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# A review of the Polish Supreme Court case law in international family law matters (from January 2015 to April 2021)

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## 1. Introduction

The jurisdiction of the Polish Supreme Court [Sąd Najwyższy] in family matters is highly limited by law. In matrimonial matters, a cassation complaint is inadmissible in divorce and legal separation matters[1], and against an annulment or nullity decree if at least one of the parties has entered into a marriage after the decree has become final[2]. However, a cassation complaint is admissible but limited depending on the disputed amount in cases concerning the division of the community property after the termination of community property regime between the spouses[3]. In matters of parental responsibility, a cassation complaint is admissible only in matters concerning the establishing or contesting a parent-child relationship[4], adoption, and dissolution of adoption[5]. Further, a cassation complaint is also inadmissible in maintenance matters[6].

1 Art. $398^2$ § 2(1) of the Act of November 17, 1964, the Code of Civil Procedure (Polish Journal of Laws of 2021, item 1805 as amended), hereinafter called: the CCP.

2 Art. $398^2$ § 3 of the CCP; see also the Decision of the Polish Supreme Court of June 17, 2020, V CZ 24/20, LEX no. 3061039.

3 Art. $519^1$ § 2 of the CCP.

4 Due to the so-called integrity of the decision establishing the parent - child relationship, in the event of a cassation complaint lodged against the judgment establishing the parent - child relationship, it is also possible to challenge all other decisions contained in the judgment, including those concerning parental responsibility. See the Decision of the Polish Supreme Court of September 19, 2013, V CSK 563/12, LEX no. 1619220.

5 Art. $519^1$ § 2 of the CCP and Art. $398^2$ of the CCP *a contrario*.

6 Art. $398^2$ § 2(1) of the CCP.

From August 27, 2018, a cassation complaint has become admissible in matters of wrongful removal or wrongful retention of a child under the 1980 Hague Convention on the Civil Aspects of International Child Abduction[7]. In these cases, only the Public Prosecutor General, the Children's Ombudsman, or the Ombudsman may lodge a cassation complaint[8]. Limiting the right to lodge a cassation complaint in such cases with the above-mentioned institutional entities results, on the one hand, from the need for efficient proceedings under the 1980 Hague Convention that undoubtedly cannot be achieved if the usually conflicted parties are granted the right to lodge their cassation complaint, and, on the other hand, from the need to enable the Polish Supreme Court to shape the case law in such cases[9].

A cassation complaint is an extraordinary appeal measure and it is up to the legislator to assess which categories of cases are subject to complaint. This assessment should take into account the effectiveness of the supervision exercised by the Polish Supreme Court over common courts regarding judgments[10] and, consequently, the protection of individual rights[11].

The cross-border nature of the case, which makes it necessary for the courts to apply EU law or the provisions of international conventions, does not create a special category of cases in terms of the admissibility of a cassation complaint. This admissibility is always examined under Polish law (*lex fori processualis*), taking into account the nature of a case in accordance with national law[12].

From January 2015 to April 2021, the Polish Supreme Court issued several rulings concerning international family law. The rulings refer to jurisdiction in matters of parental responsibility under Regulation No. 2201/2003[13] and in matters relating to maintenance

[7] The Convention on the Civil Aspects of International Child Abduction concluded in the Hague on 25 October 1980 (Polish Journal of Laws of 1995, No. 108, item 528); hereinafter called the 1980 Hague Convention.

[8] Art. $519^1$ § $2^1$ of the CCP. See also: the Act of 26 January 2018 on the performance of some activities of the Central Authority in family-related cases concerning legal transactions in accordance with the European Union law and international agreements (Polish Journal of Laws of 2018, item 416).

[9] The justification of the Bill on the performance of some activities of a Central Authority in family cases within the scope of legal transactions in accordance with the European Union law and international agreements and amending the Act: the Code of Civil Procedure and some other acts, parliamentary print VIII No. 1827; see also the Decision of Polish Supreme Court of July 24, 2020, I CSK 818/19, LEX no. 3150981.

[10] Art. 183(1) of the Constitution of the Republic of Poland of April 2, 1997 (Polish Journal of Laws 1997, No. 78, item 483 as amended).

[11] The Decision of the Polish Supreme Court of August 31, 2017, V CSK 303/17, LEX no. 2382454.

[12] The Decision of the Polish Supreme Court of August 31, 2017, V CSK 303/17.

[13] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (OJ L 338, p. 1 as amended), hereinafter called: Regulation No. 2201/2003 or the Brussels II bis Regulation.

obligations under Regulation No. 4/2009[14], the civil aspects of international child abduction, and the recognition and enforcement of foreign judgments.

## 2. Jurisdiction in matters of parental responsibility under the Brussels II bis Regulation

In the decision of August 13, 2017[15], the Polish Supreme Court dismissed the cassation complaint as inadmissible *ratione materiae*. Because of the constitutional functions of the Polish Supreme Court and the need for correct application of EU law, in the grounds for its decision, the Polish Supreme Court made a few important remarks concerning the interpretation of the provisions of EU Regulations No. 2201/2003 and No. 4/2009 concerning jurisdiction.

The facts of the case involved a Polish citizen, AC, who filed an application for divorce before a Polish court against PC, a French citizen. In the petition for divorce, AC also included claims concerning parental responsibility for the daughter of the parties and a child maintenance claim. At the time, the daughter of the parties was in Poland with her mother, who had taken her out of France without her father's consent. The Polish courts of both instances did not doubt as to the existence of jurisdiction to handle the divorce petition under Art. 3(a) of the Brussels II bis Regulation. However, they acknowledged that the Polish courts did not have jurisdiction to hear parental responsibility and child support cases.

Referring to the claim concerning parental responsibility contained in the divorce petition, the Polish Supreme Court pointed out that the grounds for jurisdiction regulated by Art. 12 of Regulation No. 2201/2003 are alternative to the general ground of jurisdiction based on the habitual residence of the child [Art. 8(1)], but do not repeal it. The Court further emphasized that if the parental responsibility matter is ancillary to matrimonial proceedings, it is necessary to examine whether the jurisdiction to handle a parental responsibility claim does not arise from Art. 8(1) of Regulation No. 2201/2003 and moreover the court should also take into account the special grounds of jurisdiction set out in Arts. 9 and 10 of the Regulation in question. However, in the Polish Supreme Court's opinion, if the jurisdiction is related to the wrongful removal or retention of a child, then all the circumstances connected with the abduction should be clarified in detail by a court when examining the admissibility of the case.

Concerning the maintenance claim, the Polish Supreme Court emphasized that the jurisdiction to rule on maintenance obligations may be based on the child's habitual residence (Art. 3(b) in conjunction with Art. 2 (1) (10) of Regulation No. 4/2009); however, the fact that the child has been wrongfully removed or retained does not exclude the juris-

[14] Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1 as amended), hereinafter: the Regulation No. 4/2009.

[15] The Decision of the Polish Supreme Court of August 13, 2017, V CSK 303/17.

diction of the state in which the child acquired his or her habitual residence after that event. Based on Art. 3(c) of Regulation No. 4/2009, jurisdiction to handle a maintenance case may result from the connection with the matrimonial case. In the Polish Supreme Court's opinion, this ground is not repealed by the fact that the jurisdiction of the *forum* state in a case concerning the status of a person results from the sixth ground of jurisdiction, mentioned in Art. 3(1)(a) of Regulation No. 2201/2003, which is based on the combined connecting factor of the habitual residence and nationality of the plaintiff or petitioner (*argumentum a contrario* from Art. 3(c) *in fine* of Regulation No. 4/2009). However, the Polish Supreme Court pointed out the need to take into account the position of the Court of Justice of the European Union (CJEU) expressed in the judgment in C-184/14, A v. B[16].

The Polish Supreme Court's interpretation of the rules of jurisdiction in matters of parental responsibility and maintenance obligations should be evaluated positively. In such cases, the inadmissibility of cassation is justified, *inter alia*, by the instability of decisions, which can be modify if the circumstances change[17]. However, it does not mean that there are no interpretation difficulties in these cases that may lead to significant discrepancies in the case law. These difficulties arise particularly from the determination of the jurisdiction, which indirectly determines the procedural position of the parties in the proceedings. What is particularly noteworthy in the decision described above is the Polish Supreme Court's standpoint regarding the possibility of establishing the jurisdiction in maintenance matters on the ground of the child's habitual residence in the state in which the child has been wrongfully removed to or in which it has been wrongfully retained. In a subsequently issued order of the CJEU, in case C-85/18 PPU, CV v. DU, the Court acknowledged that: "[If] a child who was habitually resident in a Member State was wrongfully removed by one of the parents to another Member State, the courts of that other Member State do not have jurisdiction to rule on an application relating to custody or the determination of a maintenance allowance with respect to that child, in the absence of any indication that the other parent consented to his removal or did not file an application for the return of that child"[18].

However, it does not follow from the reasons of this judgement that the CJEU has considered the possibility of the actual change of the child's habitual residence after wrongful removal. The CJEU relied upon Art. 3(d) of Regulation No. 4/2009 to establish jurisdiction in handling a maintenance case. The CJEU only broadly stated that from the case-file information it does not follow that the courts of the Member State, in which the

[16] The Judgment of the CJEU of July 16, 2015, C-184/14, A v. B, ECLI:EU:C:2015:479.

[17] Art. 577 of the CCP provides that the Family Court may change its decision, even if it is final, if it is in the best interest of a child. See also: the justification of the Bill amending the Act – the Code of Civil Procedure, the Act on registered pledge and the register of pledges, the Act on judicial costs in civil cases and the Act on court bailiffs and enforcement (Polish Journal of Laws of 2000 No. 48, item 554).

[18] The Order of the CJEU of April 10, 2018, C-85/18 PPU, CV v. DU, ECLI:EU:C:2018:220, p. 57. See also: P. Rylski, K. Weitz, B. Wołodkiewicz, *Przegląd orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej z zakresu europejskiego prawa procesowego cywilnego (2017–2018) – rozporządzenie nr 44/2001 i rozporządzenie nr 1215/2012*, „Kwartalnik Prawa Prywatnego" 2019/3, p. 967–968.

child has been wrongfully removed to, "could nevertheless have jurisdiction to rule on the matter of maintenance obligations on another basis under Regulation No. 4/2009"[19]. The concept of "habitual residence" essentially reflects a question of fact[20]. The mechanism provided in the 1980 Hague Convention does not lead to the "retention" of the child's habitual residence in the state from which the child was wrongfully removed, but to the perpetuation of the jurisdiction of that state's courts, and only in parental responsibility cases. Thus, it is difficult to assume *a priori* that, in the event of a wrongful removal of a child, the state into which the child has been taken after the abduction will never become his or her habitual residence[21]. However, determining the child's habitual residence in the state of abduction needs particular care. The circumstances of many of such cases – where the child and parent are hiding and living knowing that the child may be returned to the other parent and taken to another Member State – may themselves make it impossible for this residence to be considered "habitual" because of the temporary nature and lack of real integration of the child in a social environment. Nevertheless, the issue in question still arouses controversy, which will hopefully soon be resolved by the CJEU[22].

## 3. The civil aspects of international child abduction

For almost 20 years, the jurisdiction of the Polish Supreme Court in cases concerning the civil aspects of international child abduction has been limited to legal issues presented to the Supreme Court by common courts. However, during the analyzed period, only one legal issue has been presented. Until July 1, 2000, a cassation complaint was admissible in such cases, and the case-law of the Polish Supreme Court was rich and interesting. The supervision of the Polish Supreme Court in matters based on the 1980 Hague Convention was restored after the amendment to the CCP implemented on August 27, 2018[23]. Until that time, the Polish Supreme Court issued three decisions in cases concerning the civil aspects of international child abduction.

The Polish Supreme Court's ruling recognizing the legal issue presented by the court of second instance, concerned the possibility of changing an order to return the wrong-

[19] The Order of the CJEU of April 10, 2018, C-85/18 PPU, p. 55.

[20] See: the judgment of the CJEU of June 8, 2017, C-111/17 PPU, OL v. PQ, ECLI:EU:C:2017:436, p. 51.

[21] See: the judgment of the Austrian Supreme Court of June 27, 2013, 1Ob 91/13h, "Praxis des Internationalen Privat-und Verfahrensrechts" 2015/2, p. 169, in which it was stated that rules of jurisdiction established in Regulation No. 4/2009 did not depend on whether the child acquired his or her current habitual residence through illegal removal; see also: D. Schäuble [in:] *Brussels IIa – Rome III. Article-by-Article-Commentary*, ed. Ch. Althammer, München 2019, p. 86.

[22] See: the Request for a preliminary ruling from the Sąd Okręgowy w Poznaniu [Regional Court in Poznań] (Poland) lodged on November 26, 2020, W.J. v. L.J. and J.J. represented by their legal representative A.P., C-644/20; the Decision of Polish Regional Court of November 10, 2020, XV CA 1407/19, LEX no. 3119302.

[23] See: footnote 8.

fully removed or retained child issued on the basis of the 1980 Hague Convention[24]. The provision of Art. 577 of the CCP provides for the possibility of changing a final ruling of the family court if it is in the child's best interest. The application of this provision in matters within the 1980 Hague Convention has been interpreted divergently by the Polish courts for years[25]. Currently, the CCP expressly excludes the possibility of changing a final ruling issued on the basis of the 1980 Hague Convention[26].

In the resolution of November 22, 2017[27], the Polish Supreme Court first stated that the international nature of matters within the 1980 Hague Convention did not affect the qualification of the proceedings. Thus, child abduction cases heard by the Polish courts are conducted on the basis of the provisions on the proceedings for the removal of a person subject to parental authority or under custody in terms of Arts. $598^1$–$598^{14}$ of the CCP. Additionally, if not otherwise regulated, the general provisions on proceedings in family and guardianship cases[28] and the general provisions on non-litigious proceedings further apply[29]. In the absence of a clear exclusion of the application of Art. 577 of the CCP (at the time the Polish Supreme Court adjudicated), and because of the lack of such regulation in the 1980 Hague Convention, the Polish Supreme Court decided that this provision applies in child abduction cases. As part of its reasoning, the Polish Supreme Court considered the issue of balancing the principle of speed with the principle of the child's best interests in such proceedings. Recognizing that it is not always possible to combine the two harmoniously, the Polish Supreme Court prioritized the latter principle. Therefore, the best interest of the child should be assessed taking into account the changing circumstances under which the enforcement of the decision (return of the child) would expose a child to a grave risk of physical or psychological harm. In its concluding remarks the Polish Supreme Court stated that the jurisdiction of a state in which the child has been taken after the abduction is retained in cases concerning the change of an order for the return of the child because the subject of the matter remains the child's return.

Because of the above-mentioned amendment to the CCP, which entered into force shortly after the Polish Supreme Court's resolution of November 22, 2017 had been issued, the response provided by the Polish Supreme Court was not currently of great significance for the Polish judicature. It is only worth mentioning that in the judgments of the European Court of Human Rights (ECtHR) cited by the Polish Supreme Court it was clearly emphasized that "a change in the relevant facts may exceptionally justify the non-enforcement of a final return order", but only if "the change of relevant facts was not

[24] Earlier, in the Decision of March 13, 2015, III CZP 3/15, LEX no. 1675927, the Polish Supreme Court refused to pass a resolution in a similar case for formal reasons.

[25] See the General Announcement of the Children's Ombudsman, Marek Michalak, addressed to the Minister of Justice, the Public Prosecutor General, Zbigniew Ziobro, of July 25, 2017, http://brpd.gov.pl/sites/default/files/2017_07_25_wyst_ms.pdf (access 20.04.2021), p. 1–3.

[26] Art. $598^5$ § 5 of the CCP.

[27] The Decision of the Polish Supreme Court of November 22, 2017, III CZP 78/17, OSNC 2018/5, issue 51.

[28] Arts. 568–578 of the CCP.

[29] Arts. 506–525 of the CCP.

brought about by the State's failure to take all measures that could reasonably be expected to facilitate enforcement of the return order"[30]. It is also controversial whether the Polish Supreme Court's broad interpretation of the principle of the best interests of the child in cases relating to the return of a wrongfully abducted child is correct[31]. It is argued that in such cases, the best interests of the child cannot undermine the purpose of the 1980 Hague Convention and that the best interest of the child should be assessed by a court that has jurisdiction to hear cases of parental responsibility[32].

By the decision of December 17, 2020[33], the Polish Supreme Court rejected the cassation complaint lodged by the Children's Ombudsman in a case in which the courts of both instances found that the child was wrongfully retained in Poland within the meaning of the 1980 Hague Convention and ordered the mother to ensure the return of the child to Great Britain. The courts of both instances ascertained that the child's habitual residence immediately before the abduction had been Great Britain, where the child had lived since birth and attended kindergarten and then school. Both parents had a right of custody within the meaning of the 1980 Hague Convention, and both exercised it until the mother retained the child in Poland. Moreover, the courts found that the case was not subject to any of the exceptions provided for in Art. 13 of the 1980 Hague Convention justifying the refusal to return a child.

The Polish Supreme Court has stressed that the order to return the wrongfully abducted child is not automatic, and the exceptions are provided for in the 1980 Hague Convention[34]. The burden of proof concerning the facts justifying the refusal to return the child lies with the party opposing the return, and the exceptions should be strictly interpreted. In particular, the Polish Supreme Court upheld the position expressed in the Polish Court of Appeal's decision, according to which doubts as to whether the petitioner had a predisposition to become the child's primary guardian might not be the sole reason that affected the application's legitimacy. The same is true of a possible worsening of the child's living standard as a result of the return to the country of his or her habitual residence. In the Polish Supreme Court's opinion, arguments of an economic nature cannot justify the refusal to return the child.

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30 The Judgment of ECtHR of January 8, 2008, P.P. v. Poland, Application No. 8677/03, INCADAT: HC/E/PL 941, p. 88; the Judgment of ECtHR of November 2, 2010, Serghides v. Poland, Application No. 31515/04, INCADAT: HC/E/PL 1188, p. 69; see also: E. Holewińska-Łapińska [in:] *Studia i analizy orzeczeń Sądu Najwyższego. Przegląd orzecznictwa za rok 2017*, ed. J. Kosonoga, Warsaw 2018, p. 120.

31 The Decision of the Polish Supreme Court of March 31, 1999, I CKN 23/99, OSNC 1999/11, issue 188.

32 See. P.R. Beaumont, P.E. McEleavy, *The Hague Convention On International Child Abduction*, New York 2004, p. 140–141; Federal Tribunal (Switzerland) 15 November 2005, no. 5P.367/2005 and Federal Tribunal (Switzerland) 11 January 2010, no. 5A_764/2009 and 5A_778/2009. A different opinion: K. Bagan-Kurluta, *Dobro dziecka w sprawach o uprowadzenie dziecka za granicę. Zmiany w prawie i ich spodziewane skutki*, „Problemy Prawa Prywatnego Międzynarodowego" 2019/25, p. 20–22.

33 The Decision of the Polish Supreme Court of December 17, 2020, I CSK 183/20, LEX no. 3105674.

34 In Arts. 12, 13 and 20 of the 1980 Hague Convention.

The Polish Supreme Court also undertook the answer to the question of whether, and if so, in which cases, the child's separation from the abducting parent may entail a grave risk of psychological harm or otherwise place the child in an intolerable situation within the meaning of Art. 13(1)(b) of the 1980 Hague Convention. It has been noted in this context that the assessment of such a situation requires each time some consideration of whether, in the circumstances of the case, the parent who removed or wrongfully retained the child can be objectively and reasonably expected to return with the child to the state of the child's habitual residence. In the Polish Supreme Court's opinion, if the answer to this question is positive, the derogation from the obligation to order the child's return is generally unjustified. Applying these considerations to the examined case, the Polish Supreme Court decided that it was not proved that the mother's return with the child to Great Britain was impossible for objective reasons. Straitened relations with the petitioner, injuries, and a sense of harm cannot be considered as such reasons. The derogation from the obligation to order the child's return specified in Art. 13(1)(b) of the 1980 Hague Convention is only possible if there is a grave risk to a child, and not risks or nuisances for a parent who acts illegally. Even if there are objective reasons that impede the parent's return with the child, these must be relevant insofar as they may pose a risk to the child and which is so grave that it places the child in an intolerable situation.

The Polish Supreme Court also rejected the objection of the Children's Ombudsman regarding the necessity to admit expert evidence for the proper application of Art. 13(1)(b) of the 1980 Hague Convention. The Polish Supreme Court has emphasized that the time-consuming nature of expert evidence is difficult to reconcile with the need to act expeditiously[35] and the requirement to use the most expeditious procedures available in national law[36]. However, receiving expert evidence may sometimes be necessary if other evidence indicates disturbances in the family relationship involving the child, and it is necessary to investigate, using special knowledge, whether they may result in a grave risk within the meaning of Art. 13(1)(b) of the 1980 Hague Convention.

The Polish Supreme Court further referred to the issue of the child's own objection to being returned. First, the Court noticed that the child had been heard during the proceedings and, on this basis, *inter alia*, it found that the child would most likely live with both parents. Regardless of this fact, the Polish Supreme Court emphasized that in light of Art. 13(2) of the 1980 Hague Convention, a refusal to order the return of the child required not only the child's objection but also a finding that a child attained an age and degree of maturity at which it was appropriate to take account of the child's views. In this context, it was pointed out that when assessing a child's maturity, it was necessary to examine whether the child was able to understand the purpose and effects of the return to the state of his or her habitual residence and to present the reasons for the objection. Moreover, when assessing the child's maturity level, it was necessary to separate the child's own will – especially in the case of younger children – from the parent's will under whose actual custody the child remained.

[35] Arts. 11 and 2 of the 1980 Hague Convention.

[36] Art. 11(3) of Regulation No. 2201/2003.

The above-described decision merits approval. The Polish Supreme Court drew attention to those elements of adjudicating on the return of a wrongfully abducted child, which in practice were the most controversial. Particularly noteworthy is the position concerning the distribution of the burden of proof. The Polish Supreme Court rightly emphasized that the abductor carried the burden of proving the existence of conditions justifying the refusal to return the child[37]. Another interesting interpretative hint has concerned the assessment of the effects that separation from the abducting parent may have on a child, in the event of a return order. The Polish Supreme Court has expressed a balanced position that it is necessary to take into account all surrounding circumstances[38]. However, the Polish Supreme Court has not ruled out *a priori* that such a separation would pose a grave risk to a child, placing the latter in an intolerable situation[39]. In the context of assessing whether it is necessary to take expert evidence in a case, the Polish Supreme Court has rightly emphasized that in child abduction matters it is necessary to weigh two fundamental values: the prompt return of the child and the child's safety[40]. The doctrine and case-law indicate that the need to consult an expert witness in child abduction cases may concern, *inter alia*, foreign law (when it is necessary to assess whether the petitioner had rights of custody at the time of removal)[41], the impact of domestic violence on the grave risk of psychological or physical harm[42], or the degree of the child's maturity when taking into account his or her objection to return[43]. Regarding the latter, it is further accepted that "more than mere preference" is required for the child's objection to have the effect of a refusal to order a return. Rather, it is about a "strength of feeling which goes far beyond the child's usual ascertainment of the child's wishes in custody dispute"[44]. Moreover, the Polish Supreme Court's view is consistent with international case-law, according to which financial hardship after the return of a child does not con-

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37 See. P.R. Beaumont, P.E. McEleavy, *The Hague Convention...*, p. 140; J. Gudowski, *Kodeks postępowania cywilnego. Orzecznictwo. Piśmiennictwo. Tom IV*, Warsaw 2020, art. 598[2]; C. v. C. (Minor: Abduction: Rights of Custody Abroad) [1989] 2 All ER 465 at 473. Under the US law the defenses have to be proven "by clear and convincing evidence"; see: R. Schuz, *The Hague Child Abduction Convention. A Critical Analysis*, London 2014, p. 273.

38 See: T. Van Hof, T. Kruger, *Separation from the Abducting Parent and the Best Interests of the Child: A Comparative Analysis of Case Law in Belgium, France and Switzerland*, "Netherlands International Law Review" 2018/65, p. 152–153.

39 M.H. Weiner pointed out the need to take these circumstances into account in the article: *Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases*, "American University Law Review" 2008/58.

40 See: É. Pataut, E. Gallant [in:] *European Commentaries on Private International Law. ECPIL Commentary. Volume IV. Brussels IIbis Regulation*, ed. U. Magnus, P. Mankowski, Köln 2017, p. 132–134.

41 See US case: Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259, 269 (3d Cir. 2007).

42 See US case: Davies v. Davies, 16 Civ. 6542, 2017 WL 361556.

43 See US case: Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259, 269 (3d Cir. 2007). See: *The Hague Convention on the Civil Aspects of International Child Abduction in Cases Involving Battered Respondents*, A New York Bench Guide for Federal and State Court Judges, New York 2017, p. 25.

44 See. Re R. (A Minor Abduction) [1992] 1 FLR 105 [INCADAT: HC/E/UKe 59]; P.R. Beaumont, P.E. McEleavy, *The Hague Convention...*, p. 188.

stitute grounds for refusing the return. In this context, it is indicated that adopting such a solution would justify child abduction from poorer countries to more developed ones[45].

On March 17, 2021, the Polish Supreme Court issued another decision in a case concerning the civil aspects of international child abduction[46]. The facts of this case involved the petitioner, DF (Italian citizen) and the respondent, ER (Polish citizen), who had remained in a cohabitation relationship, out of which their daughter, EF, was born (with dual citizenship). EF was born in 2015 in Poland. The family had initially lived in Poland where their relationship faced no issues. Due to the daughter's health problems, the parents decided to move to Italy, where the climate is more favorable. After coming to Italy, the family adapted to a new place and EF started attending a kindergarten where she acclimatized quickly. The parents looked after their daughter together, with the help of the child's paternal grandmother. At the end of 2018 parties' relationship began to worsen and some impulsive behaviour of the petitioner have occurred. The petitioner had reportedly grabbed once his partner by the throat during a quarrel, while on another occasion he hit his daughter with a guitar cord knocking the child over. Despite obtaining relevant information from the Polish Embassy, the respondent had not reported domestic violence. On May 1, 2018, the mother and the daughter flew to Poland with the father's consent. The arrangement involved staying in Poland until May 11, but the mother did not return to Italy on the set date. The petitioner had no contact with the daughter from the moment she had left for Poland except during the proceedings at the Polish court. Currently, and upon the petitioner's initiative, criminal proceedings against the mother are pending in Italy concerning, *inter alia*, the abduction of a child.

The courts of both instances agreed that in this case there had been a wrongful removal of the child within the meaning of the 1980 Hague Convention and there was no ground for the refusal to return the child. As a result, these courts ordered a return of EF to Italy. The cassation complaint was lodged by the Children's Ombudsman, objecting numerous infringements, mainly concerning the incorrect interpretation of Art. 13(b) of the 1980 Hague Convention and the principle of the best interests of the child, expressed in the Convention on the Rights of the Child and resulting from the Constitution of the Republic of Poland[47], as well as a procedural infringement based on the lack of admitting expert evidence by the courts.

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[45] R. Schuz, *The Hague Child Abduction Convention...*, p. 288.

[46] The Decision of the Polish Supreme Court of March 17, 2021, I CSKP 38/21, LEX no. 3153491.

[47] The principle of the best interest of a child is not expressed directly in the Polish Constitution but is the one of the constitutional principles, derived from other provisions of the Constitution. See: G. Kowalski, *Założenia prawa rodzinnego w świetle Konstytucji Rzeczypospolitej Polskiej* [in:] *Prawo rodzinne w dobie przemian*, ed. P. Kasprzak, P. Wiśniewski, Lublin 2009, p. 43; M. Ożóg, *Dobro dziecka, czyli poszanowanie jego podmiotowości prawnej w świetle wybranych przepisów prawa polskiego* [in:] *Dobro dziecka. Perspektywa pedagogiczna i prawna*, ed. E. Włodek, Z. Solak, T. Gurdak, Kraków 2017, p. 83–89; M. Arczewska, *Dobro dziecka jako przedmiot troski społecznej*, Kraków 2017, p. 201; the Judgment of the Polish Constitutional Tribunal of December 18, 2008, K 19/07, OTK-A 2008/10, issue 182.

The Polish Supreme Court rejected all of the petitioner's allegations. Referring to the procedural objection, the Polish Supreme Court repeated its position expressed in the above-mentioned decision of December 17, 2020. In this context, the Court stressed that expert evidence should be treated as supplementary and could not replace a court's decision as to whether there were grounds for refusing to return the child under Art. 13(b) of the 1980 Hague Convention.

Next, the Polish Supreme Court referred to the grounds of the refusal to return the child in the light of the 1980 Hague Convention. The Polish Supreme Court first referred to the case law of the ECtHR as Art. 13(b) of the 1980 Hague Convention covers only situations that go beyond what the child is expected to endure; it does not, however, apply to all the inconveniences that are necessarily linked to returning to the country of habitual residence[48]. The Polish Supreme Court has also agreed with the assessment expressed in the decision of the Polish Court of Appeal, according to which a single-time violation of the inviolability of the child's body and a single act of aggression against a respondent is not a situation justifying the refusal to return the child under Art. 13(b) of the 1980 Hague Convention. The court pointed out the need to adopt an autonomous definition of the concept of "grave risk of harm" in the context of the application of this Convention, which must take into account its purposes, in particular, the protection of children at the international level against the harmful effects of their wrongful removal or retention and ensuring their immediate return to the state of their habitual residence. In the case described, a single expression of inappropriate behaviour on behalf of the father towards the child had no effect on his proper relationship with his daughter and did not cause any real risks. This is evidenced by the mother's behaviour who had been leaving the child in the father's care, and the child's behaviour who, after a long separation from the father, had a normal and warm contact with him.

The Polish Supreme Court further referred to the issue of separating the child from the mother, as a consequence of ordering the child's return to the state of her habitual residence. The Court noted that the mother's decision to stay with the child in Poland was convenient from her perspective but constituted unlawful interference with the girl's right to respect her family life. In this way, she "uprooted" the child from her current environment and also deprived the father of contact with the child and any influence he could have on her upbringing, education, and living conditions.

Moreover, in the reasons for the decision described above, the settled case law of the Polish Supreme Court was cited. According to that case law, in cases concerning a wrongful removal of a child on the basis of the 1980 Hague Convention, a rule to take into account the best interests of a child should be viewed through the prism of the previously mentioned purposes of the 1980 Hague Convention and exceptions to ordering the return of

[48] See: the Judgment of ECtHR of December 6, 2007, Maumousseau and Washington v. France, Application No. 39388/05, INCADAT: HC/E/FR 942; the Judgment of ECtHR of November 26, 2013, X v. Latvia, Application No. 27853/09, INCADAT: HC/E/LV 1234; the Judgment of ECtHR of June 18, 2018, Vladimir Ushakov v. Russia, Application No. 15122/17, INCADAT: HC/E/RU 1419.

the child specified in Arts. 12, 13 and 20 of the said Convention. The principle of the best interests of the child within the meaning of the 1980 Hague Convention is, therefore, different than in other proceedings, including those concerning parental responsibility and access to the child[49].

As a side note, the Polish Supreme Court referred to the possibility of changing the decision ordering the return of a wrongfully abducted child. Such a change is currently explicitly excluded in the CCP[50]. However, the Polish Supreme Court has expressed the position that the prohibition applies only to the proceedings concerning the application for an order to return the child, and not to the enforcement proceedings. In the latter case, it may be that, as a result of possible new circumstances arising, it will be necessary to change or suspend the court decision ordering the probation officer to remove the child from the abductor. This may be justified in the event that the implementation of the decision could lead to the infringement of the best interest of the child, in particular to the child's moral or physical harm. The Polish Supreme Court has indicated that in such a situation the courts should suspend the decision to enforce the order to return the child and issue appropriate orders ensuring that the procedure of returning the child is carried out in a manner that does not infringe his or her best interest. These may include an order aimed at restoring or strengthening the bond between the child and the parent who is to take over the child or neutralize the behaviour of parents absorbed in their own dispute. The Polish Supreme Court has also not ruled out a situation in which it would be necessary to change a previously issued order to remove a child from the abductor, albeit only in extreme and exceptional cases.

In the decision described above the Polish Supreme Court again correctly interpreted the provisions of the 1980 Hague Convention. In particular, some attention should be paid to the interpretation of the concept of "grave risk of harm" appearing in this Convention, which should not be automatically equated with the occurrence of "domestic violence" within the meaning of national law. According to the definition adopted in the Polish Act on Counteracting Domestic Violence[51], domestic violence is defined as one-off intentional act that violates the rights or personal interests of family members. At the same time, it is worth noting that the adjective "grave" refers to the word "risk" and not the word "harm"[52]. Nevertheless, in a situation such as that described in the facts of the decision above, even, if a one-off act of physical violence against a child by a father has been proven, it does not constitute a sufficient premise to assume that the child's return entails, at present, a grave risk of physical or mental harm if other circumstances do not confirm this. It is accepted in the doctrine that the established pattern of domestic violence must be present[53].

[49] See: the above-described decision of the Polish Supreme Court of December 17, 2020, I CSK 183/20.
[50] Art. $598^5$ § 5 of the CCP.
[51] Art. 2(2) of the Act of July 29, 2005, on Counteracting Domestic Violence (Polish Journal of Laws of 2021, item 1249).
[52] R. Schuz, *The Hague Child Abduction Convention...*, p. 273.
[53] See: R. Schuz, *The Hague Child Abduction Convention...*, p. 283.

The last ruling on the civil aspects of international child abduction, issued by the Polish Supreme Court in the discussed period, is the decision of the Extraordinary Control and Public Affairs Chamber of the Polish Supreme Court on April 14, 2021[54]. The proceedings before the Polish Supreme Court were initiated by the motion of the Prosecutor General, who lodged an extraordinary complaint against the final decision of the Regional Court (court of second instance) dismissing the appeal against the District Court's [Sąd Rejonowy] decision, which ordered the return of children XS and YS to Ireland. The admissibility of filing an extraordinary appeal is regulated by the Polish Supreme Court Law of December 8, 2017[55]. An extraordinary complaint may be lodged only by public entities and only unless the judgment can be annulled or changed under other extraordinary appeal measures. An extraordinary complaint shall be lodged within five years of the appealed judgment becoming final.

The case involved children XS (born in 2012) and YS (born in 2015), who were the sons of spouses AS (Polish and Irish citizen) and SS (Indian citizen who obtained a residence permit in Ireland). Both children were born in Poland and had Polish citizenship. In years 2012–2016, XS lived mainly in Poland (initially under the care of his mother and subsequently his maternal grandparents), where he attended kindergarten. After YS was born, the mother and father stayed with their children in Poland. In May 2016, the mother and the children moved to Ireland, from where they subsequently left and returned to Poland in December 2016. Despite the obligation to return from Poland, the mother had never returned the children to Ireland; therefore, the father initiated a return procedure under the 1980 Hague Convention. It was ascertained that AS had been the victim of several acts of her husband's violence. The husband's violence against AS was the reason that led the Irish court to issue an interim restraining order against him to protect both AS and the children. Subsequently, the second instance court in Ireland overruled the ban in relation to the children.

The Polish Supreme Court partly annulled the decision and referred the case for re-examination. In its reasoning the Polish Supreme Court first found that at the time when the children were retained in Poland by their mother, they were habitually resident in Ireland, despite the fact that they spent the vast majority of their lives in Poland where they attended Polish nurseries and kindergartens, under the custody of their mother or maternal grandparents. Moreover, the children only enjoyed Polish citizenship and only spoke Polish. However, in the Polish Supreme Court's opinion, this did not constitute grounds for ascertaining that the children's habitual residence was in Poland, as this would also be contrary to the assessment made by the Irish courts, regarding the children's parental responsibility. The Polish Supreme Court also emphasized that the mother's relocation of children should be assessed as illegal in light of Art. 3(a) of the 1980 Hague Convention. Furthermore, referring to the objection of the Prosecutor General, the Polish

[54] The Decision of the Extraordinary Control and Public Affairs Chamber of the Polish Supreme Court of April 14, 2021, I NSNc 36/21, LEX no. 3162700.

[55] Arts. 89–95 of The Supreme Court Law of December 8, 2017 (Polish Journal of Laws of 2021, item 1904).

Supreme Court indicated that in cases within the 1980 Hague Convention – unlike in cases concerning child custody – expert evidence is generally redundant and interferes with the obligation to act expeditiously in proceedings on the application for a child's return.

However, the Polish Supreme Court stated that there was a reason for the refusal to order the child's return pursuant to Art. 13(1)(b) of the 1980 Hague Convention, due to the father's proven violent acts against the mother that had led to persistent psychological injury to the older son beyond the mere risk of harm. Moreover, the Polish Supreme Court stated that strong emotional bonds between the children, the mother, and the maternal grandmother seem to confirm that the acts of violence against the mother were not indifferent to the children or that they had no effect on the children's psyche, nor were they incidental, hypothetical, or potential. Referring to the case before the US Court of Appeal[56], the Polish Supreme Court indicated that serious violence directly against a parent, but not specifically against the child, could constitute a grave risk to the child within the meaning of the 1980 Hague Convention. Moreover, in the light of life experience, the observation of both acts of violence and their effect on the mother has serious repercussions for a child's development and attitude. The Polish Supreme Court has stated that such a situation might lead to the child's demoralization, or at least to the consolidation of the "norm" of one of the spouse's superiority, which is unacceptable in the Polish constitutional order, whose axiological core guarantees equal human dignity.

When assessing the decision discussed above, it is worth asking a general question about the reasonableness of admissibility of an extraordinary complaint in cases concerning international child abduction. The main reasons for doubt are the broad five-year time limit for filing a complaint in such cases[57], which in extreme cases may lead to a situation in which the Polish Supreme Court would be entitled to annul an order to return the child after the child has already been returned to the country of his or her habitual residence prior to the abduction. In the case described above, an extraordinary complaint was lodged a year and a half after the decision was issued by the second instance court. The Polish Supreme Court's decision was issued four years after the father had filed an application with the Polish court for the return of the children. As a result of the Polish Supreme Court's decision, the common courts of two instances will, again, decide on the merits of this application. Such a provision conflicts with the purpose of the 1980 Hague Convention, which is to ensure the prompt return of abducted children to the state of their habitual residence[58]. Taking that into account, the Polish legislator provided for public

[56] Gomez v. Fuenmayor, No. 15-12075, February 5, 2016, INCADAT HC/E/US 1407.

[57] The broad time limits for the extraordinary complaint admissibility is controversial in general; see: T. Zembrzuski, *Extraordinary Complaint in Civil Proceedings under the Polish Law*, "Access to Justice in Eastern Europe" 2019/1, p. 11.

[58] Under Recital 42 of Council Regulation (EU) No. 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), (OJ L 178, p. 1), hereinafter called: Regulation No. 2019/1111: "Member States should also consider limiting the number of appeals possible against a decision granting or refusing the return of a child under the 1980 Hague Convention to one". See also: P. Beaumont, L. Walker, J. Holliday, *Parental Responsibility and International*

entities a shortened, four-month time limit for filing a cassation complaint in cases related to international child abduction[59]. The problem is that four years after filing the application for return of a wrongfully abducted child, the circumstances indicated therein are no longer relevant, especially with regard to children who, contrary to the orders of the Polish and Irish courts, have been continuously living in Poland for over four years. During this time, the Convention's second main purpose, which is to secure protection for rights of access, has not been achieved either. Another issue to consider is whether in the above-described case, the Polish Regional Court's ruling has "blatantly violat[ed] the letter of law through its faulty interpretation or application"[60], which is one of the grounds for appeal through an extraordinary complaint.

## 4. Recognition and enforcement of judgments

From January 2015 to April 2021, the Polish Supreme Court issued six rulings concerning the recognition or enforcement of foreign decisions in the field of family law. Under the CCP, a cassation complaint is admissible against decisions of courts of appeal regarding recognition and enforcement of judgments issued in foreign countries, irrespective of the subject matter of the case[61].

In the decision of January 22, 2015[62], the Polish Supreme Court referred to the interpretation of the public policy exception against the recognition of foreign judgment relating to parental responsibility, pursuant to Art. 23(a) of the Brussels II bis Regulation. The Polish courts of both instances refused to recognize the Belgian court's decision, which delegated both parents shared parental responsibility over their son and determined his primary residence with the father. In the Polish courts' opinion, the Belgian court's proceedings were manifestly contrary to the public policy of the Republic of Poland (in particular to the provisions of the Polish Constitution and the Convention on the Rights of the Child), because the court had not collected any significant evidence in the case in order to determine which settlement is the best for the child whose parents live in different countries. The refusal was also justified by the fact that the foreign decision was given in default of appearance of the mother, who had not been granted the right of defense, was not represented in the proceedings by a lawyer, and was not instructed as to how to appeal against the decision.

*Child Abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings*, "International Family Law" 2016, p. 309.

[59] In other cases, there is a six-moth time limit for public entities to lodge a cassation complaint, see: Art. $398^5$ § 2 of the CCP.

[60] Art. 89 § 1(2) of The Supreme Court Law; Polish translation after: T. Zembrzuski, *Extraordinary Complaint...* .

[61] Art. $1148^1$ § 3 and 11511 § 3 of the CCP.

[62] The Decision of the Polish Supreme Court of January 22, 2015, III CSK 154/14, LEX no. 1648183.

The Polish Supreme Court annulled the Polish Court of Appeal's decision and referred the case for re-examination. In its reasons, the Polish Supreme Court stressed that the public policy clause indicated in Art. 23(a) of Regulation No. 2201/2003 intends to protect the national legal order against infringement which may result from the recognition of foreign judgments that do not comply with fundamental legal standards. That is why a Polish court can only examine the potential consequences of recognizing the foreign judgment. The Polish Supreme Court has stated that the grounds for non-recognition referred to by the Polish Regional Court, that concern the rules of civil procedure, the method of collecting and testing evidence by the Belgian court, and the results of these proceedings, are nothing more than a review of the substance of the foreign court's decision, expressly excluded under Art. 26 of Regulation No. 2201/2003. When referring the case to the Polish Court of Appeal for re-examination, the Polish Supreme Court drew attention to the existence of later judgments of the Polish courts concerning parental responsibility over the parties' son, which may be relevant in the context of the refusing the recognition of Belgian court's judgment.

The interpretation of the public policy clause in the previous judgment is consistent with the CJEU's interpretation. In the CJEU's case-law, it is assumed that the "recourse to the public policy rule" should come into consideration "only where, taking into account the best interests of the child, recognition of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the state in which recognition is sought, in that it would infringe a fundamental principle"[63]. The Polish Supreme Court further aptly pointed out that in light of Art. 23(a) of Regulation No. 2201/2003, it was not the judgment itself that had to be contrary to public policy but its recognition[64]. A substantive review of a decision of another Member States' court is excluded under Art. 26 of the Brussels II bis Regulation. It should be borne in mind that due to the free movement of judgments between the Member States, adopted by Regulation No. 2201/2003, the grounds for non-recognition indicated in Art. 23 are exceptional and must be interpreted strictly[65]. Potential procedural shortcomings, resulting in failure to ensure a fair trial or the right to defence, are separate grounds for non-recognition, indicated by Art. 23(b–d) of the Brussels II bis Regulation and require detailed examination in light of the conditions set out in these provisions.

Another decision in which the Polish Supreme Court interpreted the public policy clause is the decision of January 31, 2018[66]. The case concerned the recognition of the Danish court's decision under the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental

[63] Judgment of CJEU of November 19, 2015, C-455/15 PPU, P v. Q, ECLI:EU:C:2015:763, p. 39.

[64] See: K. Siehr [in:] *European Commentaries...*, ed. U. Magnus, P. Mankowski, p. 306; A. Frąckowiak-Adamska, *Uznawanie i wykonywanie orzeczeń w sprawach cywilnych w Unii Europejskiej. Ujęcie systemowe*, Warszawa 2018, p. 405–406.

[65] See: Judgment of CJEU of October 23, 2014, C-302/13, flyLAL-Lithuanian Airlines AS, in liquidation, v. Starptautiskā lidosta Rīga VAS, Air Baltic Corporation AS, ECLI:EU:C:2014:2319.

[66] The Decision of the Polish Supreme Court of January 31, 2018, IV CSK 442/17, LEX no. 2483681.

Responsibility and Measures for the Protection of Children[67]. The Danish court ruling[68] concerned the termination of shared parental responsibility over a child and delegated it only to the child's father. At the time when the Danish court issued the decision, the child was already staying with his mother in Poland, where he had arrived at the age of three without the father's consent[69].

The Polish Supreme Court once again focused on the interpretation of the public policy clause justifying the non-recognition of the foreign court's judgment[70]. It confirmed the stand taken in the former decision, which emphasized that the purpose of the application of the public policy exception was not to assess the validity of the judgment and the compliance of the legal provisions upon which it was based with Polish law. The Court noted, however, that it was sometimes hard to set a boundary between the substantive review of a decision and the decision's result. The assessment of whether there was an infringement of public policy should always be carried out in specific circumstances, taking into account the practical effects of a foreign decision in the legal order of the state in which recognition is sought.

Moreover, the Polish Supreme Court emphasized that an appropriate time to consider a public policy infringement would be when examining whether a foreign ruling should be recognized. Applying these considerations to the facts of the previous case, the Polish Supreme Court stated that the effect of recognizing the Danish court's decision would lead to the mother being deprived of the child's custody, whom she had raised since birth and, in fact, four of those years she acted as the sole carer. In the Polish Supreme Court's opinion, the loss of the sense of security and stability would have a negative impact on the child's physical and emotional development. Referring to the issue of the child's wrongful removal from Denmark to Poland, the Supreme Court indicated that under Art. 12 of the 1980 Hague Convention on the Civil Law Aspects of Child Abduction, it was accepted that in some cases the return order might not be issued, even if the period of one year had not elapsed since the date of the abduction. Such a case occurs, for example, when the child has already adapted to the new environment.

Referring to the public policy clause contained in the 1996 Hague Convention, the Polish Supreme Court *de facto* has rendered the foreign ruling's substance unlawful'[71]. The assessment made by the Polish Supreme Court that the decision depriving a mother

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[67] The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Concluded 19 October 1996 in Hague (OJ 2008 L 151, p. 39), hereinafter: the 1996 Hague Convention.

[68] According to Arts. 1 and 2 of Protocol No. 22 to the Treaty on the Functioning of the European Union on the Position of Denmark (OJ 2012 C 326, p. 299), Denmark chooses for opt-outs in the Maastricht Treaty and shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union.

[69] See: K. Żaczkiewicz-Zborska, *SN: uprowadzone przez matkę dziecko może przy niej zostać*, prawo.pl/prawnicy-sady/sn-uprowadzone-przez-matke-dziecko-moze-przy-niej-zostac,73736.html (access 24.05.2021).

[70] Art. 23(2)(d) of the 1996 Hague Convention.

[71] See: K. Siehr [in:] *European Commentaries...*, ed. U. Magnus, P. Mankowski, p. 306.

of her child's custody is contrary to the child's welfare due to the passage of time during which – contrary to the Danish court's decision – the child was with the mother, goes beyond the scope of recognition of the decision. It is a court that has jurisdiction to handle a parental responsibility case that may, if necessary, modify its decision concerning the delegation of parental responsibility to one of the parents[72]. In the case of a wrongful removal or retention of a child, the court within the child's habitual residence immediately before the abduction will always have jurisdiction to assess the child's best interests. In the German doctrine, examples of infringement of the public policy clause, that may justify the non-recognition, include situations in which the ruling discriminates against children or parents on the basis of sex, age, or religion[73]. It is also indicated that including the best interests of the child in the public policy clause contained in Art. 23(2)(d) of the 1996 Hague Convention (as in Art. 23(a) of Regulation No. 2201/2003) means prioritizing the interests of a particular child over an abstract rule of public policy[74]. This may concern, for example, the non-recognition of surrogate or same-sex parentage in a national legal system[75]. The non-recognition of a foreign decision on the grounds that the parent, who was deprived of parental responsibility exercised the custody of the child for several years in the state where recognition is sought, may be interpreted as a breach of the principle of reciprocity applicable under international relations and treaties.

The conclusions of the previous decision were refuted in a later ruling of the Polish Supreme Court. By the decision of November 13, 2019[76], the Polish Supreme Court rejected the cassation complaint in a case concerning the declaration of enforceability of a foreign ruling under the Brussels II bis Regulation. The decision issued by the French court in a fast-track (urgent) procedure, delegated the parental responsibility for the parties' daughter, Amelie C., to the father and determined her primary residence with the father. At the same time, it prohibited the child's departure from France without both parents' consent and contained the contact order. The Polish court of first instance stated that the documents attached to the application for issuing the enforcement clause met the formal requirements set out in Regulation No. 2201/2003 and that none of the grounds indicated in Art. 23 of the Regulation justified the refusal of enforcement. Moreover, the court of first instance noted that the father's application to return the child under the provisions of the Convention on the Civil Aspects of International Child Abduction had been granted by the Polish courts. The Polish Court of Appeal upheld the decision of the court of first instance.

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[72] See: the Judgment of the CJEU of July 1, 2010, C-211/10 PPU, Doris Povse v. Mauro Alpaga, ECLI:EU:C:2010:400.

[73] K. Siehr [in:] *European Commentaries...*, ed. U. Magnus, P. Mankowski, p. 307–308.

[74] A. Frąckowiak-Adamska, *Uznawanie...*, p. 410.

[75] A. Frąckowiak-Adamska, *Uznawanie...*, p. 410; see also in this context: A. Wysocka-Bar, *Same-sex parentage and surrogacy and their practical implications in Poland in News, Views by Thalia Kruger*, https://conflictoflaws.net/2020/same-sex-parentage-and-surrogacy-and-their-practical-implications-in-poland (access 20.05.2021).

[76] The Decision of the Polish Supreme Court of November 13, 2019, V CSK 389/19, LEX no. 3029466.

The cassation complaint was lodged by the mother. From the extensive grounds of the Polish Supreme Court's decision, which countered the petitioner's numerous objections, two issues deserve special attention: hearing the child in the proceedings for the declaration of enforceability and the interpretation of the public policy clause in the context of the child's best interests. When interpreting the public policy clause, the Polish Supreme Court referred to the principle of the best interests of the child, explicitly mentioned in Art. 23(a) of Regulation No. 2201/2003[77]. In this context, it has been emphasized that the assessment of the best interests of a child is carried out by the court that has jurisdiction to handle a case concerning the change of a decision on parental responsibility as a result of a change in circumstances. This assessment cannot be replaced by the court's findings in proceedings concerning a declaration of enforceability of a foreign ruling. For this reason, the fact that a child, in a changed situation, prefers not to stay with the parent who has been delegated parental responsibility in a foreign ruling does not by itself constitute a sufficient reason to refuse the enforcement on the ground of the public policy clause. The Polish Supreme Court expressed its disapproval concerning lengthy proceedings – proceedings on the merits in one state and enforcement proceedings in another – which lead to the consolidation of the facts favoring the position of the parent who had illegally abducted the child. It stated that this situation would change with the entry into force of Regulation 2019/1111, which abolished the *exequatur*.

Furthermore, the Polish Supreme Court stated that the public policy rule includes the concept of the so-called procedural injustice, which involves, *inter alia*, a violation of an adversary system and a right to defense. However, the Court emphasized that there had been no such violations in the case under consideration, particularly due to the fast-track (urgent) procedure before the French court. In Polish Supreme Court's opinion, this type of procedural decision is a manifestation of judicial discretion. Therefore, its control in *exequatur* proceedings is limited in the sense that a refusal of enforcement may only take place when an order to hear a case in a fast-track (urgent) procedure, entailing failure to hear the child, was the result of the court's obvious arbitrariness.

The interpretation of the public policy clause in the decision described above merits approval[78]. The Polish Supreme Court's remarks regarding the length of the *exequatur* proceedings are also to the point. Postponing the stabilization of the family situation may violate the best interests of a child[79]. A change in this respect will be brought about by the recast of the Brussels II bis Regulation (Regulation No. 2019/1111), which abolishes the *exequatur* for all judgments in matters of parental responsibility. Regulation No. 2019/1111

[77] In connection with Art. 31(2) of Regulation no. 2201/2003.

[78] See: Recital 69 and Art. 56(4–6) of Regulation No. 2019/1111. See also: O. Bobrzyńska, *Nowa unijna regulacja spraw małżeńskich i rodzinnych – rozporządzenie Rady (UE) 2019/1111*, „Kwartalnik Prawa Prywatnego" 2020/3, p. 541–542.

[79] The Commission Staff Working Document. Impact Assessment Accompanying the document Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on International child abduction, SWD(2016)207/Fl, 30.06.2016, p. 132, https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/SWD-2016-207-F4-EN-MAIN-PART-1.PDF (access 8.11.2021).

also regulates in detail the issue of hearing the child. The possibility of refusing to recognize and enforce a foreign judgment due to the failure to hear the child in the course of the proceedings before the court of origin is regulated by Art. 39(2)[80] of the above-mentioned Regulation. However, it provides an exception concerning serious grounds while paying particular attention to the urgency of the case[81].

Another ruling of the Polish Supreme Court relating to the recognition of foreign judgments in matters of parental responsibility is that of February 7, 2019[82]. The proceedings concerned the application of the father of LK for a decision that the judgment of the German court delegating him sole parental responsibility of his daughter is recognized in Poland. The termination of the shared parental responsibility over LK and its delegation to the father resulted from the mother abducting the child to Poland and making contact with the father impossible for the child. The Polish Regional Court issued a decision whereby the judgment of the German court became recognized in Poland. The first-instance court's decision was subsequently changed by the Polish Court of Appeal, which dismissed the application for recognition. The Polish Court of Appeal stated that recognition would be contrary to the best interests of the child, who at the time – being under the care of the mother and grandmother – was provided with a certain degree of stability. In the Polish Court of Appeal's opinion, recognizing the decision of the German court could lead to another traumatic removal of the child from her current environment. Moreover, the Polish Court of Appeal drew attention to the argument that the girl disliked her father because of his numerous attempts to take her away from her mother.

The Polish Supreme Court annulled the decision of the Polish Court of Appeal and referred the case for re-examination. In its grounds, the Polish Supreme Court pointed out that the issue of the effectiveness of the German court's decision granting the father sole parental responsibility for the daughter did not, in fact, raise any doubts. This was confirmed by the actions of the Polish Police and probation officer who were directed to take the child from her mother and hand her over to her father. The Polish Supreme Court emphasized that decisions issued pursuant to Art. 1148 of the CCP were declaratory and led to the determination as to whether a foreign ruling would or would not be automatically recognized. Proceedings aimed at recognizing a foreign court's ruling are not an alternative to family proceedings. The Polish Supreme Court stated that the assessment of the grounds for a refusal to recognize a foreign ruling was based on the circumstances at the time when it became final and not on changed circumstances that had taken place later.

Although the Polish Supreme Court's decision in the previous case seems correct, the legal basis of the decision raises doubts. The Polish Supreme Court based its decision regarding the recognition of a German court's judgment in a parental responsibility case directly on the provisions of the Polish Code of Civil Procedure. EU law has precedence

[80] In connection with Art. 41 of Regulation No. 2019/1111.

[81] See also: B. Ubertazzi, *The hearing of the child in the Brussels IIa Regulation and its Recast Proposal*, "Journal of Private International Law" 2017/13(3), p. 585.

[82] The decision of the Polish Supreme Court of February 7, 2019, II CSK 770/17, LEX no. 2617967.

over national laws and the recognition procedure is regulated in Arts. 21–39 of Regulation No. 2201/2003. The said Regulation refers to the national law of the Member State in which proceedings for recognition or non-recognition are brought only concerning the determination of the local jurisdiction of the court[83]. Another issue worth considering regarding the Polish Supreme Court's decision discussed above is the moment when it is appropriate to assess the grounds for refusing to recognize a judgment[84]. When the test of the public policy is applied, as has been shown earlier, the recognition of the judgment rather than the judgment itself is to be contrary to public policy. Therefore, the assessment must be made in the light of the circumstances at the time of the proceedings for recognition or non-recognition. The same applies to conditions relating to the existence of later judgments which are irreconcilable with the judgment to be recognized[85]. The grounds for refusal listed in Art. 23(b)–(d) and (g) of Regulation No. 2201/2003, which are related to the foreign court's procedural errors, should be assessed in the light of the circumstances valid at the time of issuing that judgment. In this context, it is also worth noting that under the recast version of the Brussels II bis Regulation, it is possible to suspend the enforcement proceedings "if enforcement would expose the child to a grave risk of physical or psychological harm due to temporary impediments which have arisen after the decision was given, or by virtue of any other significant change of circumstances". If the grave risk is of a lasting nature, a court may even refuse the enforcement of the decision. This provision, which is an exception and can be applied only in enforcement (not recognition) cases, may function as a guideline for the public policy clause interpretation. Since it constitutes a separate ground for refusing enforcement, it should be mentioned that the circumstances indicated therein do not fall within the scope of the public policy clause.

During the period from the beginning of 2015 to April 2021, the Polish Supreme Court has issued one ruling regarding the recognition of a judgment relating to matrimonial matters. By the decision of June 2, 2017[86], the Polish Supreme Court annulled the Polish Court of Appeal's decision regarding the refusal to recognize the divorce decree of the American court, by which the latter further awarded spousal maintenance to the ex-wife. The Polish courts of both instances indicated a violation of Art. 1146 § 1(3) and (4) of the CCP arising of the unduly service of court documents, which resulted in the respondent being deprived of his protected interest in the absence of proceedings and with no possibility to defend himself.

When examining the cassation complaint, the Polish Supreme Court pointed out that the examination of whether a party was deprived of the right of defense in the proceedings before the court of the state of origin, should be based on the procedural law of the state of origin (*lex fori processualis*). However, the duty to assess whether a party was actually deprived of the right of defense lies with the Polish court, which is not bound by

[83] Art. 21(3) of Regulation no. 2201/2003.

[84] See: the above-described decision of the Polish Supreme Court of January 31, 2018, IV CSK 442/17.

[85] Art. 23(e–f) of Regulation no. 2201/2003.

[86] The Decision of the Polish Supreme Court of June 2, 2017, II CSK 710/16, LEX no. 2326158.

the position of the foreign court[87]. The question as to whether the defendant was duly served with the claim form should also be examined according to *lex fori processualis*. The court of a state in which such recognition is sought must, on the other hand, examine whether the service took place in a sufficient time to defend. This, in turn, requires Polish courts to establish how and when the claim form was served and whether the document was duly served. The Polish Supreme Court noted that the provisions of Art. 1146 § 1(3) and (4) of the CCP did not require that service in proceedings before the court of the State of origin be made to the addressee in person. He emphasized that the Polish civil procedure rules also permit the service's waiver in person, and such solutions were necessary in order to prevent the obstruction of court proceedings.

In the above-described case, the Polish Supreme Court correctly adopted the provisions of the CCP as the basis for its ruling. The United States is not a party to the Hague Convention of June 1, 1970, on the Recognition of Divorces and Legal Separations[88], nor is there a bilateral treaty between Poland and the USA on the recognition of judgments in civil matters. On the merits, the Polish Supreme Court's decision is consistent with the Polish courts' case-law, according to which the examination of whether the defendant has been served the claim form and the notice of hearing and whether the service has taken place at an appropriate time, cannot be only be based on the need to comply with the rules of the procedural law of the state of origin but must also be in line with procedural guarantees[89].

By its decision of July 12, 2019[90], the Polish Supreme Court refused to accept a cassation complaint in a case concerning the recognition of a foreign judgment awarding child support. The Polish Regional Court acknowledged that the order of the UK's Child Maintenance Agency, establishing the father's maintenance obligation towards the child (MB), is recognized in Poland. Earlier, the amount of the maintenance obligation was determined in the judgment of the Polish court. The order of the British authority was issued as a result of a request to determine the amount of the maintenance obligation and not to change the amount by reducing the adjudicated maintenance based on changed circumstances. The decision did not refer to the judgment of the Polish court nor did it refer to it. Only the content of the certificate of the Child Maintenance Agency of the UK indicated that at the date of the decision, he had knowledge of the previous decision of the Polish Regional Court in Poland. As a result of the appeal, the Polish Court of Appeal changed the decision of the Court of first instance and rejected the application.

The Polish Supreme Court has emphasized that Art. 24 of Regulation No. 4/2009

[87] See also: the Decision of the Polish Supreme Court of October 5, 2012, IV CSK 68/12, LEX no. 1232241.

[88] The Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, Concluded 1 June 1970 in Hague (Polish Journal of Laws of 2001, No. 53, item 561), entered into force in Poland on June 24, 1996.

[89] See: the Decision of the Polish Supreme Court of January 9, 1980, IV CR 478/79, OSNC 1980/12, issue 233; the Decision of the Polish Supreme Court of October 11, 2013, I CSK 451/12, OSNC 2014/7–8, issue 78.

[90] The Decision of the Polish Supreme Court of July 12, 2019, I CSK 706/18, LEX no. 2743811.

clearly indicates the grounds for refusing to recognize a foreign decision concerning maintenance. In particular, according Art. 24(c) a judgment shall not be recognized if it is irreconcilable with a decision given in a dispute between the same parties in the Member State in which the recognition is sought. At the same time, as appears from Art. 24 of Regulation No. 4/2009 *in fine*, a decision that has the effect to modify an earlier decision on maintenance based on changed circumstances shall not be considered an irreconcilable decision within the meaning of points (c) or (d). Therefore, if the decision of the British authority was issued without any analysis concerning the change of circumstances and without indication as to the amount of the petitioner's maintenance obligation as a part of the Polish Regional Court's judgment, then it is not to be recognized. Moreover, the Polish Supreme Court emphasized that these circumstances could not be indicated only in the certificate of the authority which issued the decision, as such a certificate could not qualify as a decision.

The assessment adopted by the Polish court of second instance and the Polish Supreme Court in the case above merits approval. A joint analysis of the provisions of Art. 24(c) and Art. 24(2) of Regulation No. 4/2009 clearly indicates that a decision contrary to an earlier decision given in the Member State where recognition is sought is not merely a decision modifying the earlier maintenance decision on the basis of changed circumstances. The lack of reference to the changed circumstances in the decision awarding maintenance and to the earlier decision itself means that the later decision is not an exception provided in Art. 24(2) of Regulation No. 4/2009[91]. It is further worth noting, that the same ground for refusal to enforce a judgment, formulated in Art. 21(2) of Regulation No. 4/2009, is optional and requires the debtor's application to be taken into account ("the competent authority in the Member State of enforcement may, on application by the debtor, refuse").

## 5. Conclusions

From January 2015 to April 2021, the Polish Supreme Court issued eleven rulings in which it resolved issues related to international family law. The Polish Supreme Court's case law is not extensive on this subject due to the generally strongly limited jurisdiction of this Court in matrimonial matters and matters regarding parental responsibility. The Polish Supreme Court is obliged to dismiss as inadmissible cassation complaints lodged in these cases. However, the approach adopted by the Polish Supreme Court in its decision of August 13, 2017, in which it dismissed the complaint, involved consideration of the interpretation of the provisions of Regulation No. 2201/2003, which raise serious doubts and discrepancies in the case law of the Polish common courts. Such a ruling, although not binding, may be helpful in resolving other cases of this type by common courts, merits approval.

[91] See: P. Grzegorczyk, *Automatyczna wykonalność orzeczeń sądowych w sprawach cywilnych w Unii Europejskiej – geneza, stan obecny i perspektywy* [in:] *Europejskie prawo procesowe cywilne i kolizyjne*, Warszawa 2012, p. 161.

In cases related to parental responsibility, a cassation complaint may only be lodged against decisions on the return of a wrongfully removed child according to the 1980 Hague Convention. However, only public entities, and not private parties, are entitled to lodge it. A cassation complaint in these cases was re-established in 2018, after almost 20 years of interruption. Hence, the Polish Supreme Court's case law in these cases is only being re-shaped. Since 2018, the Polish Supreme Court has issued three decisions as a result of cassation complaints against rulings issued by the Polish courts under the 1980 Hague Convention. In the three aforementioned decisions, the Polish Supreme Court took an appropriate position regarding the interpretation of the provisions of the Convention, and also presented several interpretative guidelines, that will undoubtedly be helpful in adjudicating on the return of a wrongfully abducted child by common courts. This case law gives hope for the development of an interesting and strongly settled jurisprudence in cases concerning the civil aspects of international child abduction. It is also worth noting at this point that the same amendment to the Polish Code of Civil Procedure, which re-established a cassation complaint in the 1980 Hague Convention's cases, also established specialist courts to hear such cases. Currently, these applications are examined in the first instance by 11 selected Polish Regional Courts, and in the second instance only by the single Polish Court of Appeal in Warsaw[92]. An extraordinary complaint to the Extraordinary Control and Public Affairs Chamber of the Polish Supreme Court in family matters is also admissible. Particular doubts are raised by the broad five-year time limit for filing this complaint in such cases, particularly in cases concerning the return of the abducted child.

Moreover, a cassation complaint is also admissible against rulings concerning the recognition or enforcement of a foreign judgments in family matters. The Polish Supreme Court has had the opportunity to pronounce several times on the grounds for non-recognizing or non-enforcing a foreign judgment issued by the EU Member States' courts and third countries' courts. The interpretation of the provisions on the recognition and enforcement of foreign judgments, adopted by the Polish Supreme Court in these rulings, generally merits approval.

Furthermore, common courts may also request the Polish Supreme Court to provide a ruling if there is a legal issue giving rise to serious doubts during the examination of an appeal or a complaint. In such cases, the Polish Supreme Court resolves the doubts concerning interpretation by way of a resolution. In the period under consideration, the Polish Supreme Court issued only one resolution in the field of international family law. The CCP does not oblige courts to ask such questions, and in the event of interpretative doubts in the context of EU regulations, the common courts are obliged to submit prejudicial questions to the CJEU, which they have already been doing[93]. That is why the

[92] However, it is doubtful whether this change will really improve the "quality" of hearing those cases; see: J. Kluza, *Amendment to National Provisions Implementing The Hague Convention*, "Ius Novum" 2020/3, p. 181, https://iusnovum.lazarski.pl/iusnovum/article/view/1108/79 (access 23.05.2021).

[93] See: the Request for a preliminary ruling from the Sąd Apelacyjny w Warszawie [Court of Appeal in Warszawa] (Poland) lodged on 17 June 2015, Edyta Mikołajczyk v. Marie Louise Czarnecka, Stefan Czarnecki, C-294/15 (OJ C 311, p. 19); the Request for a preliminary ruling from the Sąd Rejonowy

case law by the Polish Supreme Court is unlikely to develop substantially in matters regarding EU family law. Considering that the Polish Supreme Court's resolution of November 22, 2017, is no longer valid because of the amendment mentioned above concerning the CCP, and taking into account the reasons for the Polish Supreme Court's recent decision of March 17, 2021, it may be necessary to request the Polish Supreme Court to give a resolution dealing with the issue of changing the court's enforcement order to remove the child from the abductor.

**Abstrakt**

***Przegląd orzecznictwa polskiego Sądu Najwyższego w sprawach z zakresu prawa rodzinnego międzynarodowego (od stycznia 2015 r. do kwietnia 2021 r.)***

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*Do kompetencji polskiego Sądu Najwyższego należy m.in. rozpatrywanie skarg kasacyjnych i wydawanie uchwał. Jednakże w sprawach małżeńskich oraz w sprawach dotyczących odpowiedzialności rodzicielskiej właściwość Sądu Najwyższego jest mocno ograniczona ustawowo. Dotyczy to również spraw z elementem transgranicznym. W okresie od stycznia 2015 r. do kwietnia 2021 r. Sąd Najwyższy wydał jedenaście orzeczeń dotyczących jurysdykcji w sprawach dotyczących odpowiedzialności rodzicielskiej na podstawie rozporządzenia Bruksela II bis, cywilnych aspektów uprowadzenia dziecka za granicę, a także uznawania i wykonywania orzeczeń w sprawach z zakresu prawa rodzinnego. Artykuł prezentuje przegląd tego orzecznictwa. Zawiera zwięzły opis stanu faktycznego spraw, ocenę prawną wyrażoną przez Sąd Najwyższy oraz zwięzły komentarz autora.*

**Słowa kluczowe:** *Sąd Najwyższy, orzecznictwo, prawo rodzinne międzynarodowe, odpowiedzialność rodzicielska, Rozporządzenie Bruksela II bis, porwanie dziecka, uznawanie i wykonywanie orzeczeń*

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