter Ciszewski], 2 *Przegląd sądowy* [Court Review (Polish law review)] 23-31 (1994).

³ The Declaration, para 5, *supra* note 1.

legal scholars with very few exceptions⁴ have been able to develop an appropriate and satisfactory way of transferring these terms into the Polish legal system. This report, therefore, having a mainly informative character, does not attempt to undertake such a difficult task, except where it is absolutely necessary.

Other International Agreements

Aside from the Hague Convention, the Republic of Poland is also bound by other bilateral and multilateral agreements dealing with international child abduction.

Poland has signed bilateral agreements relating to recognition and execution of civil and family judgments dealing with child custody with various countries, including, but not limited to: France,⁵ former Czechoslovakia,⁶ Hungary,⁷ Lithuania,⁸ Byelorussia,⁹ and the former Union of the Soviet Socialist Republic.¹⁰ The Hague Convention provides that bilateral agreements between the particular contracting states have priority over the Hague Convention. The Hague Convention states the following in article 26:

Nothing in this Convention shall prevent two or more contracting states, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

The Republic of Poland is also bound by other international agreements dealing with international child abduction, including, but not limited to, the Convention on the Rights of the Child,¹¹ the European Convention on Recognition and Execution of Judgments Concerning Child Custody and on Return to Custody,¹² and the Convention on the Appropriate Authorities and Law for Minors' Protection.¹³

⁴ See further in the text, e.g., 1997 (unpublished) and 1998 Supreme Court decision, note 40, *infra*. See also 30-35 Holewinska-Lapinska, E., Konwencja Haska: Urowadzenie dziecka za granice as "prawo do opieki" w prawie polskim [The Hague Convention: International Child Abduction and "the Rights of Custody" in Polish Law], *Jurysta* [Polish law journal] no. 10-11 (1999) [hereinafter Holewinska].

⁵ Dz.U. No. 4, items 22 and 23 (1969).

⁶ Dz.U. No. 39, items 210 and 211 (1989).

⁷ Dz.U. No. 8, items 54 and 55 (1960).

⁸ Dz.U. No. 35, items 130 and 131 (1994).

⁹ Dz.U. No. 128, items 619 and 620 (1995).

¹⁰ Dz.U. No. 32, items 147 and 148 (1958). Some agreements concluded by the USSR were confirmed by several FSU countries.

¹¹ Adopted by the General Assembly of the United Nations, Nov. 20, 1989, and ratified by Poland. See Konwencja o prawach dziecka, Dz.U. No. 120, items 526 and 527 (1991).

¹² Done in Luxemburg on May 20, 1980 [hereinafter the European Convention]. Ratified by Poland. See Europejska Konwencja o uznawaniu i wykonywaniu orzeczen dotyczacych pieczy nad dzieckiem oraz o przywracaniu pieczy nad dzieckiem, Dz.U. No. 31, item 134 (1996), correction: Dz.U. No. 32, item 196 (1997).

¹³ Done in Hague on Oct. 5, 1961, [hereinafter the 1961 Hague Convention]. Ratified by Poland. See Konwencja o wlasciwosci organow i prawie wlasnym w zakresie ochrony maloletnich, sporzadzona w Hadze dnia 5 pazdziernika 1961 r., Dz.U. No. 106, item 519 (1995). The 1961 Convention replaced the previous Convention on Minors' Protection, done in Hague on June 12, 1902, also ratified by Poland.

When applying the Hague Convention, Polish courts take into consideration the provisions of the Convention on the Rights of the Child:

Speaking about the interpretation and application of the 1980 Hague Convention while taking into consideration the provisions of the 1989 Convention on the Rights of the Child, one should mainly consider such provisions of the latter which indicate that the primary and superior value in each proceedings relating to the child is “interes dziecka” [“the interest of the child”] (article 3). According to the resolution of seven justices of the Supreme Court¹⁴ of June 12, 1992, III CZP 48/92; OSNCP No. 10, item 179 (1992) “the interest of the child” corresponds with the Polish term “dobro dziecka” [“best interest of the child”]. As provided by the Preamble to the 1980 Hague Convention “interes” [“interest”] in the meaning of “dobro” [“best interest”] of a child is “of paramount importance in matters relating to its custody.” Therefore, the general directive for deciding parental conflicts resulting from exercising children’s custody, particularly resulting from such situation as in this case when one parent leaves the present residence together with children, should be in the best interest of the children.¹⁵

In another decision, the Polish Supreme Court held:

When the conditions described in the Convention happen (wrongful removal or retention of a child), its provisions concerning the return of a child should be implemented, unless the circumstances justifying refusal of return provided in article 13 of the Convention will be established, as interpreted and applied taking into consideration “dobro dziecka” [“the interest of a child”] defined in the Convention on the Rights of the Child..¹⁶

I. Domestic Laws and Regulations Implementing the Hague Convention

In Poland’s Declaration of Accession to the Hague Convention (article 6), the Ministry of Justice was designated as the Central Authority obliged to discharge the duties imposed by the Hague Convention on the territory of the Republic of Poland.¹⁷ An aggrieved party may apply to the Ministry of Justice and request it to perform its Central Authority duties, particularly those described in article 7 of the Hague Convention.¹⁸ The aggrieved party may also bypass the Central Authority and apply directly to the judicial or administrative authority of a contracting state, pursuant to article 29 of the Hague Convention.

In order to help Polish judges in the application of the new Conventions and other international agreements ratified by Poland, the Polish Ministry of Justice and the Dutch Ministry of Justice signed agreements on mutual cooperation. Pursuant to these agreements, Polish judges may refer, free of charge,

¹⁴ By their own decision, resolutions adopted by a bench composed of seven justices of the Supreme Court may become a binding legal principle which has a precedence value. See arts. 13, 16, 21, and 22, Ustawa z dnia 20 września 1984 o Sądzie Najwyższym [The Law of Sept. 20, 1984 on the Supreme Court], consolidated text: Dz.U. No. 13, item 48 (1994), as amended.

¹⁵ See decision, note 28, *infra*, OSNC No. 9, item 142 (1998) at 63-64. See also 16 Gronowska, B., Jasudowicz, T., O prawach dziecka, Wydawnictwo Comer, Torun 1994.

¹⁶ Supreme Court decision of Mar. 31, 1999, SN I CKN 23/99.

¹⁷ *Supra* note 1, ¶ 6. Ministerstwo Sprawiedliwosci, Al Ujazdowskie 11, 00-950 Warszawa, Poland. Tel. 628-44-31, Fax 628-73-68

¹⁸ Such was the situation in the Supreme Court decision cited in note 28 *infra*, at 60.

questions concerning private international law to the International Legal Institute in the Hague, Holland.¹⁹ Information on these services may be obtained in the Polish Ministry of Justice or directly at the International Legal Institute in the Hague.

A. The Constitution

When the Hague Convention was ratified, the Polish Constitution that was in force at that time did not define the place or implementation of international agreements in the domestic legal order. The present Polish Constitution²⁰ lists explicitly ratified international agreements as a source of universally binding law.²¹ The Constitution provides that the ratification and denunciation of some categories of international agreements require prior consent granted by a statute. Such categories are enumerated in article 89 of the Constitution and include those concerning “freedoms, rights, or obligations of citizens, as specified in the Constitution” and “matters regulated by statute or those for which the Constitution requires a statute.”²² The Hague Convention falls within these categories.

The Constitution is based on principles of direct application of international agreements, the so-called transformation,²³ and their supremacy over domestic law. It states:

1. The ratified international agreement, after its promulgation in the Official Gazette (*Dziennik Ustaw*) of the Republic of Poland, constitutes a part of the domestic legal order and applies directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by a statute shall have precedence over a domestic statute if such a statute cannot be reconciled with the provisions of the agreement.²⁴

Most international conventions ratified by Poland concerning human rights have precedence over domestic laws.²⁵

The Hague Convention was ratified prior to the entering into force of the new Polish Constitution, at a time when there was no requirement of prior legislative delegation for its ratification. In such a situation, article 241, section 1 of the present Polish Constitution applies. It provides that some international agreements, relating to categories mentioned in article 89, section 1 of the Constitution, ratified by the Republic of Poland pursuant to previous laws and promulgated in *Dziennik Ustaw*, are

¹⁹ The address of the Institute is: Hoenstraat 5, 2596 HX's-Gravenhage, Netherlands. Tel.: 070-356 09 74, Fax : 070-330 71 82. See Konwencja o ochronie dziecka oraz Konwencja o uprowadzenia dziecka [The Convention on the Protection of the Child and the Convention on Child Abduction], 5 Przegląd sadowy 84, 84-88 (May 1995).

²⁰ Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., [The Constitution of the Republic of Poland of Apr. 2, 1997], Dz.U. No. 78, item 438 (1997) [hereinafter Constitution].

²¹ *Id.* art. 87, § 1.

²² *Id.* art. 89, § 1.

²³ Banaszak, B., *Prawo konstytucyjne* [Constitutional Law], C.H. Beck, Warsaw (1999) [hereinafter Banaszak], at 126.

²⁴ *Supra* note 20, art. 91, §§ 1 & 2.

²⁵ 30 Holewinska, *supra* note 4.

treated the same as those ratified after prior legislative delegation.²⁶ The Hague Convention falls within this category.²⁷

The content of this provision [article 241, section 1] permits an assumption that, from the moment it came into force, it includes all international agreements ratified until this date. As far as the Hague Convention [on the Civil Aspects of International Child Abduction] is concerned, it permits an assumption that it constitutes a part of the domestic legal order and applies directly, provided that specific provisions of the Convention concerning the civil aspects of child abduction should be interpreted and applied, taking into consideration provisions of the Convention on the Rights of the Child, binding Poland, and adopted by the General Assembly of the United Nations on November 20, 1989 (Dz.U. No. 120, item 526 (1991)).²⁸

According to the Polish law,²⁹ the Hague Convention is self-implementing, it applies directly, and its application does not require any implementing domestic laws. After its ratification and publication in the Polish official gazette, the provisions of the Hague Convention became part of the Polish domestic legal order automatically,³⁰ pursuant to the so-called transformation. Furthermore, pursuant to article 27 of the Vienna Convention on the Law of Treaties,³¹ ratified by Poland on July 2, 1990,³² a Party may not rely on its domestic law to justify its failure to comply with a treaty.³³

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

1. The Constitution

The Polish Constitution does not have any provisions referring directly to child abduction. However, its article 72 states:

1. The Republic of Poland ensures the protection of the rights of the child. Everyone has the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation, and demoralization.

²⁶ *The Constitution*, Chapter XIII: Transitional and Final Provisions.

²⁷ Smyczynski, T., (Ed.), *Konwencja o prawach dziecka-analiza i wykladnia* [Convention on the Rights of the Child–Analysis and Interpretation], Poznan (1999), [hereinafter *Smyczynski Konwencja*].

²⁸ Polish Supreme Court decision of January 16, 1998, [hereinafter 1998 Supreme Court decision]. Case No. II CKN 855/97. OSNC No. 9, item 142 (1998) at 63.

²⁹ The Constitution, art. 91, § 1.

³⁰ See *supra* note 28, OSNC No. 9, item 142, summary at 59.

³¹ Concluded in Vienna on May 23, 1969.

³² Dz.U. No. 74, item 440 (1990).

³³ 17 Smyczynski Konwencja, *supra* note 27.

2. A child deprived of parental care has the right to care and assistance provided by public authorities.

3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, as far as possible, give priority to the views of the child.

4. The statute shall define the competence and procedure for the appointment of the Commissioner for Children's Rights.

2. Administrative Law

The administrative law provides that when a minor applies for a passport, the permission of both parents or a guardian is required, unless only one of the parents has parental authority. Any disagreement between the parents on that matter will be resolved by a court.

A Polish passport is not required from Polish citizens who cross the Polish border with the Czech Republic, the Slovak Republic, and the German Federal Republic. Similar rules apply appropriately for citizens of these three countries. A minor may cross these borders on grounds of a note on the identification card from a parent or a guardian. Polish law also provides that the appropriate authority may refuse a Polish entry visa when it is obvious that it would facilitate a child's removal or retention. The Office of the Children's Ombudsman has been created in order to coordinate the implementation of children's rights as established by domestic laws, government programs, international agreements, and recommendations of international organizations.³⁴

3. Family Law

The whole concept of parental authority, as specified in articles 92-113 of the Family Code,³⁵ is intended to prevent wrongful removal or retention of children. It is based on an idea that neither parents nor children have any influence on the contents of the parental authority. All Family Code provisions relating to parental authority constitute preemptory norms, and parents may not "release" a child from their parental authority.³⁶

The rights of custody (*prawo do opieki*) protected by the Hague Convention, as defined in its article 5, "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." The Hague Convention states in article 3 that "the rights of custody ... may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that state."

³⁴ The Law on Children's Ombudsman, Dz.U. No. 6, item 69 (2000).

³⁵ Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekunczy, Dz.U. No. 9, item 59 (1964); amended: Dz.U. No. 45, item 234 (1975); Dz.U. No. 36, item 180 (1986); Dz.U. No. 34, item 198 (1990); Dz.U. No. 83, item 417 (1995); Dz.U. No. 117, item 757 (1998); Dz.U. No. 52, item 532 (1999); Dz.U. No. 122, item 1322 (2000); Dz.U. No. 128, item 1403 (2001); Dz.U. No. 83, item 772 (2003) [hereinafter the Family Code].

³⁶ 469 Ignatowicz, J., Kodeks rodzinny i opiekunczy z komentarzem [Family and Guardianship Code with a Commentary], Warszawa 1993.

The Polish Supreme Court in its decision No. I CKN 653/97 (unpublished) of October 16, 1997,³⁷ equated this right of custody with the “parental authority” specified in articles 92-113 of the Family Code. In scholarly legal writings, the opinion has been expressed that this “right of custody” constitutes a significant part of parental authority. However, it has been pointed out that in the Polish legal system “the right of custody” may arise only by operation of law or by reason of a judicial decision. It may not arise by reason of an administrative decision or by an agreement.³⁸

The Family Code does not provide the definition of parental authority. It only states that “parental authority includes in particular a duty and right of care over a person and property of a child, as well as of raising a child.”³⁹ Parental authority is defined in the scholarly legal writings as “the totality of rights and duties of parents toward a child intended to provide care over his person and property.”⁴⁰ It is generally accepted among Polish legal authorities that parental authority includes the right to determine the child’s place of residence.⁴¹ The Civil Code⁴² states:

1. The place of residence of a child under parental authority shall be the place of residence of his parents or of one parent who is entitled to exclusive parental authority or to whom the exercise of parental authority has been entrusted.

2. If both parents are equally entitled to parental authority and have separate places of residence, the place of residence of the child is with the parent with whom the child remains permanently. If the child does not remain permanently with either of the parents, his place of residence shall be decided by the guardianship court.⁴³

In certain situations, the guardianship court may intervene in the implementation of parental authority.⁴⁴ The court may limit, suspend, or terminate parental authority. Parental authority may be limited when the best interests of a child are endangered, when the child is in danger of being demoralized, or due to a particular situation of the parents. A particular situation may be due to actual separation of the parents or other situation causing a limitation of trust in the implementation of their parental authority.

Actual separation of parents occurs when:

³⁷ Also cited in the 1998 Supreme Court decision, *supra* note 28.

³⁸ 31- 32 Holewinska.

³⁹ Family Code, art. 95.

⁴⁰ Smyczynski, T., 134 Prawo rodzinne i opiekuncze [Family and Tutelage law], Wydawnictwo C. H. Beck, Warsaw 1997 [hereinafter Smyczynski Prawo].

⁴¹ 372 Smyczynski Konwencja.

⁴² Ustawa z dnia 23 kwietnia 1964 r., Kodeks cywilny [The Law of April 23, 1964, Civil Code], Dz.U. No. 16, item 93 (1964), as amended [hereinafter Civil Code].

⁴³ *Id.* art. 26.

⁴⁴ 216 Winiarz, J., Gajda, J., Prawo rodzinne [Family Law], Wydawnictwo Prawnicze PWN, Warszawa 1999 [hereinafter Winiarz].

1. The parents live apart due to a divorce or marriage annulment decree.⁴⁵ Pursuant to article 58, section 1, Family Code, the court issuing the divorce decree is obliged to determine parental authority over minor children of both spouses. This is one of the major duties of the divorce court.⁴⁶ The court may entrust only one parent with parental authority while limiting the other to specifically defined duties and obligations towards the child.⁴⁷

2. The parents are still married but they live apart.⁴⁸

3. Both parents of an out-of-wedlock child living apart have parental authority (acknowledgment of a child or paternity and parental authority established by a court.

The limitation of trust in proper implementation of parental authority occurs when both parents have parental authority but are not married,⁴⁹ only one parent is entrusted with parental authority,⁵⁰ or the child has been declared totally incompetent.⁵¹

As a rule, parental authority belongs to both parents.⁵² However, parental authority may belong to only one parent if the other parent is deceased, unknown, or does not have full legal capacity; the other parent has been permanently or temporarily deprived of parental authority; or the fatherhood was established by a court decision and the court did not provide the father with parental authority.⁵³

One of the most important provisions protecting children from wrongful removal or retention is article 100 of the Family Code which states:

the guardianship court and other state authorities are obliged to provide help to parents when it is necessary for proper exercise of their parental authority. In particular, each parent may petition the guardianship court for return of a child removed by an unauthorized person.

The right to request the return of a child removed by an unauthorized person has its source in parental authority. Only a person entrusted with parental authority may request the return of a child. When a person's parental authority has been limited, he may pursue such a request only if his parental

⁴⁵ Family Code, art. 58, § 1.

⁴⁶ Wytyczne Sadu Najwyzszego z dnia 18 marca 1968 r. [Supreme Court Directives of March 18, 1968], No. III CZP 70/66 (OSN 1968, item 77), point V.

⁴⁷ Family Code, art. 58, § 1.

⁴⁸ *Id.* art. 107, § 2.

⁴⁹ *Id.* art. 107, § 1.

⁵⁰ *Id.* art. 104.

⁵¹ *Id.* art. 108.

⁵² *Id.* art. 93, § 1.

⁵³ 207 Winiarz.

authority provides that the child resides with him.⁵⁴ However, the category of persons entitled to help under this article includes not only parents but also foster parents, legal guardians, or curators.⁵⁵

An “unauthorized person” in the meaning of article 100 of the Family Code is any person who refuses the return of a wrongfully removed child. This category also includes a parent who retains the child in contravention of the court decision.⁵⁶ “Other state authorities” should include all state authorities, in particular police, the prosecutors’ office, and state administration authorities.⁵⁷

There are also other provisions of the Family Code which are meant to prevent the wrongful removal and retention of children. They include those regulating deprivation⁵⁸ and limitation of parental authority,⁵⁹ prohibition of personal contacts with the child by parents deprived of parental authority,⁶⁰ and supervision on exercising custody and release of the custodian.⁶¹ Performing or permitting the wrongful removal of a child may be a triggering factor for the court to implement sanctions proscribed by these provisions.

The Permanent Bureau of the Hague Convention of October 25, 1980, on the Civil Aspects of International Child Abduction has requested all states party to the Hague Convention and some Non-Governmental Organizations to respond to the questionnaire. Polish government responses to the questionnaire⁶² contain official information on the implementation of the Hague Convention by Poland. It states, among others:

A guardianship court, in view of a threat of abduction or retention of a child abroad, may prohibit, by means of a provisional order (in a custodianship case), the child to leave the territory of Poland. Moreover, a guardianship court may also provisionally apply other preventive measures, which seem to be most effective in a given situation, in order to prevent abduction or retention (e.g., deposit). Such a decision is enforceable from the very moment of its issuance. A decision on prohibiting a child to leave Poland until the guardianship proceedings is concluded shall be transferred by a court to the Border Guards Headquarters, which is a unit responsible for the notification of the border check points.

The provisional prohibition of the removal of a child from Poland may be also adjudicated in divorce proceedings. A judgment in this kind of proceedings may be issued:

⁵⁴ Gajda, J., *Kodeks rodzinny i opiekunczy. Komentarz* [The Family and Guardianship Code. Commentary], Wydawnictwo C.H. Beck, Warszawa 1999 [hereinafter Gajda], art. 100, comment 9.

⁵⁵ *Id.* art. 100, comment 8.

⁵⁶ *Id.* art 100, comment 10.

⁵⁷ *Id.* art. 100, comment 7.

⁵⁸ *Id.* art. 111.

⁵⁹ *Id.* art. 109.

⁶⁰ *Id.* art. 113.

⁶¹ *Id.* arts. 165, 168, and 169.

⁶² See: <http://www.hcch.net/e/authorities/index.htm>

- upon a request by a parent who shall prove the existing risk of a child abduction,
- by a court acting *ex officio*.

In this case, a judgment will be also immediately enforceable, despite the possibility of being appealed.

The Polish law admits the possibility of issuing by a guardianship court an emergency decision prohibiting a child to leave the territory of Poland or otherwise making it impossible to abduct or retain a child. The possibility of issuing by a guardianship court the aforementioned judgment can be also obtained out-of-hours, since there are additional duty hours held by judges in family courts. There is no need to appoint a hearing for this purpose.⁶³

4. Civil Procedure

Article 100 of the Family Code constitutes substantive grounds for a request to return a child. Judicial proceedings in matters regulated in the Family Code are governed by the Code of Civil Procedure.⁶⁴

5. Civil Law

Wrongful removal or retention of a child affects his dignity, freedom, personal inviolability, and the right to contact his parents and relatives. These rights constitute personal rights protected under articles 23 and 24 of the Civil Code. When, as a result of wrongful removal or retention, a child suffers bodily injury or health impairment, he may request damages and/or compensation on a tort basis, pursuant to article 444 of the Civil Code.

6. Criminal Law

Wrongful removal or retention of a child may constitute a crime and result in criminal prosecution and penalties defined in the Criminal Code.⁶⁵ Article 211 of the new Criminal Code⁶⁶ states the following:

[w]hoever, contrary to the will of the person appointed to take care of or supervise, removes or retains a minor person under 15 years of age ... shall be subject to the penalty of imprisonment for up to 3 years.

The purpose of article 211 of the Criminal Code is to protect legal institutions of care and supervision [opieki i nadzoru], and not to protect the freedom of a person wrongfully removed or retained. Removal constitutes the violation of the legal order of exercising the rights of care or supervision over a

⁶³ *Id.* at A3 & A4.

⁶⁴ Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego [The Law of Nov. 17, 1964, Code of Civil Procedure] [hereinafter the Code of Civil Procedure], Dz.U. No. 43, item 296 (1964), as amended.

⁶⁵ Ustawa z dnia 6 czerwca 1997 r. Kodeks karny [The Law of June 6, 1997, Criminal Code] [hereinafter Criminal Code], Dz.U. No. 88, item 553 (1997) which came into force in 1998.

⁶⁶ In the former Criminal Code of 1969, the crime of removal or retention (kidnapping) of a minor was dealt with in art. 188.

minor.⁶⁷ The latter is protected by article 189 of the Criminal Code. According to scholarly legal writings, “wrongful removal” is the active removal of a minor from the care or supervision of authorized persons. “Retention,” on the other hand, takes place when a perpetrator authorized to have temporary custody does not return a child to the permanent custodian.⁶⁸ Removal is an act, while retention constitutes a forbearance.⁶⁹

The commission of a crime under article 211 does not require the use of threat, force, or fraud. Permission of a minor is immaterial and does not exclude the liability of a perpetrator;⁷⁰ it is enough that the perpetrator acted against the will of persons authorized to care for or supervise the child.⁷¹ The category of “authorized persons” includes persons authorized by the Family Code, *i.e.*, natural and adoptive parents who have full parental authority, legal guardians, or foster parents. It also includes persons authorized to exercise care and supervision by other laws, *e.g.*, teachers.

Since the crime of kidnapping has to be committed “against the will of a person authorized to exercise care or supervision,” usually it cannot be committed by a parent or legal guardian exercising parental authority. However, when one or both parents are divested of parental authority, or their parental authority has been suspended or limited pursuant to articles 107, 110, and 111 of the Family Code, then such parents may become perpetrators of the crime of kidnapping.⁷² The fact that the perpetrator did not take a minor under his care but abandoned him or transferred him to a third person, is not a defense. Polish Criminal Code also penalizes attempts at, as well as aiding and abetting in, the wrongful removal or retention of a child.⁷³

B. Parental Visitation

The “rights of access” protected by the Hague Convention “shall include the right to take a child for a limited period of time to a place other than the child’s habitual residence.”⁷⁴ Polish domestic law does not use the term exactly corresponding to the “rights of access.” The “rights of access” have been translated in the Polish version of the Hague Convention as visitation rights (*prawo do odwiedzin*). The latter term, however, does not have any term exactly corresponding to it in Polish domestic law. The closest term in Polish law to “rights of access” used by the Hague Convention, is “personal contacts with a child” (*osobista styczność z dzieckiem*) used in article 113 of the Family Code. Article 113 states the following:

⁶⁷ Andrejew, I, Kodeks karny. Krotki komentarz [Criminal Code. A Short Commentary] [hereinafter Andrejew]. Panstwowe Wydawnictwo Naukowe. Warszawa 1986, art. 188, comment 1.

⁶⁸ 374 Wojciechowski, J. Kodeks karny - komentarz, orzecznictwo [Criminal Code--Commentary and Jurisprudence]. Warsaw 1997.

⁶⁹ Marek, A., Prawo karne. Zagadnienia teorii i praktyki [Criminal Law. Problems of Theory and Practice] [hereinafter Marek]. Wydawnictwo C.H. Beck. Warszawa 1997, note 836.

⁷⁰ Supreme Court decision of Dec. 18, 1992. Inf. Prawn. No. 7-9 (1992). *See also* Marek, note 836.

⁷¹ 369 Smyczynski Konwencja, *supra* note 27.

⁷² Supreme Court Resolution of Nov. 21, 1979, No. VI KZP 15/79; OSNKW No. 1 (1980), item 2. *See also* Andrejew, comment to art. 188; Marek, note 835 and 836.

⁷³ Pursuant to arts. 13-24, Criminal Code.

⁷⁴ *Supra* note 2, The Hague Convention, art. 5.

1. When an interest of a child so requires, a custodial court will prohibit parents divested of parental authority from personal contacts with a child.
2. In extraordinary situations, a custodial court may limit personal contacts with a child by parents whose parental authority has been limited, by placing a child with a foster family or in a custodial-educational facility.

In Polish scholarly legal writings, the right of parents to have personal contact with their children has its source in a close personal and emotional relationship with a child and does not depend on parental authority.⁷⁵ Even divesting parents of their parental authority does not deprive them of the right of personal contacts with their children. Only when the interest of a child is endangered, may the court prohibit parents deprived of parental authority from personal contacts with their child, pursuant to article 113 of the Family Code. Personal contacts include not only visitation rights, but also all other means of contact, *e.g.*, correspondence, telephone conversations. The Supreme Court of Poland has stated that:

Entrusting one parent in a divorce decree or decree annulling the marriage with parental authority does not deprive the other of the right to personal contact with a child. Therefore, there is no need for precise definition of this right in a decree. Prohibition or limitation of personal contact of parents with the child may be declared only when their parental authority has been abrogated or limited and not when the divorce or annulment decree vests parental authority with one parent.⁷⁶

III. Court System and Structure – Courts Handling the Hague Convention.

Judicial power in Poland has been handled mainly, but not exclusively, by the Supreme Court, courts of general jurisdiction, administrative courts, and military courts.⁷⁷

The matters connected with the application of the Hague Convention are handled by the courts of general jurisdiction⁷⁸ and the Supreme Court.⁷⁹ Pursuant to article 1, section 2 of the Law on Courts, the following are courts of general jurisdiction: district, voivodship (regional), and appellate. Together with the Supreme Court, there are four court instances.⁸⁰ However, the Polish Constitution guarantees only two instances in judicial proceedings.⁸¹ As a rule, district courts have subject matter jurisdiction in all

⁷⁵ 163 Smyczynski Prawo, *supra*. See also 74 Krzeminski, Z., Rozwód [Divorce] [hereinafter Krzeminski]. Kantor Wydawniczy Zakamycze. Krakow 1997.

⁷⁶ Supreme Court decision of Sept. 30, 1980, Case No. IICR 277 (1980); Gazeta prawnicza No. 7-8 (1991).

⁷⁷ 169 Majchrowski, J., Winczorek, P., Ustrój konstytucyjny Rzeczypospolitej Polskiej [The Constitutional Structure of the republic of Poland] [hereinafter Majchrowski], Hortpress. Warszawa 1998.

⁷⁸ Organized pursuant to Ustawa z dnia 20 czerwca 1985 r. Prawo o ustroju sadow powszechnych [The Law of June 20, 1985, on Courts of General Jurisdiction], [hereinafter the Law on Courts], consolidated text: Dz.U. No. 7, item 25 (1994), as amended.

⁷⁹ Its organization and functioning has been based on The Law of Sept. 20, 1984 on the Supreme Court.

⁸⁰ See Courts of Law in Poland from Piasecki, K. Organizacja wymiaru sprawiedliwosci w Polsce [Organization of Justice Administration in Poland], [hereinafter Piasecki], PWSBiA. Warszawa 1995.

⁸¹ *The Constitution*, art. 176, § 1.

cases except those which are transferred to voivodship courts.⁸² Courts of general jurisdiction handle criminal, civil, family, and guardianship matters, as well as labor law and social security, except for those which are transferred by law to other courts. Different divisions specializing in particular cases, *e.g.*, criminal, civil, family, commercial, or labor and social security, may be created in courts of general jurisdiction.

The Law on Courts provides that a person who does not possess proficiency in the Polish language has the right to use his native language in court, as well as to be provided with a translator free of charge.⁸³ The Supreme Court handles annulments (*Cour de Cassation*). It has four Chambers: Civil, Criminal, Military and Administrative, Labor and Social Security Chamber. The Code of Civil Procedure gives subject matter jurisdiction for requests for return of a child to the custodial district court.⁸⁴ Territorial jurisdiction belongs to the court of the child's residence or stay.⁸⁵

Judicial procedure for the return of a child may be initiated at the request of an authorized party or by the court's own motion.⁸⁶ The motion may be submitted by any parent provided that he has parental authority. A copy of a motion is delivered to the prosecutor who has to be informed of the date of the trial.⁸⁷ However, the prosecutor does not become a party to the proceedings unless he submits an official joinder.⁸⁸ Therefore, there is no requirement to serve him a copy of the court's decision.⁸⁹

Article 579 of the Code of Civil Procedure contains some departures from general rules provided for some family matters in articles 568-578, as well as from rules for the non-contentious procedure provided in articles 506-525, namely: (1) the court's substantive decisions on return of a child may be made only after a trial; and (2) the decisions become effective and enforceable only after they become final. The latter constitutes a departure from a general rule provided in article 578 of the Code of Civil Procedure that substantive decisions become immediately effective and enforceable.

There is no departure from the general rule provided in article 577 that a custodial court may change its decision any time, even after it becomes final, when the interest of a person affected so requires.⁹⁰

⁸² The Law on Courts, art. 3

⁸³ *Id.* art. 8.

⁸⁴ *The Code of Civil Procedure*, art. 568.

⁸⁵ *Id.* art. 569, § 1.

⁸⁶ *Id.* arts. 506 and 570.

⁸⁷ *Id.* art. 580

⁸⁸ *Id.* art. 60.

⁸⁹ *Id.* art. 517. *See also* Korzan, K., *Postępowanie nieprocesowe* [Non-contentious Procedure], Wydawnictwo C.H. Beck. Warszawa 1997, [hereinafter Korzan].

⁹⁰ *The Code of Civil Procedure*, art. 577.

IV. Law Enforcement System

As a general rule, judgments are enforceable only after they become final, i. e., when they are not subject to appeal. This rule has exceptions applicable to the return of a child which were discussed in part III of this report.

The Code of Civil Procedure contains a separate Chapter VI entitled, *The Enforcement of Judgments Concerning the Return of a Person Subject to Parental Authority or Care*, which contains articles 1089-1095(1). These special provisions regulating procedure for the return of a child are meant to avoid the negative impact that use of force could have on a child.

Pursuant to these provisions, the bailiff should use particular care and do everything in order to avoid any physical and moral damage to the child.⁹¹ The forceful removal of a child, subject to parental or custodial authority and his return to the authorized person may take place only in the presence of the authorized person or his designee. The act of return of a child can not take place in absence of this person.⁹² When performing his duties connected with the return, the bailiff is subject to strict court supervision.

V. Legal Assistance Programs

The Republic of Poland signed the Hague Convention with reservations to article 26, paragraph 3. As a result of this reservation, Poland is bound to assume any costs resulting from the participation of legal counsel or advisers or from court proceedings only to the extent to which those costs may be covered by the Polish system of legal aid and advice.

VI. Conclusion

In its response to a questionnaire sent by the Permanent Bureau of the Hague Convention, the Polish government stated:

There is a general feeling that the system of the existing legal regulations in Poland is comprehensive as far as this issue is concerned and it seems to be quite successful in preventing child abduction abroad. These provisions are generally applied in practice. Obviously whether they prove efficient or not in a given situation depends on a number of factual conditions.⁹³

This evaluation is confirmed by a detailed analysis of the topic and description of the court cases, presented in this report, which did not detect any major problems with the application of the Hague Convention in the Polish legal system.

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⁹¹ *Id.* art. 1092.

⁹² *Id.* art. 1091.

⁹³ See, above: <http://www.hcch.net/e/authorities/index.htm>.