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International child abduction

Removing a child abroad without the permission of the other parent or in the absence of a court order can be a decision with far-reaching consequences. However, such situations are becoming increasingly frequent.

A parent may not deprive a child of his/her family environment and consequently of the presence of the other parent with impunity.

International co-operation has been organized through the adoption of bilateral or multilateral conventions to provide an efficient response to parents whose child has been abducted or retained.

The ultimate question that arises in every situation is as follows: what is in the child's best interests?

The removal of a minor child abroad by one parent shall be considered unlawful whenever it is in breach of the exercise of the parental authority or custody rights of the other parent under the laws of the State in which the minor child was habitually resident.

In France, the choice of the habitual residence of a minor child is determined through the exercise of parental authority which is defined by Article 371-1 of the French Civil Code as "*a set of rights and duties, the purpose of which is the welfare of the child*", and belongs to both parents, unless they have been deprived of it.

Any change in the child's country of residence must therefore be subject to the prior agreement of the other parent or the authorization of the Family Court judge.

International child abductions concern bi-national couples, or couples of the same nationality expatriated to a country which is not the parents' country of origin.

The difficulty lies therefore in the interaction of several legal systems and various legislations.

These situations are, however, becoming increasingly frequent and States have decided to co-operate judicially and administratively at the international level to provide an efficient and immediate response to parents whose child has been abducted or retained, in particular by signing bilateral or multilateral conventions.

The creation of a central authority

The signature of bilateral or multilateral conventions implies for the signatory States the obligation to create a central authority.

In France, this authority is the office for EU law, private international law and mutual legal assistance in civil matters (*Bureau du droit de l'Union du droit international privé et de l'entraide civile*) located at 13 Place Vendôme, Paris.

This central authority may act as the requested authority when a child has been wrongfully removed to the French territory or as the requesting authority when a child, whose habitual residence was hitherto fixed in France, has been removed to another State.

A parent whose child has been abducted or retained must apply to the central authority of the requesting State which shall then transmit the application to the central authority of the requested State.

The latter shall in turn refer the matter to the Public Prosecutor having territorial jurisdiction.

In this respect, it should be pointed out that not all courts in France have jurisdiction to hear international child abduction cases.

Only one judicial court per jurisdiction of each Court of Appeals is empowered to hear such cases.

In addition to referring the matter to the central authority, it may be appropriate to directly summon the parent who has wrongfully removed the child, if the application is not processed quickly enough by such authority.

If the State where the child is located has not signed any bilateral or multilateral conventions with France, the French central authority has no jurisdiction as it has no treaty basis to act.

If the applicant or the child is of French nationality, the Ministry of Foreign Affairs, in conjunction with the consular authorities, will have jurisdiction.

If the applicant is a foreign national, the consular authorities must be contacted directly.

In addition, an International Family Mediation Unit (*Médiation Familiale Internationale*) has been set up to promote communication between parents residing in different countries in the interests of the child, and to try to resolve conflicts between them.

The actions of this unit do not, however, replace judicial proceedings.

Applicable conventions and regulations

In order to promote cooperation, France has ratified bilateral agreements with nearly 18 countries, but also multilateral agreements.

If only one bilateral agreement has been signed between France and the State where the child has been removed, this agreement must be applied.

In other cases, multilateral agreements will be applied, provided that both States are signatories to such agreements.

In matters of international child abduction, three texts are intended to apply.

Luxemburg Convention of May 20, 1980 on the recognition and enforcement of decisions concerning custody of children and on restoration of custody of children[1]

The application of this multilateral convention is subject to the existence of a court decision.

It was adopted within the framework of the Council of Europe. Its application seems to have been reduced since the adoption of the Brussels IIa Regulation in European Union Member States, but it is still of interest to countries which are only members of the Council of Europe.

The main advantage of this Convention is that it allows the immediate application of a court decision without the need to resort to exequatur proceedings.

It facilitates the recognition and enforcement of decisions relating to the custody of minor children in a Contracting State as long as they are "*enforceable in the State of origin*" (article 7 of the Convention).

If a referral was made to a central authority within a period of six months from the date of the unlawful removal of the child, the principle shall be the immediate return of the child to his/her place of habitual residence on the sole basis of the established unlawful removal, provided that:

"at the time of the institution of the proceedings in the State where the decision was given or at the time of the improper removal, if earlier, the child and his parents had as their sole nationality the nationality of that State and the child had his habitual residence in the territory of that State" (Article 8 of the Convention).

The same applies if "*the child, having been taken abroad, has not been restored at the end of the agreed period to the person having the custody*".

Where these conditions are not met but the application was filed with the central authority within 6 months from the unlawful removal, the immediate return of the child is subject to stricter requirements (Article 9 of the Convention).

If the application is filed after the 6-month period, the restoration of custody is subject to more requirements, since it is necessary to take into account the fact that the child might have settled in his/her new environment (Article 10 of the Convention).

To this end, Article 10 provides in particular that restoration may also be refused if "*it is found that the effects of the decision are manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed*".

The Hague Convention of October 25, 1980 on the civil aspects of international child abduction[2]

It is the major instrument for the management of international child abduction cases.

However, the Convention has not yet been ratified by all States and has to date around 100 signatory States.

This may pose many difficulties, since in order to be applied, the Convention must be ratified by both States, i.e. the requesting State and the requested State.

In this respect, it should be pointed out that the States that were signatories of the Hague Convention at the time it entered into force enjoy a privilege over the States which have ratified it afterwards.

As such, France may choose not to be bound by the terms of the Hague Convention in its relationships with new signatories.

The objective of the Hague Convention is the rapid handling of international child abduction cases, considering that any removal of a minor child from his/her habitual residence without the agreement of one of the holders of parental authority or custody rights necessarily prejudices the interests of the child and constitutes an unlawful conduct.

The principle is the same as in the Luxembourg Convention, i.e. the immediate return of the child to his/her habitual residence.

The difference lies in the fact that the Hague Convention does not require the existence of a prior decision.

However, the Hague Convention is not intended to be relied upon to rule on the manner in which parental authority or custody rights may be exercised.

The mere finding that the removal is unlawful is sufficient for the immediate return of the child to be ordered.

Article 13 of the Convention envisages certain cases which may make it possible to oppose the return of the child, i.e. when:

- whose child has been abducted or retained has not exercised his/her right of access and accommodation before the removal;
- the parent whose child has been abducted or retained has subsequently acquiesced in the removal or retention;
- there is a risk that the child's return to his/her State of habitual residence would expose him/her to physical or psychological harm;

This concept of harm is subject to a sovereign assessment by trial judges who usually adopt a broad interpretation thereof, considering that this harm may be linked to the behavior of the applicant parent, health reasons, geopolitical considerations, etc.

- the child objects to being returned and "*has attained an age and degree of maturity at which it is appropriate to take account of his/her views*".

The application for the return of the child must be made within one year from the date of the removal.

If the application is lodged after this one-year period, the authorities may object to the return if the child has settled in his/her new environment (Article 12 of the Convention).

The competent judicial or administrative authorities must issue their decision within a period of six weeks (Article 11 of the Convention).

Council Regulation (EC) No 2201/2003 of November 27, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[3]

If the State where the child has been moved is a member of the European Union, European Regulation No 2201/2003 of November 27, 2003, known as the "Brussels IIa Regulation", and the Hague Convention of October 25, 1980 shall apply.

The Brussels IIa Regulation, which entered into force in March 2005, has increased the effectiveness of the provisions of the Hague Convention of October 25, 1980 and takes precedence over the Luxembourg Convention.

In this respect, Article 11 of the Brussels IIa Regulation reaffirms the primacy of the courts of the Member State where the minor child was habitually resident.

This means that if the courts of the Member State where the child has been moved issue an order for the non-return of the child pursuant to Article 13 of the Hague Convention, the court of the requesting Member State may issue a judgment ordering the return of the child.

This order shall be recognized and enforced in all Member States without the need to initiate exequatur

proceedings.

This Article therefore empowers the courts of the Member State where the minor child is habitually resident to issue a decision on the merits of the case, i.e. on the arrangements for organizing the child's life.

This possibility stemming from the Brussels IIa Regulation applies only to the Member States of the European Union, with the exception of Denmark that has not ratified said Regulation.

The principle is also the return of the child to his/her place of habitual residence.

If a decision on the merits issued by a court of the State where the minor child has been moved conflicts with a decision on the merits rendered by a court of the State of origin, the latter decision will be applicable if it satisfies several conditions.

In particular, the court of the State where the minor child was habitually resident must take into consideration in its decision the findings and evidence set out in the decision of the State where the child has been moved.

A certificate will be issued by the State where the minor child was habitually resident and the decision will be recognized and enforceable without the need for exequatur proceedings.

Case-law

The judicial authorities ensure that the interests of the child are safeguarded and must deal with a daunting and meticulous task.

The child's interests mean both to allow him/her to maintain regular personal relations with each of his/her parents and to protect him/her from the actions of an abusive parent.

Did the parent who unlawfully removed the child act to protect the child from a dangerous parent, or was it purely for personal convenience purposes? How should the harm to the child be assessed?

The European Court of Human Rights has on several occasions adjudicated international child abduction cases, and it has been found that it is most often the abducting parent who refers the case to the competent authorities.

The discussions focus on the concept of serious risk to the child when returning to his/her country of origin.

A recent judgment of the European Court of Human Rights ("ECHR"), in a case in which France was challenged by the father who had abducted the child, provides an illustration of how the interests of the child are assessed under European case law.

The applicant, who had removed the child, complained that "*no decision handed down by the domestic courts had assessed the danger to the child if the latter was to be returned to his mother by taking into account the trauma that a new separation from his new environment would represent for him*", stating that "*this trauma*

had been clearly established by a medical certificate".

The ECHR, in the Lacombe vs. France decision of October 10, 2019[4], considered that France had not violated Article 8 of the European Convention on Human Rights by ordering the return of the child to his mother in the United States.

The ECHR pointed out that "*the allegation of grave risk in the event of the child's return to his mother had been effectively examined on the basis of the considerations set out by the applicant regarding the child's best interests*".

The French courts had fairly assessed the protected values at issue, i.e. the interests of the child and respect for private and family life.

The ECHR held that:

"*The First Instance Court did examine the allegations of danger made by the applicant and replied to them with detailed and non-stereotypical findings. (...)*

At no time did the Court of Appeals exclude this medical certificate or refuse to consider an allegation of serious risk. On the contrary, the Court of Appeals considered that the child was at no risk of harm in his mother's care after examining the documents in the file. (...)

The Cour de Cassation [French Supreme Court] *has conducted an effective review as to whether the Court of Appeals of Aix-en-Provence had given sufficient reasons for the return decision in the light of Article 13b of the Hague Convention and the child's best interests.*"

What to do?

If a child is removed by one of his/her parents, the parent suffering from this situation may file a criminal complaint for failure to surrender the child, an offence under Article 227-5 of the French Criminal Code which punishes "*the act of improperly refusing to surrender a minor child to the person who has the right to claim him/her*" by one year's imprisonment and a fine of 15,000 euros.

Article 227-9 of the French Criminal Code provides for aggravating circumstances which apply in case of international abduction.

A complaint for failure to surrender a child will lead to the issue of an international arrest warrant and the involvement of Interpol in the search for the parent responsible for the unlawful removal of the child.

If one of the parents fears that the other parent may unlawfully remove the child, the latter may ask the Family Court Judge to include the child in the national wanted persons file.

This inclusion prevents the child from leaving the territory without the agreement of both parents.

A mere doubt on the part of one of the parents or a difference in nationality is not enough to convince the judge and induce him/her to order a ban on leaving the country.

The judge shall determine on a case-by-case basis the duration of this prohibition, which may be valid until the child reaches the age of majority.

In case of a conflictual situation and suspicion of an imminent removal, it is also possible to object to a child's departure from France (*Opposition à la sortie du territoire*). This request is made to the *Préfecture* or *Sous-Préfecture* or, failing that, to the police or gendarmerie services.

This administrative measure is a protective measure that will only be valid for 15 days.

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[1] https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680078b09

[2] https://www.hcch.net/en/instruments/conventions/full-text/?cid=24

[3] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201

[4] ECHR October 10, 2019 Judgment Lacombe v. France – Application No. 23941/14