

EXECUTIVE SUMMARY

of the

POLISH

BEST PRACTICE TOOL

for the Recognition and Enforceability
of Mediated Agreements in the EU
(Relocation Agreement)



This project was funded by the European Union's Justice Program (2014-2020)

Poland - Best Practice Tool for the Recognition and Enforceability of Family Law Agreements Involving Children within the European Union

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The AMICABLE Project is an EU co-funded project conceived by the project co-ordinator MiKK - International Mediation Centre for Family Conflict and Child Abduction. The project is conducted by a Consortium of Partners from four different EU countries: the University of Milano-Bicocca (Italy), the University of Wrocław (Poland), the University of Alicante (Spain) and MiKK (Germany). The Consortium Partners have developed four country-specific Best Practice Tools for their respective countries. For further details on the AMICABLE project please refer to the project website: <https://www.amicable-eu.org/>



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Executive summary



Step 1

Poland

Executive summary - International Relocation Agreement

(For details please consult the Polish National Best Practice Tool)

International relocation case inside the EU: The unmarried parents of a child (age: 10 years) who habitually reside in Poland split up. The parents, who have joint custody of their child, agree that:

- child mother will relocate together from Poland to EU State B;
- the father, who will remain in Poland, will have personal contact with the child every fourth week-end and during school holidays;
- the father will pay a monthly child maintenance of 200 EUR to the mother.

They set up a detailed agreement in writing. No legal proceedings are yet pending between the parents.

Step I: EU / international legal framework needs to be analysed to identify in which country the family agreement should first be rendered legally binding and enforceable to make best use of the mechanism of cross-border recognition and enforcement of EU / international law.

For relocation agreements such as the agreement in the above case, dealing with matters of parental responsibility the best “starting point jurisdiction” is the **State of habitual residence of the child** at the moment the agreement is rendered legally binding and enforceable. Hence, where the parents want to render the agreement legally binding before the relocation, the best “starting point jurisdiction” would be the State where the child currently lives (Poland).



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Step 2

Step 2: Using the national law options of Poland to render the family agreement legally binding in Poland

In Poland if parents conclude a parental agreement as described above – dealing with place of residence of a child, contacts and maintenance (and it does not include divorce and parental authority issues) several options are given to make family agreements legally binding and enforceable.

Option 1 (method A) – homologation of a settlement obtained without mediation,

Option 2 (method A) - homologation of a settlement concluded in the process of mediation,

Option 3 (method A) - seizing the court and settle the case,

Option 4 (method B) - formally drawing up the agreement as an authentic instrument before a notary.

If parents are married and wish also end up this relationship:

Option 5* (method A) – seizing the court in order to divorce and turn the agreement into a court decision.

All matters – place of residence, contacts and maintenance - are dealt by *sąd rejonowy* (district court), Wydział Rodzinny i Nieletnich (Family and Juvenile Division) which in family cases acts as *sąd rodzinny* (guardianship court).

Option 1 Homologation of a settlement obtained without mediation

If parents conclude a parental agreement as described above without mediation and no proceeding relating to these matters is pending before

courts, it is possible to make a settlement before the court on the basis of Article 184-185 k.p.c. (a settlement between the parties reached prior to the trial).

It is necessary that one parent apply to the court to summon the other party for a conciliation hearing. If parties make a settlement during this hearing, the court will approve the settlement unless its content is contrary to the law or principles of social coexistence or if it seeks to circumvent the law (Article 184 k.p.c.). Such judicially approved settlement is a basis for enforcement on the same conditions as a court decision, i.e. after obtaining a declaration of enforceability by a court (Article 578¹ § 1 k.p.c.).

a. Which local court or other authority is competent

The application for a settlement may be addressed to a district court (*sąd rejonowy*) of general jurisdiction over the adverse party, irrespectively of the jurisdiction *ratione materiae* (normally provided by the law for relevant subject matter) or if it is not possible to establish jurisdiction – to a district court of the applicant's place of residence (Article 185 § 1 k.p.c.).

b. Representation by attorneys mandatory?

No.

c. Are there other participants obligatory?

No.

d. Time required

The proceeding consist of one hearing. Its organisation depends on the court and can vary from 1 month to even 1 year (rather exceptionally) in some courts.

e. Costs incurred (for rendering the agreement binding not for arriving at an agreement using mediation etc.)

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In case of the approval of a settlement obtained without mediation on the basis of Article 184 k.p.c. the court fee is 1/5 of regular fee but no less than 30 PLN.

The regular court fee for matters of parental responsibility is 100 PLN (aprox. 25 Euro) and in child maintenance matters no court fees apply.

Option 2 Homologation of a settlement concluded in the process of mediation

If parents conclude a parental agreement as described above in the process of mediation (which can be conducted on the basis of an agreement to mediate by the parties) – it is possible to “homologate” the agreement by a court on the basis of Article 183 k.p.c. It is necessary that one parent apply to the court. A court will approve an agreement concluded in mediation unless it is contrary to the law or principles of social coexistence, or if it seeks to circumvent the law, or if it is incomprehensible or contradictory. Once approved by the court, a settlement agreement concluded in mediation will have the same legal effect as a settlement concluded before a court (Article 183¹⁴ § 1 k.p.c.).

a. *Which local court or other authority is competent*

According to Article 183¹⁴ § 1 and Article 183¹³ § 1 k.p.c.: the court of general or exclusive jurisdiction to hear the case.

Provided that Poland has international jurisdiction, the competent court for the proceeding is for:

- parental authority and access: court of the domicile of the child, if a child does not have domicile – the court of the place of his stay, if a child does not have a place of stay – the district court in Warsaw (Article 569 § 1 k.p.c.)
- child maintenance : court of the place of the domicile of the defendant or the child (Article 27 § 1 and 32 k.p.c.)

The starting point could thus be the district court (sąd rejonowy) of the place of residence of the child.

b. *Representation by attorneys mandatory?*

No.

c. *Are there other participants obligatory?*

No.

d. *Time required*

According to Article 183¹⁴ § 1 k.p.c. If the parties conclude a settlement agreement before in mediation, the court referred to in Article 183¹³ shall, at the party's request, take prompt action to approve such an agreement. However, in practice it depends on the court and can vary from 1 months to even 1 year (rather exceptionally) in some courts.

e. *Costs incurred (for rendering the agreement binding not for arriving at an agreement using mediation etc.)*

The approval of a settlement agreement concluded in mediation by the court is free of charge.

Option 3 Seizing the court and settle the case

This option is theoretically possible but it in practice it does not make sense as the option 1 is easier and faster and a whole package is approved in one proceeding. In Option 3 it is necessary to start two proceedings - contentious (maintenance) and non-contentious (parental responsibility). Then it is possible to settle the cases. As the result there are two settlements concluded before the courts which have the same legal effect as court decisions and which should be enforced in other Member State.

This option could possibly be used if parents already started proceeding; it can be faster to settle the case than to start a new procedure for approval of a whole settlement.

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a. Which local court or other authority is competent

The starting point could thus be the court of the place of residence of the child (for more details see Option 2)

All matters - parental authority, contact and maintenance - are dealt by Sąd Rejonowy (District Court), Wydział Rodzinny i Nieletnich (Family and Juvenile Division) but in different types of proceedings: contentious (maintenance) and non-contentious (parental responsibility). There is a minor chance that the proceedings will be treated by the same judge.

b. Representation by attorneys mandatory?

No.

c. Are there other participants obligatory?

No.

d. Time required

The length of proceeding depends on the court and the judge's caseload.

e. Costs incurred (for rendering the agreement binding not for arriving at an agreement using mediation etc.)

The court fee for matters of parental responsibility is 100 PLN (aprox. 25 Euro).

In child maintenance matters no court fees apply (exemption from costs pursuant to art. 96 section 1 point 2 Act of July 28, 2005 on court costs in civil matters (as of December 2019)).

Fees for a lawyer (which is not mandatory) depending on different factors - mainly the size of the city, the renown of the lawyer and his/her fees depending on the complexity of the case, in a simple case the fee starts from 1500 PLN, i.e. aprox. 350 Euro.

Option 4 Formally drawing up the agreement as an authentic instrument before a notary

In case of child maintenance, place of residence of a child and contacts it is possible to formally draw up the agreement as an authentic instrument before a notary (a notarial deed). However only in case of maintenance (child) it is possible to render it enforceable. It is done in the form of a notary deed in which the debtor submits himself to enforcement. According to Article 777 § 1 k.p.c. a notary deed which contains debtor's voluntarily submission to enforcement is considered as an enforcement order.

A notary needs to verify whether the agreement complies with the law. He/she will refuse to draw up the authentic act if the agreement is contrary to law.

a. Which local court or other authority is competent

Any notary in Poland can be chosen as notarial practices are not limited by law to a specific territorial range.

b. Representation by attorneys mandatory?

No.

c. Are there other participants obligatory?

No.

d. Time required

One visit is sufficient.

e. Costs incurred (for rendering the agreement binding not for arriving at an agreement using mediation etc.)

Depends on the notary, size of the city and specificity of the case (amount of maintenance and duration of the maintenance contract (eg. for a contract for 10 years 1000 PLN (around 230 Euro) by month the notary fee (not including taxes) will be around 1200 PLN (280 Euro)).

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Option 5* Seizing the court in order to divorce and turn the agreement into a decision

If a couple plans also to end the marriage, they can file for divorce and all matters will be decided in the divorce proceedings by one and the same court.

In Poland in case of divorce, legal separation and parental authority (i.e. the question as to which parent has parental authority) party autonomy is excluded. In consequence these matters can be decided exclusively by a court (Articles 56 § 1, 61¹ §1 and 93 § 2 k.r.o.). Even if parents have agreed on these issues they must apply to the court to obtain a court decision.

In divorce cases it is mandatory for the court to decide on parental authority concerning the common minor child and the parents' contact with the child, as well as to determine the amount in which each spouse is required to bear the costs of maintaining and upbringing the child. The Court will take into account the written agreement of the spouses on how to exercise parental authority and maintaining contact with the child after the divorce, if it is consistent with the best interest of the child (Article 58 § 1 k.r.o.).

a. Which local court or other authority is competent

Divorce is dealt by another level of the judiciary - Sąd Okręgowy (Regional Court). But within divorce proceeding the Regional Court is competent (and even obliged) to deal with all the matters relating to the child. A competent court is the court of the last place of residence of the spouses (Article 41 k.p.c.).

b. Representation by attorneys mandatory?

No.

c. Are there other participants obligatory?

No.

d. Time required

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In case if a divorce if parties agree to all issues it is possible to obtain it after fist hearing which depends on the court caseload (between 2-3 months in some courts and even 8 months in others after filing a divorce petition).

e. Costs incurred (for rendering the agreement binding not for arriving at an agreement using mediation etc.)

For divorce matters the court fee is 600 PLN (about 125 Euro) and it covers also all the decisions relating to the child (as the court is obliged to decide on this). If the parties apply for no-fault divorce (divorce without adjudicating on guilt) half of the fee (300 PLN) is returned. The fee does not cover fees for a mediation (max. 450 PLN i.e. aprox. 105 Euro), lawyer (which is not mandatory) depending on different factors (mainly the size of the city, the renown of the lawyer and his/her fees depending on the complexity of the case, in a simple case the fee starts form 1500 PLN, i.e. aprox. 350 Euro).





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Step 3

Step 3: Making (the content of) the agreement, which is now enforceable in Poland, travel cross-border with the assistance of EU law and guaranteeing enforceability in EU State B (not Denmark)

From the point of view of EU law the enforceability of a decision/ a judicially approved settlement/ an authentic acts is governed by two different regulations – Brussels IIa as to place of residence and contacts and Maintenance regulation for maintenance.

A competent authority for completing certificates is for:

- annex II Certificate in accordance with Article 39 Brussels IIa Reg.: president of the department in the court which adopted a judgment/ approved a settlement (Article 1144¹ k.p.c.) but in practice this competence is usually delegated on the court which adopted a decision / approved a settlement,
- annex III certificate in accordance with Article 41(1) Brussels IIa: president of the department in the court which adopted a judgment/ approved a settlement (Article 1144¹ k.p.c.) but in practice this competence is usually delegated on the court which adopted a decision/ approved a settlement,
- annex I Form in accordance with Article 20 Maintenance Reg. (relating to a decision or a court settlement): a court which adopted a decision / approved a settlement (Article 795¹² §§ 1 and 2 k.p.c.),
- annex III Form of the EU-Maintenance Reg. (relating to an authentic instrument): a district court of the place where the authentic instrument was drafted (Article 795¹² § 3 k.p.c.).

Option 1 and Option 2

The settlement approved by the court becomes legally binding and enforceable in Poland (Method A can be used to let the agreement travel cross border as a court decision).

The authority which would fill in which form /annex of the relevant EU Regulations: a part of a settlement relating to:

- place of residence (annex II certificate, Article 39 Brussels IIa) and contacts (annex III certificate Article 41(1) Brussels IIa): president of the department in the court which approved a settlement (in practice the court which approved a settlement),
- maintenance (annex I, Article 20 EU-Maintenance Reg.): a court which approved a settlement.

Option 3

There are two settlements reached before the courts which are legally binding and enforceable in Poland (Method A can be used to let the agreements travel cross border as a court decision).

The authority which would fill in which form /annex of the relevant EU Regulations: a settlement relating to:

- place of residence of a child (annex II certificate, Article 39 Brussels IIa) and contacts (annex III certificate Article 41(1) Brussels IIa): president of the department in the court which approved a settlement (in practice the court which approved a settlement),
- maintenance (annex I, Article 20 EU-Maintenance Reg.): a court which approved a settlement.

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Option 4

The agreement about child maintenance as the obligation of the father to pay maintenance for his child has been documented as authentic instrument before a notary public and becomes by that way legally binding and enforceable in Poland (Method B can be used to let the agreement travel cross border according to Article 48 Maintenance Regulation).

The authority which would fill in which form /annex of the relevant EU Regulations: an authentic instrument: annex III Form of the EU-Maintenance Reg.: a district court of the place where the authentic instrument was drafted (Article 795¹² § 3 k.p.c.).

Option 5

A divorce and all other matters were decided by a court (Method A can be used to let the court decision travel cross border).

The authority which would fill in which form /annex of the relevant EU Regulations: a part of a court decision relating to:

- place of residence of a child (annex II Certificate in accordance with Article 39 Brussels IIa Reg) and contacts (annex III certificate in accordance with Article 41(1) Brussels IIa): president of the department in the court which approved a settlement (in practice the court which approved a settlement),
- maintenance (annex I Form of the EU-Maintenance Reg.): a court which adopted a decision.

The authors of the present study wish to underline how this is a speculative solution, as they were unable to find any practice in regard of agreements concluded before the court, where a certificate for circulation under the Brussels IIa Regulation was actually required.



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Executive summary



Step 1

Poland

Executive summary - International Abduction Case – Return Agreement

(For details please consult the Polish National Best Practice Tool)

International child abduction inside the EU: The unmarried parents of a child (age: 10 years) who habitually reside in State B split up. They have joint custody of their child. Against the wish of the father, the mother takes the child to her home-country, Poland, with the intention to settle there. Since the mother does not return the child voluntarily, the father applies for the return of the child under the 1980 Hague Child Abduction Convention to the competent court in Poland.

In parallel to the Hague return proceedings, the parents follow specialised mediation and come to a return agreement, which regulates the following main aspects:

- Mother and child will return to State B (details given, including the modalities of the return and cost payment)
- The parents will continue to exercise the rights of custody jointly.
- The child will live with the mother in State B; father and child will maintain regular contact (details given).
- The father will pay a fixed amount of child maintenance on a monthly basis (details given).

Step I: EU / international legal framework needs to be analysed to identify in which country the family agreement should first be rendered legally binding and enforceable to make best use of the mechanism of cross-border recognition and enforcement of EU / international law.

In international child abduction cases **special rules on international jurisdiction apply for matters of parental responsibility** in accordance with Art. 10 Brussels IIa Regulation (equivalent to Art. 7 of the 1996 Hague Child Protection Convention). These rules preserve the international jurisdiction of the authorities in the State of the child's habitual residence *ante* abduction (= State B). In addition, Art. 16 of the 1980 Hague Child Abduction Convention blocks jurisdiction for custody proceedings in the State to which the child has been taken (=State A) as soon as a judicial or administrative authority in this State informed of the abduction and until it has been determined that the child is not to be returned or no return application is lodged within a responsible time.

This ensemble of rules aims to protect the children affected by international child abduction. The provisions are premised on the notion that the most appropriate forum to determine the long-term merits of custody is usually the State of the habitual residence of the child (=State B) (see Art 8 Brussels IIa Regulation) and that the child's removal or retention by one parent in breach of the other parent's custody rights should not bring about a change of jurisdiction and provide procedural advantages for the taking parent.

Consequently, one might be tempted to simply refer the parties to the authorities of State B in order to render their return-agreement enforceable, since the authorities in State A lack international jurisdiction on the merits of custody. However, this can cause **major inconveniences in practice**: Time is of the essence in international child abduction cases, therefore the court seized with Hague return proceedings in State A is under the legal obligation to decide swiftly (six-weeks-time-frame imposed by Art. 11(3) Brussels IIa Regulation).



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Step 2

The authorities in State B are under no such obligation when being asked to render the parental agreement enforceable. For the parties who have negotiated a return agreement it will be **crucial to avoid partial binding force of the agreement**. Where the Hague return proceedings end with a return order while the agreed conditions to the return and the agreed custody and contact arrangement following the return are not yet binding, we have a de facto partial validity of the agreement which is likely to be a source for new conflicts. Even where the authorities in State B are ready to act swiftly and render the return agreement legally binding within the time frame the Hague court has to act, difficulties may arise, where the authorities of State B request the presence of the abducting parent and / or wish to interview the child.

Specialised judges have over the past decades developed **good practices and tools (such as direct judicial communications)** to assist the parties in upholding the amicable solution of their dispute. In practice, it is often thanks to personal engagement of Hague judges and the efforts undertaken by specialised judges in the Hague International Network of Judges as well as the European Judicial Network, that practical solutions can be found to bring about a binding force of agreed solutions despite challenges imposed by the legal systems involved. The promoted way forward is twofold and can be summarised as follows: (1) Giving the return agreement in front of the Hague court (State A) binding force to the maximum extent feasible and (2) doing everything feasible to obtain binding force for the remainder of the agreement as speedily as possible in the (State B), ideally before the Hague proceedings are terminated in State A.

For proceedings commenced on or after 1 August 2022, the new Brussels IIa (recast) Regulation will remedy the above described dilemma: In cases of wrongful removal or retention the international jurisdiction can be prorogated in line with Article 10 of the new Regulation, see Article 9 of the Brussels IIa (recast) Regulation. In its Recital 22 the new Regulation furthermore encourages Member States with concentrated jurisdiction to “consider enabling the court seized with the return application under the 1980 Hague Convention to

exercise also the jurisdiction agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility where agreement of the parties was reached in the course of the return proceedings. Such agreements should include agreements both on the return and the non-return of the child. If non-return is agreed, the child should remain in the Member State of the new habitual residence and jurisdiction for any future custody proceedings there should be determined on the basis of the new habitual residence of the child.”

The following summary of national law will address the legal situation under the current Brussel IIa Regulation but will also be most useful to assist in cases under the new Brussels IIa (recast) Regulation since it will highlight what competencies the court seized with Hague return proceedings has under national law to render agreements on matters usually contained in typical return agreements legally binding and enforceable.

Step 2: How can the court seized with Hague return proceedings in Poland assist with rendering the return agreement legally binding and enforceable? Can the judge seized with Hague return proceedings render all parts of the return agreement for which international jurisdiction is given in State A legally binding? What can the judge seized with Hague return proceedings do to assist with rendering the remainder of the agreement binding in State B?

(1) *Which local court has jurisdiction for Hague return proceedings & whether there is specialised / concentrated jurisdiction for Hague cases?*

In 2018, Poland reformed its civil procedure and introduced a concentration of jurisdiction in order to better guarantee the functioning of the Convention and implement the objective of swift return proceedings. Under Polish law, applications for return proceedings pursuant to the Hague Convention shall be filed before one of 11 Regional courts in the first instance (in Białystok, Gdańsk, Katowice, Kraków, Lublin, Łódź, Poznań,

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Rzeszów, Szczecin, Warszawa, Wrocław). A Court of Appeal in Warsaw serves as second instance court (Article 569¹ k.p.c.). According to Article 578² § 1 k.p.c. in proceedings in cases involving removal of a person from parental responsibility or guardianship held in accordance with an Hague Convention of 1980 participants must be represented by advocates or legal advisors. Few exceptions are provided in § 2 (where the participant, its body, statutory representative or an attorney is: 1) a judge; 2) public prosecutor; 3) notary; 4) a professor or PhD of legal sciences; 5) an advocate; 6) legal advisor; 7) an attorney of the State Treasury Attorneys' Office). In Hague convention cases a public prosecutor shall be served with a copy of the petition and a notice of scheduled dates of hearing.

(2) *Whether national procedural law allows the Hague judge to render all parts for which international jurisdiction could be assumed in State A (return & modalities of return etc & possibly maintenance matters) legally binding and also enforceable?*

A consequence of the 2018 reform is that the courts competent to hear Hague proceedings (regional courts) differ from those who are competent to hear regular parental responsibility and maintenance cases (district courts). Moreover it is stated expressly in the law (Article 598² § 1 k.p.c.) that no issues concerning parental authority may be decided in the course of 1980 Hague Convention proceedings. Proceedings concerning such issues shall be stayed by the family court ex officio upon receipt of the information about an application filed involving the removal of a minor under parental responsibility or a ward. The court shall resume proceedings as soon as proceedings involving removal of a minor from parental responsibility or guardianship are validly concluded. Case law reveals that the courts interpret the Hague Convention in such a manner that Hague court is not competent to decide about parental authority or methods of its exercise¹, nor establish the place of a domicile of a child².

(3) *What options has the judge seized with Hague return proceedings in line with national procedural law to assist the parties in obtaining binding legal force to the remainder of their agreement in State B (direct judicial communications etc.)?*

No options found.

1 Sąd Okręgowy w Gliwicach, 26.11.2015, III Ca 1088/15.

2 Sąd Okręgowy w Suwałkach, order of 24.04.2017, I Ca 119/17.

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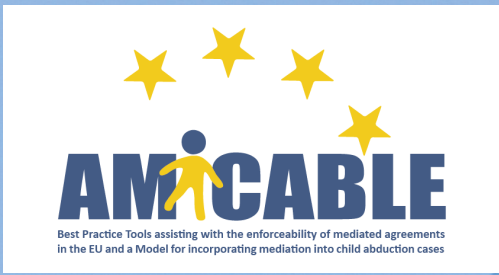
Change of perspective – **Assuming the child had been taken to State B and Poland would be the State of return**

Hague return proceedings are ongoing in State B, how can the parts of the return agreement on custody and contact, for which international jurisdiction remains in Poland be rendered legally binding and enforceable in the most swift way possible, ideally before the Hague proceedings are concluded?

In Poland in case of **parental authority** (this notion does not include contacts) party autonomy is excluded. In consequence these matters can be decided exclusively by a court (Articles 61¹ §1 and 93 § 2 k.r.o.). Even if parents have agreed on these issues they must apply to the court in non-contentious proceeding to obtain a court decision. In our case the parental authority (to whom it belongs) does not change (the parents will continue to exercise the rights of custody jointly). The rest of matters – place of living, contacts and maintenance can be settle by the parties and approved by the court. The prohibition of deciding on issues concerning parental authority in the course of 1980 Hague Convention proceedings introduced by Article 598² § 1 k.p.c. relates only to such proceedings pending before Polish courts.

If parents conclude a parental agreement as described above in the process of mediation it is possible to “homologate” the agreement by a court on the basis of Article 183 k.p.c. It is necessary that one parent apply to the court. A court will approve an agreement concluded in mediation unless it is contrary to the law or principles of social coexistence, or if it seeks to circumvent the law, or if it is incomprehensible or contradictory. Once approved by the court, a settlement agreement concluded in mediation will have the same legal effect as a settlement concluded before a court (Article 183¹⁴ § 1 k.p.c.).

It is very unlikely that the approval of a settlement will be done within the six-weeks-timeframe imposed by Art. 11(3) Brussels IIa Regulation.



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Step 1

Poland

Executive summary - International Abduction Case – Non-Return Agreement

in cases where international jurisdiction on matters of parental responsibility has shifted to the State to which the child had been taken (Cases where the international jurisdiction has not shifted will have to be solved as described under International Abduction Case – return agreement)

(For details please consult the Polish National Best Practice Tool)

International child abduction inside the EU: The unmarried parents of a child (age: 10 years) who habitually reside in State B split up. They have joint custody of their child. Against the wish of the father, the mother takes the child to her home-country, Poland, with the intention to settle there. Since the mother does not return the child voluntarily, the father applies for the return of the child under the 1980 Hague Child Abduction Convention to the competent court in Poland.

In parallel to the Hague return proceedings, the parents follow specialised mediation and come to a return agreement, which regulates the following main aspects:

- Mother and child will not return, they will from now on live in Poland
- The parents will continue to exercise the rights of custody jointly.
- The father and child will maintain regular contact (details given including payment of travel costs).
- The father will pay a fixed amount of child maintenance on a monthly basis (details given).

Step I: EU / international legal framework needs to be analysed to identify in which country the family agreement should first be rendered legally binding and enforceable to make best use of the mechanism of cross-border recognition and enforcement of EU / international law.

Since we focus here on those cases of international child abduction, where **international jurisdiction for matters of parental responsibility** has shifted in accordance with Art. 10 Brussels IIa Regulation (equivalent to Art. 7 of the 1996 Hague Child Protection Convention), the ideal starting point jurisdiction to render the non-return agreement legally binding and enforceable is Poland, i.e. the State to which the child has been taken.

These cases are much easier to handle than those where the international jurisdiction has not shifted. However, the settings of national law may nonetheless make it difficult to render the agreement with the above ingredients binding at once by the judge seized with the Hague proceedings or another authority within the remainder of the six-weeks-timeframe imposed by Art. 11(3) Brussels IIa Regulation. For the parties who have negotiated a non-return agreement it will be **crucial to avoid partial binding force of the agreement**. Where the Hague return proceedings end with a non-return order while the agreed conditions to the non-return and the agreed custody and contact arrangement are not yet binding, we have a de facto partial validity of the agreement which is likely to be a source for new conflicts.



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Step 2

For proceedings commenced on or after 1 August 2022, the new Brussels IIa (recast) Regulation will allow for a prorogation of international jurisdiction in line with Article 10 of the new Regulation, see Article 9 of the Brussels IIa (recast) Regulation. In its Recital 22 the new Regulation furthermore encourages Member States with concentrated jurisdiction to “consider enabling the court seized with the return application under the 1980 Hague Convention to exercise also the jurisdiction agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility where agreement of the parties was reached in the course of the return proceedings. Such agreements should include agreements both on the return and the non-return of the child. If non-return is agreed, the child should remain in the Member State of the new habitual residence and jurisdiction for any future custody proceedings there should be determined on the basis of the new habitual residence of the child.”

The following summary of national law addresses the legal situation under the current Brussel IIa Regulation. However, since the focus is here on cases where the international jurisdiction has shifted, the analysis will be most useful for cases under the new Brussels IIa (recast) Regulation since it will highlight what competencies the court seized with Hague return proceedings has under national law to render agreements on matters usually contained in typical return agreements legally binding and enforceable.

Step 2: How can the court seized with Hague return proceedings in Poland assist with rendering the return agreement legally binding and enforceable? Can the judge seized with Hague return proceedings render the entire non-return agreement legally binding and enforceable simultaneously with ending the Hague proceedings? If not, what can the judge seized with Hague return proceedings do to assist with rendering the remainder of the agreement binding in State A most swiftly?

- (1) Which local court has jurisdiction for Hague return proceedings & whether there is specialised / concentrated jurisdiction for Hague cases?

In 2018, Poland reformed its civil procedure and introduced a concentration of jurisdiction in order to better guarantee the functioning of the Convention and implement the objective of swift return proceedings. Under Polish law, applications for return proceedings pursuant to the Hague Convention shall be filed before one of 11 Regional courts in the first instance (in Białystok, Gdańsk, Katowice, Kraków, Lublin, Łódź, Poznań, Rzeszów, Szczecin, Warszawa, Wrocław). A Court of Appeal in Warsaw serves as second instance court (Article 569¹ k.p.c.).

According to Article 578² § 1 k.p.c. in proceedings in cases involving removal of a person from parental responsibility or guardianship held in accordance with an Hague Convention of 1980 participants must be represented by advocates or legal advisors. Few exceptions are provided in § 2 (where the participant, its body, statutory representative or an attorney is: 1) a judge; 2) public prosecutor; 3) notary; 4) a professor or PhD of legal sciences; 5) an advocate; 6) legal advisor; 7) an attorney of the State Treasury Attorneys' Office).

In Hague convention cases a public prosecutor shall be served with a copy of the petition and a notice of scheduled dates of hearing.

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(2) *Whether national procedural law allows the Hague judge (assuming international jurisdiction has shifted) to render all parts (non-return, custody and contact arrangement, & possibly maintenance matters) legally binding and also enforceable?*

A consequence of the 2018 reform is that the courts competent to hear Hague proceedings (regional courts) differ from those who are competent to hear regular parental responsibility and maintenance cases (district courts). Moreover it is stated expressly in the law (Article 598² § 1 k.p.c.) that no issues concerning parental authority may be decided in the course of 1980 Hague Convention proceedings. Proceedings concerning such issues shall be stayed by the family court ex officio upon receipt of the information about an application filed involving the removal of a minor under parental responsibility or a ward. The court shall resume proceedings as soon as proceedings involving removal of a minor from parental responsibility or guardianship are validly concluded.

Case law reveals that the courts interpret the Hague Convention in such a manner that Hague court is not competent to decide about parental authority or methods of its exercise¹, nor establish the place of a domicile of a child².

(3) *If the Hague judge cannot render the entire agreement binding and enforceable, what options has the judge in line with national procedural law to assist the parties in obtaining binding legal force to the remainder of their agreement in State B (direct judicial communications etc.)?*

It seems that it is not possible to obtain binding legal force to the whole agreement in Poland.

Regular family courts cannot take any decision on parental authority (including the change of the place of living of a child) if the Hague proceedings are ongoing. As contacts are not a part of parental authority in Poland, theoretically it is possible that the issues of contacts and maintenance are regulated during the Hague proceedings (if parents manage to convince the court that international jurisdiction has shifted to Poland).

If parents conclude a parental agreement as described above in the process of mediation it is possible to “homologate” the agreement by a court on the basis of Article 183 k.p.c. It is necessary that one parent apply to the court. A court will approve an agreement concluded in mediation unless it is contrary to the law or principles of social coexistence, or if it seeks to circumvent the law, or if it is incomprehensible or con-

tradictory. Once approved by the court, a settlement agreement concluded in mediation will have the same legal effect as a settlement concluded before a court (Article 183¹⁴ § 1 k.p.c.).

But it is very unlikely that the approval of a settlement will be done within six-weeks-timeframe imposed by Art. 11(3) Brussels IIa Regulation.

No options for the Hague judge to assist the parties in obtaining binding legal force to the remainder of their agreement in State B were found.

1 Sąd Okręgowy w Gliwicach, 26.11.2015, III Ca 1088/15.

2 Sąd Okręgowy w Suwałkach, order of 24.04.2017, I Ca 119/17.