

## **Conflict of Laws Conventions and their Reception In National Legal Systems. Poland**

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POLAND

### I. INTRODUCTORY ISSUES.

Poland has participated in the works of the Hague Conference on Private International Law (the Hague Conference) since the 1920's. Poland officially became a member of the Hague Conference – in its capacity of a permanent intergovernmental organisation based on the Statute of 1955 – on May 29, 1984. Being a European country, Poland is not a party to the Organisation of American States and does not participate in Inter-American Conferences on Private International Law. Poland has ratified 16 conventions elaborated under the aegis of the Hague Conference, including three so-called 'old conventions' adopted before the year 1945. Additionally, one convention has been signed but not yet ratified by Poland. The particular conventions are named in the following charts (with the dates of Poland's accession and of the publication of conventions in the Polish Official Journal):

Old conventions:

1.	Convention of 12 June 1902 relating to the Settlement of Guardianship of Minors	Poland's accession 1929	Publication 1929
2.	Convention of 17 July 1905 relating to Civil Procedure	Poland's accession 1926	Publication 1926
3.	Convention of 17 July 1905 relating to Deprivation of Civil Rights and similar Measures of Protection	Poland's accession 1929	Publication 1929

Post-war conventions:

1.	Convention of 1 March 1954 on Civil Procedure	Poland's accession 1962	Publication 1963
2.	Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors	Poland's accession 1993	Publication 1995
3.	Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions	Poland's accession 1969	Publication 1969
4.	Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents	Poland's accession 2004	Publication 2005
5.	Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters	Poland's accession 1996	Publication 2000
6.	Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations	Poland's accession 1996	Publication 2001
7.	Convention of 4 May 1971 on the Law Applicable to Traffic Accidents	Poland's accession 2002	Publication 2003
8.	Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters	Poland's accession 1996	Publication 2000
9.	Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations	Poland's accession 1996	Publication 2000
10.	Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations	Poland's accession 1996	Publication 2000
11.	Convention of 25 October 1980 on the Civil Aspects of International Child Abduction	Poland's accession 1992	Publication 1995

12.	Convention of 25 October 1980 on International Access to Justice	Poland's accession 1992	Publication 1995
13.	Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption	Signature 1995 Poland's ratification 1995	Publication 2000

Non-ratified conventions:

1.	Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation with respect to Parental Responsibility and Measures for the Protection of Children	Signed by Poland on Nov 20, 2000	
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The conventions to which Poland is a party can be categorized into three groups according to the criteria typically used by the Polish legal doctrine. Firstly, there are the classical conflicts conventions concerning the law applicable to particular substantive issues, i.e. the 1961 Convention on the Law Applicable in respect of the Protection of Minors, the 1961 Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions, the 1971 Convention on the Law Applicable to Traffic Accidents, and the 1973 Convention on the Law Applicable to Maintenance Obligations.

Secondly, there are conventions creating the uniform substantive law in a given area, i.e. the 1980 Convention on the Civil Aspects of International Child Abduction, or the 1993 Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption.

Last but not least, there is a significant number of conventions relating to international civil procedure, which deal with various procedural questions where an international element is involved. One of the important issues here is the recognition and enforcement of judgments handed down in other jurisdictions. This third category encompasses the 1954 Convention on Civil Procedure, the 1961 Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, the 1965 Convention on the Service Abroad of

Judicial and Extrajudicial Documents in Civil or Commercial Matters, the 1970 Convention on the Recognition of Divorces and Legal Separations, the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, the 1973 Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations, or the 1980 Convention on International Access to Justice.

The analysis that follows in the next part of this Report will be devoted to explaining the position of all Hague Conventions ratified by Poland in the light of the Polish constitutional law. Part III shall be more focused on the conventions from the first group, such as the classical conflicts conventions, whose provisions shall be compared with the domestic conflict-of-laws rules. Finally, Part IV is meant as an illustration of certain practical problems regarding the implementation and application of the Hague Conventions in Poland and it will concentrate on the reception of the two conventions from the second group (Uniform Law).

## **II. The position of the international conventions in the Polish legal system.**

1. According to art. 87 section 2 of the Polish Constitution of April 2, 1997, international conventions ratified by Poland constitute one of the binding sources of law whereby the rights and obligations of Polish citizens may be regulated. Upon their publication in the Polish Official Journal, the ratified conventions become directly applicable as an integral part of the domestic legal system (art. 91 section 1 of the Constitution). The only exception are the conventions whose application is not possible without an implementing statute. This is not the case with the Hague Conventions, though, since their provisions are sufficiently clear to be applied directly without the intermediation of a separate national statute.

*The act of ratification regarding international conventions is the prerogative of the President of the Republic of Poland (art. 133 section 1 point 1 of the Constitution). It has to be remembered though, that the majority of conventions in Poland can be ratified only upon a prior parliamentary consent which should be given in the form of an appropriate statute. This will apply to all conventions elaborated by the Hague Conference since they concern issues which belong to the statutory domain where the parliamentary consent is obligatory (see art. 89 section 1 point 5 of the Constitution).*

*The Constitution further provides that international conventions ratified upon obtaining the said consent shall hold priority over ordinary statutes in all cases when their respective provisions cannot be reconciled (art. 91 section 2). This means that whenever a possible clash appears, the court seized of the case should set aside the domestic statute and apply the provisions of the convention. Additionally, the Constitutional Tribunal in Poland is a body entrusted with, among other things, the general control of conformity of statutes and other domestic acts with the ratified international conventions (see art. 2 section 1 point 2 and 3 of the statute of 1 August 1997 on the Constitutional Tribunal, Dz.U. Nr 102, item 643 with subsequent changes). In the area of conflict of laws, the Polish statute of 1965 on private international law (Dz.U. Nr 46, item 290 with subsequent changes) clearly spells out in art. 1 §2 that the conflict rules contained therein do not apply whenever an international convention, to which Poland is a party, provides otherwise. The substantive regulation of the Polish PIL statute often looks different to the provisions of the Hague conflicts conventions but the statute shall always give way whenever any such convention is applicable. This will be explained in more detail in Part III below.*

*It should be pointed out that although the current Polish Constitution was enacted in 1997, its provisions concerning the position of ratified international conventions are also applicable to conventions which, like the majority of those elaborated by the Hague Conference, were ratified by Poland before the new Constitution entered into force (see art. 241 section 1 of the Constitution, which is specifically devoted to this issue).*

*In conclusion, the Polish Constitution makes it rather clear that the provisions of the Hague Conventions (whether regular conflicts conventions or conventions belonging to other groups mentioned in Part I of this Report) will be given priority in Poland and should be applied directly with precedence over other sources of domestic law (with the exception of the Constitution itself, which always enjoys the paramount supremacy).*

*2. It must also be mentioned that there is a possibility of a potential clash between the provisions of the ratified international conventions and the legal instruments enacted by the European Community to which Poland belongs. The Community possesses the competence to legislate in the area of private international law as well as in the field of*

*international civil procedure. This competence has been widely used in recent years. The legislative activities of the Community usually take the form of Regulations which are directly applicable and binding in the Member States and which enjoy precedence over domestic laws. It needs to be noted, though, that these instruments usually contain a special clause concerning the relationship with existing international conventions that cover the same subject matter. By virtue of that clause, priority is normally given to conventions already in force unless they are exclusively concerned with relations between two or more of the EU Member States with no participation of a third country. An example of such clause is art. 28 of the Regulation (EC) no. 864/2007 of the European Parliament and of the Council, dated 11 July 2007, on the law applicable to non-contractual obligations (Rome II) (Official Journal EU L 199/40 of 31 July 2007). Thus, it may be observed that, by virtue of the said art. 28, the Regulation, which will be applied from 11 January 2009, does not set aside the 1971 Convention on the Law Applicable to Traffic Accidents notwithstanding the fact that the Convention concerns the subject matter falling clearly within the scope of the Regulation. The issue seems quite important since the particular conflict rules of the two instruments differ significantly (see remarks in Part III, point 3 below).*

### **III. Conflicts conventions and domestic conflicts law – a substantive comparison**

*Bearing in mind that Poland officially joined the Hague Conference in 1984 and the main Polish statutory act containing the rules on the applicable law in civil, family and labour cases was enacted in 1965, it should not be surprising that there are differences between the original conflict rules as set out in the domestic PIL statute, and the contents of the Hague Conventions ratified by Poland in the years to come.*

*It has already been said that the Hague Conventions enjoy precedence over the statutory rules whenever the case at hand falls within the scope of a particular convention. The prevailing view in Poland holds that the provisions of the ratified conventions are applicable not only in relations between their signatories but that they generally substitute all domestic rules which were formerly in force with regard to the subject matter covered by a given convention. This means that in certain areas, such as*

*the form of testamentary dispositions regulated by the 1961 Convention, the counterpart provisions of the PIL statute are in fact never used (see point 2 below). This approach is possible because the Hague Conventions themselves typically provide for their universal application whether the designated applicable law is that of a Contracting State or not (cf. art. 6 of the 1961 Convention on the Conflicts of Laws relating to Testamentary Dispositions). Thus, the conclusion is that whenever the scope of statutory and conventional rules is the same, the Polish PIL statute is simply set aside (cf. the judgment of the Polish Supreme Court of 31 May 1975, III CZP 78/75, OSNCP 1976/2/33).*

*To make the comparison between the Hague Conventions and the domestic law, the four classical conflicts conventions to which Poland is a party shall be presented against the background of the Polish conflict rules as set forth in the statute of 12 November 1965 on private international law (the Polish PIL).*

Additionally, some remarks will be made concerning the official draft of a new Polish PIL statute which was elaborated by the Codification Commission on Civil Law and was widely discussed in the recent months (the 2007 draft was published in the textbook of M. Pazdan, *Prawo Prywatne Międzynarodowe*, 10<sup>th</sup> ed., Warszawa 2007, p. 349 ff). Although it is difficult to predict whether the enactment of the new statute will take place in the foreseeable future, the solutions proposed in the draft are definitely worth considering in this Report.

#### 1. The Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors.

The Convention in question applies to minors who hold that status in accordance with the domestic law of the State of their nationality and that of their habitual residence (art. 12). The authorities with the competence to take measures directed at the protection of the person or property of a minor are the judicial or administrative authorities of the State of its habitual residence (art. 1) and the applicable law is the domestic law of those authorities (art. 2).

By way of exception, if the authorities of the State of the minor's nationality consider that the interests of the minor so require, they may, after having informed the

authorities of the State of its habitual residence, take measures according to their own law for the protection of the person or property of the minor (art. 4). Moreover, all Contracting States are bound to recognise the authority concerning the minor which arises directly from the domestic law of the State of the minor's nationality.

*Under Polish private international law, as it stands now, the issue of the protection of minors is not directly dealt with and it seems to be covered by the scope of two separate conflict rules concerning, respectively, the relationships between parents and child, which includes the question of parental authority (art. 19 §1 Polish PIL), and the institution of guardianship (art. 23 §1 Polish PIL). Such regulation on the conflict-of-laws level reflects the divisions present in the Polish substantive family law where the care and custody over minors is exercised either by parents with formal parental authority or by a guardian designated by the court. Within both institutions the child is expected to be provided with sufficient protection which – at least under Polish substantive law – is exercised with some control of the court.*

*In both cases mentioned above, the applicable law will be the national law of the person to be protected i.e. the child or the pupil. It is only when the national law cannot be identified (incl. the case of apatrids), a general subsidiary rule of the PIL statute comes into play and provides for the application of the law of domicile (art. 3 Polish PIL). Finally, the last resort rule is that when the circumstances important for finding applicable law cannot be ascertained, the Polish law applies (art. 7 Polish PIL).*

*For the sake of the analysis that follows in the remaining part of this Report, it needs to be noted in passing that art. 3 and art. 7 of the Polish PIL will apply in all cases when the connecting factor of a given conflict rule does not make it possible to identify the law applicable in the first place.*

Coming back to the main point, it may be observed that, apart from the 1961 Hague Convention, in cases when the Polish court is seized of the matter concerning the protection of minors (whether under parental authority or guardianship), by virtue of conflict-of-laws rules currently in force in Poland, it is normally the law of the nationality of the minor that would apply and not the law of its habitual residence. This marks a major difference from the 1961 Convention since the latter evidently favours the solution where protection



measures are taken by the authorities which are ‘closest’ to the minor and in accordance with local law.

However, it is instructive to analyse the appropriate provisions of the 2007 PIL draft where important changes were put forward. Firstly, the issue of protection of minors (and in fact of all persons without full capacity for legal acts) was covered by a single conflict provision (art. 13) which – as the draft expressly stipulates – is meant to apply both in case of persons under parental authority or under guardianship. Moreover, the applicable law designated by art. 13 is the law of the country where – at the time when the protective measure is needed – the person in question has their habitual residence.

Thus, without a direct reference to the 1961 Convention, the provisions of the 2007 PIL draft appear to be at least inspired by the Convention. As will be demonstrated by other examples too, there seems to be a strong need for the harmonisation of the internal PIL rules with the international regulations by which Poland is bound.

## 2. *Convention of 5 October 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions.*

According to art. 1 of the Convention, a testamentary disposition shall be valid as regards form, if its form complies with the internal law:

- a) of the place where the testator made it, or
- b) *of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or*
- c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or
- d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or
- e) *so far as immovables are concerned, of the place where they are situated.*

This approach makes it clear that the underlying idea is that of upholding the formal validity of any testamentary disposition which is made in an international setting (so called ‘*favor testamenti*’ approach).

*The position of the Polish PIL statute is not so ‘generous’ in this respect. Art. 35, which deals with the validity of testamentary acts in general, gives far less possibilities of finding the law according to which the form of a testamentary disposition could be*

*positively verified. The provision in question refers only to the law of testator's nationality (which is also the applicable law as far as substantive validity is concerned) and the law of the place where the testament was made.*

Again, the situation looks different in the 2007 PIL draft whose art. 61 does not contain any conflict rule but simply refers to the 1961 Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions. This legislative technique, although controversial for some commentators, was meant to fully harmonise the domestic statute with the international regulations and to make sure that the law enforcement bodies (incl. courts) would never make the mistake of relying on purely domestic conflict provisions when an international convention is applicable.

### 3. Convention of 4 May 1971 on the Law Applicable to Traffic Accidents.

The Convention defines a traffic accident as 'an accident which involves one or more vehicles, whether motorized or not, and is connected with traffic on the public highway, in grounds open to the public or in private grounds to which certain persons have a right of access' (art. 1 subparagraph 2).

*The applicable law is, generally, the internal law of the country where the accident occurred (art. 3). The Convention provides for certain exceptions, though, where the internal law of the country of registration of a vehicle is applicable (see art. 4). Still, the latter may sometimes be replaced by the internal law of the country in which the vehicle is habitually stationed (art. 6).*

*Polish private international law of 1965 does not provide for a separate conflict rule that would be devoted exclusively to traffic accidents. According to the classifications made in Polish law, traffic accidents are a special case of delicts. Consequently, if it had not been for the 1971 Hague Convention, the traffic accident case would fall under the broad and universal rule of the PIL statute concerning non contractual obligations (art. 31). The article in question provides in its paragraph 1 for the application of the law of the country where the event giving rise to civil liability has taken place. This would normally lead to the use of the same law as designated by art. 3 of the Convention. Thus, one could conclude that the main rule is harmonised. However, in cases where the parties are nationals of the same country and they are all domiciled*

*there, art. 31 §2 of the Polish PIL provides for the application of the law of that country. This exception obviously moves in a different direction in comparison to the special rules of the Convention (cf. art. 4 and art. 6).*

*Again, though, it is important to acknowledge that the changed approach which is found in art. 26 of the 2007 PIL draft and refers directly to the Hague Convention on the Law Applicable to Traffic Accidents, is aimed at better and more express harmonisation of domestic and international rules.*

*To conclude the remarks on the 1971 Convention, it needs to be recalled here that from January 11, 2009 the European Communities Regulation on the law applicable to non-contractual obligations will apply. The Regulation does not devote a separate rule to traffic accidents but these would be covered by a general conflict provision concerning delicts which may be found in art. 4. Unlike the Hague Convention and the Polish PIL, art. 4 section 1 of the Regulation provides, in the first place, for the application of the law of the country in which the damage occurs. By way of exception, if the person claimed to be liable and the person sustaining damage have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply (art. 4 section 2). There is also a corrective clause in art. 4 section 3, which allows the disregarding of the rules based on fixed connecting factors and to apply the law of the country with which, in view of all circumstances, the case is manifestly more closely connected. The modern approach of the Regulation is quite different from the 1971 Convention. However, as it was already pointed out, in the case of Poland and other EC signatories of the Convention, the provisions of the latter shall not be replaced by the Regulation which, in its art. 28, gives priority to previously concluded international conventions binding the European Communities Members States.*

#### 4. Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.

*The 1973 Convention has a fairly broad scope as it covers all kind of maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate (art. 1). The provisions of the Convention seem to aim at offering protection to creditors of maintenance obligations already on the conflict-of-laws level. The basic rule provides*

*for the application of the law of the habitual residence of the creditor (art. 4) but there are also special rules designed for situations when the law which is applicable in the first place does not allow obtaining maintenance from the debtor. Thus, as an alternative, the law of common nationality of the parties may apply (art. 5), and finally, if the result is still negative for the creditor, his last chance would be the law of the country of the authority seized (art. 6).*

*The scheme outlined above is subject to an interesting exception concerning the maintenance obligations arising in the 'post marital' setting. By virtue of art. 8 of the Convention, the maintenance obligations between the divorced spouses are governed by the law applied to divorce. The same concerns the case of a legal separation and a marriage which has been declared void or annulled. However, this special rule holds true only in the Contracting State in which the decree for divorce (separation, annulment) was granted. One can presume that if the authority of another State is seized, the applicable law will be ascertained according to general rules.*

*Poland acceded to the 1973 Convention in the year 1996 with two reservations made in accordance with art. 24. Firstly, Poland reserved the right not to apply the Convention to maintenance obligations between persons related by affinity and between divorced or legally separated spouses or spouses whose marriage has been declared void or annulled if the relevant decree has been rendered by default in a State in which the defaulting party did not have its habitual residence (art. 14 points 2 and 3). In the above situations, the Polish statutory provisions on conflict of laws are applicable. Secondly, Poland decided to apply its internal substantive law if the creditor and the debtor are both Polish nationals and if the debtor has its habitual residence in Poland (art. 15).*

*Polish private international law of 1965 does not contain one universal rule devoted to all kinds of maintenance obligations. Art. 20 of the Polish PIL covers maintenance relationships between blood relatives and relatives by marriage (affinity). Here, it is the national law of the creditor that applies and not the law of their habitual residence. The situation is different in the case of maintenance obligations in a marital and post marital setting, which are covered by separate conflict rules. In case of potential claims between married couples, art. 17 of the Polish PIL would be used, which*

*concerns personal and economic relations between spouses and which designates the common law of nationality of the spouses as applicable law, or – if they have different nationalities – the law of their common domicile, or finally – if there is no common domicile – the Polish law.*

*It is a prevailing view in Poland that, with the exception of the 1973 Convention which usually applies here, maintenance obligations connected with divorce or legal separation would be subject to the law governing the divorce and separation (art. 18 of the Polish PIL). The applicable law is the law of the country of which both spouses have nationality, or – in the absence thereof – the law of their common domicile, or – in the last instance – the Polish law.*

*Finally, as far as maintenance between spouses of an annulled marriage is concerned, it is commonly agreed that the applicable law would be – respectively – the law governing the formal or material validity of marriage, depending on which grounds the annulment is declared (see art. 16 referring to art. 14 and 15 of the Polish PIL).*

*This somewhat complex situation with regard to maintenance obligations was supposed to be simplified in the 2007 PIL draft. Just like in the case of the previously mentioned Hague Conventions concerning the form of testamentary dispositions and traffic accidents, art. 15 of the 2007 draft contains a direct reference to the 1973 Convention, which makes the latter generally applicable to all maintenance obligations within its scope. This presupposes that the national legislator is now prepared to make the Convention apply in areas previously covered by the Polish reservations.*

#### **IV. Implementation and application of the Hague Conventions.**

*In this last part of the Report, the questions of implementation and application of the Hague Conventions in Poland will be touched upon. Firstly, some remarks will be made on the issue of implementation of international conventions in general with the special focus on practical problems experienced by Polish courts. Secondly, the samples from the case law with regard to the 1980 Convention on the Civil Aspects of International Child Abduction will be presented. Lastly, a short presentation of data concerning the functioning of the 1993 Convention on Protection of Children and Co-operation in respect of Intercountry Adoption will be made.*

*1. As previously explained in Part II of this Report, the Hague Conventions are directly applicable in Poland. When the ratification process is completed and the act in question has been published in the Polish Official Journal, individuals can invoke the provisions of such conventions in the courts and the judicial authorities are bound to apply them.*

*Unfortunately, the publication in the Official Journal often takes places a long time after the formal ratification. This means that a given convention might already be binding upon Poland on an international level, but it will not be used by the courts which, in the light of art. 91 section 1 of the Constitution, must await the official publication (cf. the remarks in Part II point 1 of the Report). This practice, which is heavily criticised by commentators, may sometimes postpone the application of an international convention for many months or even years (see the charts in Part I above where relevant dates with regards to the Hague Conventions are shown).*

*As far as the actual use of the conventions is concerned, it is important to start with a general observation, that, under Polish law, the court is obliged to make use of the law applicable in a given field by its own motion, be it substantive law, conflict rules or procedural provisions. This includes the law as set forth in ratified (and published) international conventions. Unfortunately, the theory does not always go hand in hand with the practice. Not infrequently, the courts are not aware of the conventions which should be applied. Sometimes it is the parties and their professional attorneys that indicate the necessity to use a given conventional regulation but it also happens that the problem goes unnoticed and the case is settled according to purely internal rules, even though the issue in question is covered by a convention. In case of typical conflicts conventions, the mistake is sometimes discovered by the Ministry of Justice when the court seized requests from the Ministry, in accordance with the Code of civil procedure (art. 1143), the text of foreign law necessary to decide the dispute at hand. Here it often transpires that the applicable law, whose text is needed, was asserted on the basis of the domestic statute of 1965 on private international law and not on the basis of a relevant convention.*

*In order to increase the general awareness of the binding conflicts conventions and to harmonise the domestic conflict rules with the international ones, important changes*

were put forward in the 2007 draft of a new Polish statute on private international law. First of all, the draft employed a special legislative technique whereby direct references to relevant conventions were made. This technique was used in arts. 26, 58 and 61 of the draft as far as the determination of the law applicable to traffic accidents, maintenance obligations and the form of testamentary dispositions is concerned. On the other hand, as it was already explained in Part III point 1 above, when it concerns the protection of persons without full capacity for legal acts, art. 13 of the 2007 draft provides for the solutions which are materially in line with the 1961 Convention in so far as they concern the law to be applicable in respect of the protection of minors.

2. The Polish jurisprudence concerning the 1980 Convention on the Civil Aspects of International Child Abduction is still rather limited. Although the Convention entered into force for Poland (*vis-à-vis* other signatories) on 1 November 1992, its text was published in the Polish Official Journal as late as 25 September 1995 (Dz.U. Nr 108, item 528) and only from that point in time could the Convention be applied by the national courts.

Additionally, it needs to be pointed out that following the change of the Code of Civil Procedure in the year 2000, the judgments concerning international child abduction, delivered on the basis of the 1980 Convention, are generally precluded from the control exercised by the Polish Supreme Court. That is because after the said procedural reform, there is no right of cassation in such cases. This was confirmed by the decision of the Supreme Court of 17 August 2001 (I CKN 236/2001, Lex nr 52475) and by the judgment of 8 November 2001 (II CZ 126/2001, OSNC 2002/7-8/95). Thus, the access to jurisprudence under the 1980 Convention has become more difficult since the case law of the lower courts (especially those of first instance) is reported far less extensively.

Nevertheless, one important case concerning the international child abduction was decided by the Polish Supreme Court before the change of the procedural rules. The judgment in question was handed down on 16 January 1998 (II CKN 855/1997, OSNC 1998/9/142) and the facts of the case were as follows:

Janusz L. and Anna L. – married since 1983 – had dual nationality (Polish and Canadian) and they lived in Canada with their two sons: Konrad (born 1990) and

*Mateusz (born 1995). In 1995 the parents stopped living together. According to the decision of the Canadian court dated 1 August 1996, both parents were entrusted with the care of their children but it was the mother with whom the children were supposed to stay. Additionally, the court decided that the mother was not allowed to take the children outside the borders of the Canadian province of Ontario for a period exceeding 6 weeks without the consent of the father.*

*On October 16, 1996, Anna L. left Canada and, without informing the father, came back to Poland with her two sons. Polish Ministry of Justice, being a Central Authority in the meaning of art. 6 of the 1980 Hague Convention, upon receiving the motion of Janusz L., instituted appropriate proceedings in front of the Polish courts with regard to the suspected abduction of children from Canada without the consent of their father.*

*In the course of judicial proceedings, Anna L. put forward a number of defenses based on art. 13 of the Convention, claiming in particular that the father enjoyed no custody rights at the time of removal, that the children were receiving medical treatment in Poland, which was absolutely necessary, and which the father objected to in Canada, and finally, that the children expressed strong emotional ties with the mother, they were happy to stay in Poland and did not want to return to Canada at all.*

*In its decision of 3 April 1997 the court of first instance in Cracow confirmed that the case was that of a wrongful removal, as envisaged in art. 3 of the 1980 Convention, and ordered the immediate return of children to their father on the basis of art. 12. The judgment was upheld by the regional court on 5 September 1997. The courts did not find the mother's defence persuasive. In their view the father did enjoy the right of custody as defined in art. 5 of the Convention, which was confirmed by the decision of a Canadian court of 1 August 1996. The medical treatment of children could just as well be continued in Canada where standards of health care are not lower than in Poland. Also the return travel would not expose children to any grave risks. Furthermore, in view of the courts, the children did not attain the age and level of maturity that would justify taking account of their opinion on the issue of return.*

*The dissatisfied mother lodged a final appeal for cassation with the Supreme Court, which resulted in quashing the decisions of lower courts with the case being sent for*



*reconsideration. In the written motives supporting the Supreme Court's judgment, several legal points of the 1980 Convention were touched upon.*

*Firstly, the Supreme Court did not find it an example of a wrongful removal case. In the light of the decision of the Canadian court of 1 August 1996, the mother was not totally prohibited from taking the children out of the province of Ontario. All she was required to do was obtaining father's consent for any stay that would exceed 6 weeks. Consequently, the leaving of Canada on October 16, 1996, should not be considered wrongful. The case in question was rather of a wrongful retention and so the trial courts should have determined the circumstances of Anna L. remaining with her children in Poland after the end of November 1996 when the 6-week period expired.*

*Secondly, the Supreme Court paid special attention to art. 13 of the Convention. The findings of the trial courts appeared superficial in this respect. The Supreme Court pointed out that art. 13 letter b) allows preventing the return of the child if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The adequate level of health care in Canada is not enough in a situation when there is a serious dispute between the parents whether children ought to undergo health treatment at all. Moreover, there should be a detailed analysis of the conditions in which the children would stay in Canada after their potential return (the father claimed that they would stay in school or preschool for most of the day) in comparison with the conditions actually offered to children in Poland.*

*Finally, the Supreme Court challenged as arbitrary the conclusion that the older son's views could not be taken into account. In the case of a 6-year boy, such determination should not be made by the courts themselves, but should be based on the opinions of competent experts. Consequently, the rejection of the mother's motion asking for such opinions was found unjustified. The Court invoked also art. 12 of the United Nations Convention of 20 November 1989 on the Rights of the Child, to which Poland is a party, and which should be applied alongside the 1980 Hague Convention. The said art. 12 introduces a general rule that every child capable of forming its views should have the right to express those views freely in all matters affecting the child and the*

*views of the child should be given due weight in accordance with the child's age and maturity.*

*For the above reasons the appeal was successful and the case was returned to the trial court for reconsideration.*

*3. There is no officially reported case law in Poland concerning the 1993 Convention on Protection of Children and Co-operation in respect of Inter-country Adoption, which was ratified by Poland in 1995 and whose application commenced locally in the year 2000 (following the publication in the Polish Official Journal). Again, one of the reasons for this situation is the preclusion of the Supreme Court's control in such type of family cases resulting from the aforementioned reform of the Polish civil procedure (see the remarks in point 2 above).*

*However, there is some available data with regard to the practical use of the Convention. The chart below – which covers the years 2003-2006 – demonstrates a fairly constant number of international adoptions of Polish children taking place every year:*

<i>Year</i>	<i>Total number of adopted children</i>	<i>Number of families in which adopted children were placed</i>	<i>The most popular receiving countries with the number of adopted children</i>
<i>2003</i>	<i>333</i>	<i>216</i>	<i>Italy (155), USA (86), the Netherlands (21), Sweden (21), France (16), Germany (12)</i>
<i>2004</i>	<i>387</i>	<i>254</i>	<i>Italy (187), USA (84), France (39), Sweden (22), the Netherlands (23), Germany (10)</i>
<i>2005</i>	<i>336</i>	<i>212</i>	<i>Italy (211), France (38), the Netherlands (34), Sweden (28), Germany (11)</i>

2006	311	202	<i>Italy (214), France (25), USA (22), the Netherlands (20), Sweden (15)</i>
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