

**JOINT INTERNATIONAL  
CONFERENCES**

**10<sup>TH</sup> EDITION**  
EUROPEAN INTEGRATION  
REALITIES AND PERSPECTIVES

**5<sup>TH</sup> EDITION**  
THE GLOBAL ADVANCEMENT  
OF UNIVERSITIES AND COLLEGES

**Some Aspects of International Children Abduction - Theoretical and  
Practical Approach from the Perspective of the European Law and Judicial  
Practice**

**Gabriela Lupșan<sup>1</sup>**

**Abstract:** Everyday life revealed even in the media by presenting cases of international abduction of minors, on the one hand, and on the other hand, the existence of cases increasingly complex from the national/ EU practice, to which we should add the insufficient analysis in the doctrine of the topic in representing some evidence to support the elaboration of this paper. Through its international and / or European regulations (Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which is supplemented by Regulation (EC) no. 2201/2003 of 27 November 2003 concerning jurisdiction, the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, (prevailing the latter) and national ones (Law no. 63/2014 amending and supplementing Law no. 369/2004 on the application of the Convention on the Civil Aspects of International Child Abduction which Romania adhered to by the Law no. 100/199), the legislator sought to ensure the prompt return of children abducted in the Member State of origin, the objective being the same: discouraging underage child abduction by a parent or by third parties, usually relatives and, in case of committing an act of international abduction of minors, ensuring the best interests of the child through the cooperation of the competent authorities in the field. The structure includes sections that address theoretical issues (e.g. the notion of international abduction of minors, regulations, procedure for solving the request, the competent authorities) and practical aspects, without neglecting the interpretation given by the Court of Justice of the European Union of some texts from the Regulation.

**Keywords:** return of the child; the child's residence; jurisdiction; exequatur; the EU Court of Justice

## **1. The Regulations**

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction was ratified by all Member States of the European Union, including Romania and it shall apply in cases of child abduction between Member States. The provisions of the Hague Convention of 1980 are supplemented by the *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*<sup>2</sup>, so that the provisions of the Regulation prevails over the Convention in the

---

<sup>1</sup> Assistant Professor, PhD, Faculty of Law, “Danubius” University of Galati, Romania, Address: 3 Galati Boulevard, 800654 Galati, Romania, Tel.: +40.372.361.102, fax: +40.372.361.290, Corresponding author: gabriela.lupsan@univ-danubius.ro.

<sup>2</sup> Published in OJ L 338, 23.12.2003, p. 1. The Regulation applies to all Member States of the European Union, except Denmark, from March 1, 2005 (except articles 67-70, which entered into force on 1 August 2004). It is known in the specialized literature as “Brussels II bis Regulation”. On this regulation, see Ioana Burduf, Ulrike Frauenberger, Maria

subjects covered by the Regulation. Regarding Romania, the last legislative act on this matter is Law no 63/2014 amending and supplementing Law no. 369/2004 on the application of the Convention on the Civil Aspects of International Child Abduction to which Romania adhered by the Law no. 100/1992.<sup>1</sup>

Whether it is national or European/international legislator, its purpose is the same, namely: discouraging underage child abduction by a parent or by third parties, usually relatives, and, in the case of committing an international act of a minor's abduction, it is regarded the best interest of the child by the cooperation of the competent authorities in the field. By establishing the rules of law it is intended that, in the case of international child abduction, it is ensured the prompt return of the abducted child in the Member State of origin.

Also, the Court of Justice of the European Union and the European Court of Human Rights have established a set of principles in their jurisprudence regarding the international child abduction primarily taking into account the best interests of the child.

The theme of this material takes into account the conditions in which the kidnapped child's return in the Member State of origin, when a child is taken by one parent, divorced or separated from each other, in the State of his habitual residence.

## **2. The Concept of International Child Abduction. The Concept of Habitual Residence of the Child**

The term “international child abduction”, under the civil aspect and applying only to minors under the age of 16, on which a judgment or administrative decision or an agreement concluded under the law of a contracting State (e.g. notarial agreement or a mediation agreement) and of custody, rights to visitation or home setting is defined by article 3 of the Hague Convention of 1980 as follows: “*The removal or retention of a child is considered illicit in the following cases:*

*a) it is in breach of rights of custody attributed to a person, institution or body acting either separately or jointly, by the law of the state where the child will have his habitual residence immediately before his removal or retention and*

*b) at the time of removal or not returning this right was actually exercised, either jointly or alone taking action or it would have been so exercised, if such circumstances would not have occurred”.*

The same issue is established in the provisions of art. 2, point 11 of the Regulation No. 2201/2003 which defines the term “wrongful removal or retention of a child”, as for the child's removal or retention in the case where:

“A) there has been a breach of rights of custody acquired by a court, by a provision established by the law or / a current agreement having legal effect under the law of the Member State, where the child is habitually resident immediately before the removal or retention and

---

Kaller, katalin Markovits, Viviana Onaca, Flavius George Păncescu, Walter Rechberger, Camelia Tobă, *Cooperarea judiciară în materie civilă și comercială, Manual/ Judicial cooperation in civil and commercial matters, Manual*, pp. 140-158, address available at [http://www.just.ro/Portals/0/CooperareJudiciara/Doc%201\\_Manual%20Civil.pdf](http://www.just.ro/Portals/0/CooperareJudiciara/Doc%201_Manual%20Civil.pdf); (Buglea, 2013, pp. 222-225)

<sup>1</sup> Published in the Official Monitor of Romania, Part I, no. 352 of 05.13.2014, under which Law no. 369/2004 was republished in the Official Monitor of Romania, Part I, no. 468 of 25 June 2014.

b) for the custody to be actually exercised, alone or jointly, at the time of removal or retention, or it would have been so exercised, if the events have not occurred. Custody shall be considered as being exercised jointly when one of the holders of parental responsibility may not, pursuant to a judgment or by the operation of law, decide on the child's place of residence, without the consent of the other holder of parental responsibility.”

Regarding the concept of “*habitual residence of the child*”, it corresponds to the place which reflects a certain degree of integration by the child in a family and social environment, the national court having the mission to establish where is this child's habitual residence, taking into account all relevant circumstances of the case.

The rule of habitual residence of the child is provided by **article 10 of Regulation no. 2201/2003**, governing jurisdiction **for travel or unlawful detention of a child**, meaning that the courts of the Member State where the child is habitually resident immediately before the cross-border abduction, *it retains jurisdiction* until the child has acquired a habitual residence into another Member State and additional conditions are met, namely:

- any person, institution or other body having rights of custody has acquiesced in the removal or retention of the child; or
- the child has resided in that Member State for at least one year after the person, institution or other body entrusted with the child had known or should have known the place where the child was, until the child has adapted to his new environment and until it was fulfilled at least one of the conditions expressly provided.

### 3. On Returning the Abducted Child

A court of a Member State called upon based on article 13 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, with a request for returning a child, who has been wrongfully removed or retained in a Member State, other than the Member State in which the child was habitually resident, immediately before his illicit removal or retention, applying the rules of this Convention, complemented by article 11 of Regulation no. 2201/2003, may decide, after a trial conducted by the fastest method prescribed by the *lex fori*, not exceeding six weeks<sup>1</sup>, from the moment it was applied, either the solution of the immediate return of the child or the solution of child's retention.

The courts of the Member States have not always been able to meet this deadline. However, it is clear, as confirmed by experts, that six-week period, where it needs to pass a judgment, is essential to send a signal on the importance of ensuring a rapid return of the child.

In the latter case, the non-return of the child, article 11, paragraph 6-7 of the Regulation No 2201/2003 provides for a special procedure, according to which this judgment, together with relevant documents shall be submitted either directly or through the central authorities of the two Member States court of origin (the Member State in which the child was abducted), for the latter, after administering the evidence and hearing the parties and the child, if necessary, to decide finally whether or not the child's return will occur. Only if the judgment is to return the child, it is directly recognized and enforceable

---

<sup>1</sup> Experts have found that the courts of the Member States have not always been able to meet this deadline of six weeks in order to pass a judgment. Or, to meet this deadline is a signal of the importance of ensuring a rapid return of the child. See Report COM (2014) 225 final of the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of this Regulation, available at file:///C:/Users/HP/Downloads/1\_RO\_ACT\_part1\_v2.pdf.

in the requested Member State without the need for exequatur procedure. In this way, the rule is the suppression of exequatur for a judgment of a court from a Member State of origin, deciding the return of the child.

#### **4. The Proceedings before the Court of Origin**

In the proceedings before the court of origin, after the court from another Member State where the child is, has passed a judgment of non-returning the child, we make the following clarifications:

The court of origin should receive the documents from the court of the requested State within one month of the judgment of non-returning the child, under article 13 of the Hague Convention of 1980. When examining the case, **the court of origin** must notify the parties in accordance with article 11, paragraph 7 of the Regulation, information on the file and invites them to express their position within 3 months from the date of notification of acceptance or otherwise, so that the court of origin would examine the case.

Depending on the procedural attitude of the parties, there are two solutions for the court of origin:

- a decision to close the file, if the requested information is not received;
- the case is judged, if at least a party submits the requested information. In that case, the court of origin shall ensure that all parties have an opportunity to be heard (especially the child, unless it is considered inappropriate in relation to the age and maturity of the child), that there are considered the reasons for the judgment of non-return and there are assessed the evidence on which this decision was taken on the basis of article 13 of the Hague Convention of 1980. Finally, the solutions of the court of origin may be:
  - a. *a judgment of non-return of the child*, in which case the process will be closed. The competence to decide on the merits of the case is thus transferred to the courts of the Member State where the child **was removed**.
  - b. *a decision to return the child*, in which case the Regulation provides that this decision, as the decision on visiting rights is directly recognized and enforceable in other Member States, under the condition of providing a *certificate on the return of the child* (article 42, paragraph 1), certifying the compliance with the *procedural rules set out in article 42, paragraph 2 of the Regulation*.

#### **5. Legal Effects of Issuing the Certificate on Returning the Child**

After hearing the parties and the child, appreciation of the administrative evidence, the court of origin passes, where appropriate, the decision of returning the child, after it becomes enforceable, issuing the certificate. It was wanted by the declaring the enforceable judgment to prevent the dilatory appeals, promoting that unduly delay the return of the child's judgment. So, after the deadline expiry for lodging an appeal, the court may, on the right conferred by the Regulation and notwithstanding the provisions of the national law, that the judgment is enforceable.

The certificate on the returning the child produces two legal effects: to enforce the judgment in another Member State<sup>1</sup> “it is no longer needed for an exequatur application, the judgment of the court of origin

---

<sup>1</sup> About the procedure for recognition and enforcement of a judgment, see (Pancescu, 2013, pp. 679-720).

was considered, according to article 42, paragraph (1) of the Regulation, as it was given by a national court of the executing State; it makes impossible to challenge the recognition of the judgment.

In the procedure for enforcing a judgment for the return of the child, it is subject to the national law and the national authorities are called upon to apply the rules that guarantee efficient and rapid execution of judgments under the Regulation, without bringing prejudice to its objectives (e.g. in one case<sup>1</sup>, the ECJ held that article 31, paragraph (1) of Regulation no. 2201/2003, insofar as it provides that any person against whom the enforcement is sought, or the child cannot, at this stage of the procedure to present observations, it does not apply to proceedings of refusal of a judgment recognition, made without having previously been introduced a recognition application on the same judgment. In such a situation, the defendant, seeking recognition, may submit comments.

The party who wishes to request the execution of the return of the child's judgment, will provide a copy of the judgment of the court of origin and the certificate of returning the child, the exequatur is eliminated in the case of a judgment for the return of the child (article 45 of the Regulation).

## **6. Considerations on the European Court of Human Rights**

Analyzing the jurisprudence of the European Court of Human Rights related to the cases of returning the abducted child and the means of enforcement of the judgment in the State of origin may retain a series of conclusions, which we note below.

The Brussels Court recommends that each Contracting State to establish appropriate and sufficient legal means to ensure that the positive obligations incumbent upon it under article 8 of the European Convention of Human Rights (for example, cases *Maire vs. Portugal* on June 26, 2003, paragraph 76 and *Ignaccolo-Zenide vs. Romania* on January 25, 2000, paragraph 108).

Also, once the authorities of a Contracting State to the 1980 Hague Convention have found that a child has been illegally moved, under the Convention, the Court states that they have a duty to take the necessary and appropriate measures to ensure the return of the child, otherwise, it is violated the right to respect for family life established in article 8 of the European Convention on Human Rights (Case of *Iglesias Gil and AUI vs Spain* of 29 July 2003, paragraph 62)

Finally, the appropriateness of a measure to be considered by the Court in terms of speed of implementation, since the procedures for attributing parental responsibility, including the execution of the final judgment, need to be addressed urgently, as far as the passage of time can have irremediable consequences for the relationship between the child and parent, of whom the child has been separated (e.g. cases *Ignaccolo-Zenide vs Romania* on 25 January 2000, paragraph 102 and *Maire vs Portugal* of 26 June 2003, paragraph 74).

## **7. Conclusions**

The European Court in Luxembourg confirmed through practice, that Regulation no. 2201/2003 aims at preventing child abduction between Member States and without delay the returning of the child in case of kidnapping. In turn, the European Court of Brussels ruled that once it was found that a child has been wrongfully removed, the Member States should endeavor to ensure appropriate and effective

---

<sup>1</sup> See Case C-195/08.

return of the child and the failure of the efforts represents a violation of the right to family life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

## **8. References**

Buglea, C.-P. (2013). *Drept internațional privat din perspectiva reglementărilor europene aplicabile în domeniu și a noului Cod civil român/Private international law from the perspective of European regulations applicable in the field and the new Romanian Civil Code*. Bucharest: Universul Juridic.

Burduf, Ioana, Ulrike Frauenberger, Maria Kaller, katalin Markovits, Viviana Onaca, Flavius George Păncescu, Walter Rechberger, Camelia Tobă, *Cooperarea judiciară în materie civilă și comercială, Manual/ Judicial cooperation in civil and commercial matters, Manual*, pp. 140-158, [http://www.just.ro/Portals/0/CooperareJudiciara/Doc%201\\_Manual%20Civil.pdf](http://www.just.ro/Portals/0/CooperareJudiciara/Doc%201_Manual%20Civil.pdf).

Păncescu, F. (2013). *Procesul civil internațional în Noul Cod de procedură civilă. Comentariu pe articole/International civil process in the New Code of Civil Procedure. Comment on articles (coord. G. Boroi), Vol. II*. Bucharest: Hamangiu.

Report COM (2014) 225 final of the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of this Regulation available on file: [///C:/Users/HP/Downloads/1\\_RO\\_ACT\\_part1\\_v2.pdf](///C:/Users/HP/Downloads/1_RO_ACT_part1_v2.pdf).