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Protection of international families with links to the European Union post-Brexit:
Collaborative Scotland-EU partnership

POLAND

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I. General questions

At the beginning of this Report, it should be explained that Poland is a member to the HCCH since 29 May 1984 (even though Poland has participated in the works of HCCH before II World War during its 6th and 7th sessions). The status of Poland with respect to the conventions subject to the project is as follows:

1. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Pursuant to Article 37 1980 Convention, it is open for signature by the States which were Members of the HCCH at the time of its 14th Session, however in accordance to Article 38, any other State may also accede to the Convention. In such case, the Convention enters into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession. The accession has effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Poland deposited its document of accession on 10 August 1992, and therefore the convention entered into force in Poland on 1 November 1992.[1] Poland made a reservation pursuant to Article 26(3) and declared that it will not be bound to assume any costs resulting from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice. The UK accepted accession on 2 November 1992, so **the convention entered into force in relations between Poland and the UK on 1 February 1993**.

2. Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

Pursuant to Article 57(1) 1996 Hague Convention is open for signature by the States which were Members of the HCCH at the time of its 18th Session. In accordance with Article 61(1) 1996 Hague Convention enters into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval. The 1996 Hague Convention entered into force on 1 January 2002, however neither for Poland, nor the UK.

Pursuant to Article 57(2)(a) 1996 Hague Convention, after its entry into force, it enters into force for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession. Poland has deposited such instrument on 27 July 2010 and therefore the **convention entered into force in Poland on 1 November 2010**.[2] This Convention does not provide for the approval or objection mechanism for the accession of new contracting states. Poland made declaration concerning primacy of EU law over the convention

[1] Konwencja haska dotycząca cywilnych aspektów uprowadzenia dziecka za granicę, sporządzona w Hadze dnia 25 października 1980 r., Dz.U. 1995, nr, 108, poz. 528.; Oświadczenie rządowe z dnia 17 maja 1995 r. w sprawie przystąpienia Rzeczypospolitej Polskiej do Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę, sporządzonej w Hadze dnia 25 października 1980 r., Dz.U. 1995, nr 108, poz. 529.

[2] Konwencja o jurysdykcji, prawie właściwym, uznawaniu, wykonywaniu i współpracy w zakresie odpowiedzialności rodzicielskiej oraz środków ochrony dzieci, sporządzona w Hadze dnia 19 października 1996 r., Dz.U. 2010, nr 172, poz. 1158; Oświadczenie rządowe z dnia 23 sierpnia 2010 r. w sprawie mocy obowiązującej Konwencji o jurysdykcji, prawie właściwym, uznawaniu, wykonywaniu i współpracy w zakresie odpowiedzialności rodzicielskiej oraz środków ochrony dzieci, sporządzonej w Hadze dnia 19 października 1996 r., Dz.U. 2010, nr 172, poz. 1159.

and on the precedence of the convention between bilateral agreements that Poland concluded with other parties to the convention. Additionally, Poland declared that it reserves the jurisdiction of its authorities in order to take measures directed to the protection of immovable property of a child situated in the territory of Poland (Article 55(1)(a) and reserves the right not to recognise any parental responsibility or measure in so far as it is incompatible with any measure taken by the Polish authorities in relation to immovable property of a child situated in the territory of Poland (Article 55(1)(b))

The UK deposited its instrument of ratification on 27 August 2012 and therefore the convention entered into force for the UK on 1 November 2012.

3. Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations

Pursuant to Article 28 of the 1970 Convention, any state not represented at the 11th Session, may accede to it after its entry into force. Poland has filed the instrument of accession on 25 April 1996, so **it entered into force for Poland on 24 June 1996**.[3] While acceding to the convention, Poland made two reservations, namely reserved the right to refuse to recognize a divorce / legal separation in situations defined in the first paragraph of Article 19[4] and the right not to apply the convention to a divorce / legal separation obtained before the date on which the convention comes into force.

In accordance with Article 28, the accession has effect only as regards the relations between the acceding state and such contracting states as have declared their acceptance. The Convention enters into force as between the acceding state and the state that has declared its acceptance on the 60th day after the deposit of the declaration of acceptance. Interestingly, the UK deposited its declaration of acceptance of Poland's accession shortly before the expiration of the Brexit transition period, namely on 29 October 2020, and therefore the **convention entered into force in relations between Poland and the UK on 28 December 2020**.

4. Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

Pursuant to Article 58(1) and 58(2) 2007 Hague Convention, it is open for signature by the States which were Members of the HCCH at the time of its 21st Session and by the other States which participated in that Session. It shall be ratified, accepted or approved. In accordance Article 58(3), any other State or REIO (EU) may accede to the Convention after it has entered into force.

In accordance with Article 60 (1) the convention enters into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance or approval. The convention entered into force on 1 January 2013.

Pursuant to Article 59 2007 Hague Convention, a REIO (EU) may similarly sign, accept, approve or accede to the convention. EU has deposited an instrument of accession on 9 April 2014, and therefore **the convention entered into force for Poland and the UK on 1 August**

[3] Konwencja o uznawaniu rozwodów i separacji, sporządzona w Hadze dnia 1 czerwca 1970 r., Dz.U. 2001, nr 53, poz. 561, Oświadczenie rządowe z dnia 31 stycznia 2001 r. w sprawie mocy obowiązującej Konwencji o uznawaniu rozwodów i separacji, sporządzonej w Hadze dnia 1 czerwca 1970 r., Dz.U. 2001, nr 53, poz. 562.

[4] Contracting States may, not later than the time of ratification or accession, reserve the right –
(1) to refuse to recognise a divorce or legal separation between two spouses who, at the time of the divorce or legal separation, were nationals of the State in which recognition is sought, and of no other State, and a law other than that indicated by the rules of private international law of the State of recognition was applied, unless the result reached is the same as that which would have been reached by applying the law indicated by those rules.

2014.[5] Later, the UK has deposited an instrument of ratification on its own to assure continuous application of the convention after Brexit.

5. Convention of 13 January 2000 on the International Protection of Adults

Pursuant to Article 56(1) and 56(2) 2000 HCCH Convention, it is open for signature by the States which were Members of the HCCH on 2 October 1999. It shall be ratified, accepted or approved. In accordance with Article 57(1), it enters into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance or approval. It entered into force on 1 January 2009 following ratifications by the UK, France and Germany.

Poland has signed the convention on 18 September 2008, but has never ratified it, and therefore **is not a contracting party to 2000 Hague Convention**.

1. Are there any data available in your jurisdiction on the number of international family cases involving EU Members States and international family law cases involving third States? If so, please briefly outline the data.

In my view, no statistics are available in Poland as to the number of international family cases. Please note that the available data on cases decided by common courts in Poland prepared by the Ministry of Justice[6] does not allow for extracting family matters only, as civil matters cover some family matters as well. Please compare the below table.

Table 1. The number of incoming, resolved and pending cases in common courts in Poland

Wyszczególnienie (Specification)		2020		2021		
		Załatwienie	Pozostałość	Wpływ	Załatwienie	Pozostałość
		Resolved Cases	*Pending cases*	*Incoming cases*	*Resolved Cases*	*Pending cases*
SPRAWY CYWILNE	***Civil cases***	**9 443 757**	**2 836 378**	**9 095 998**	**9 248 164**	**2 682 297**
sądy:	*courts:*					
rejonowe [b), e)]	*district courts*	9 122 727	2 604 927	8 691 028	8 890 718	2 403 320
okręgowe [c)]	*regional courts*	291 496	217 070	373 035	327 790	262 315
apelacyjne [c)]	*courts of appeal*	29 534	14 381	31 935	29 656	16 662
SPRAWY RODZINNE	***Family law cases***	**1 180 281**	**216 954**	**1 260 710**	**1 258 527**	**219 145**
sądy:	*courts:*					
rejonowe	*district courts*	1 180 281	216 954	1 260 710	1 258 527	219 145
okręgowe [d)]	*regional courts*	73 843	60 024	82 992	85 011	58 005

a) in district courts also misdemeanour cases
b) electronic writ of payment proceedings included
c) family law cases included
d) only divorce and separation cases
e) land and mortgage register cases included
f) from July 1st 2020 Intellectual Property Court

Additionally, when statistics concerning a given type of matters is being published, for example on divorce and legal separation, it does not indicate whether the case has any cross-border feature in it, not to mention whether it involves EU Member States or third states. The table groups the cases into two segments, mainly divorce and legal separation, and then classifies these cases based on the matters decided together with granting divorce, for example parental responsibility and/or sharing of matrimonial property.

[5] Council Decision of 9 June 2011 on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, OJ L 192, 22.7.2011, p. 39–70.

[6] See: Ewidencja spraw w sądach powszechnych w Polsce (The number of incoming, resolved and pending cases in common courts in Poland) at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/.

Table 2. Divorce and separation cases decided in first instance by regional courts in 2021

Ewidencja spraw o rozwód, separację w pierwszej instancji w sądach okręgowych w 2021 roku

Sprawy wg repertoriów lub wykazów	Wpłynęło	Załatwiono						Pozostało na okres następny
		razem	w tym					
			uwzględ-niono w całości lub części	oddalono	zwrócono	odrzucono	umorzono	
o rozwód								
razem	80 659	82 708	65 352	271	5 661	767	8 449	56 326
rozwód	78 247	79 958	63 114	262	5 520	750	8 141	54 493
z zastosowaniem art. 58 §2 k.r.o. bez zdania pierwszego	1 028	1 237	905	7	92	3	211	998
z zastosowaniem art. 58 §3 k.r.o.	1 360	1 489	1 313	2	48	14	95	816
z zastosowaniem art. 58 §2 k.r.o. (bez zdania pierwszego) i §3	24	24	20	0	1	0	2	19
o separację								
razem	1 990	1 949	1 118	18	250	23	485	1 586
separacja	1 921	1 865	1 062	17	242	23	466	1 538
z zastosowaniem art. 58 §2 k.r.o. bez zdania pierwszego	46	64	39	1	6	0	18	35
z zastosowaniem art. 58 §3 k.r.o.	19	19	16	0	2	0	1	9
z zastosowaniem art. 58 §2 k.r.o. (bez zdania pierwszego) i §3	4	1	1	0	0	0	0	4

2. How is the adjudication of international family law cases organised in your jurisdiction?

The common courts in Poland are the district courts (*sądy rejonowe*), regional courts (*sądy okregowe*), and courts of appeal (*sądy apelacyjne*). They are competent to hear civil law cases, family and custody law cases, labor law cases and social insurance cases, and criminal law cases. The Supreme Court (*Sąd Najwyższy*) is the highest central judicial body in Poland, and thus the highest court of appeal. There are separate administrative district courts (*wojewódzkie sądy admini*stracyjne). The administrative judiciary falls under the Supreme Administrative Court (*Naczelny Sąd Administracyjny*), which has judicial control of public administration, including civil status registrars. They are competent to hear administrative cases.

District courts deals with cases concerning family and guardianship law, except for divorce, legal separation, and incapacitation. Examples include establishment of parenthood and claims connected to it, denial of paternity, maintenance, liquidation of matrimonial property, parental responsibility, rights of access. Regional court may act as a court of second instance for the decisions of district courts or as a court of first instance concerning certain type of cases, for example divorce. There are separate divisions in district and regional courts dedicated to family and juvenile matters. There are no special divisions dedicated to cross-border cases.

When it comes to child abduction cases dealt with under 1980 Hague Convention, only 11 regional courts deal with such cases as first instance court and the Court of Appeal in Warsaw is the only one to hear such cases in second instance.

Cassation appeal to Supreme Court may be brought in family matters only as to cases on adoption and division of matrimonial property of spouses provided that the estate exceeds certain value. Cassation appeal to Supreme Court may also be brought also in cases concerning child abduction dealt with in accordance with the 1980 Hague Convention. Cassation in appeal may be brought only by certain bodies, namely a public prosecutor, Ombudsman (*Recznik Praw Obywatelskich*) or Ombudsman for Children (*Rzecznik Praw Dziecka*) with four months counting from the moment the decision becomes final (Article 519^1§2^1 and 519^1§2^1 Code of Civil Procedure).[7] The four-month period for filling cassation appeal rises doubts as to

[7] All the peculiarities of the proceeding under 1980 Hague Convention as provided for in civil procedure in Poland and also amended over past few years are described in detail in: J. Pawliczak, *Reformed Polish court proceedings*

compatibility with the 1980 Hague Convention which requires the proceeding to be expeditious. Please note that the above measure of appeal results in the suspension of the return proceedings (pursuant to 388[1] Code of Civil Procedure), which was analyzed by the CJEU judgement in *Rzecznik Praw Dziecka* case (C-638/22 PPU) and found to be contrary to Brussels II bis Regulation.

In general, in the first instance only one judge hears the case, unless a special provision provides otherwise (Article 47 of the Code of Civil Procedure). Example of such a special provision is Article 509 of the Code of Civil Procedure, which states that incapacitation matters are heard in the first instance by one judge and two jurors. Similarly, pursuant to Article 47§2(2) of the Code of Civil Procedure, one judge and two jurors hear the following family matters: divorce, separation, dissolution of adoption and establishing the ineffectiveness of acknowledging paternity. In the second instance, in general pursuant to Article 367 §3 of the Code of Civil Procedure, there are three judges hearing the case and giving the judgement.

Certain family matters are heard in contentious proceeding (for example, divorce, separation on the application of one spouse – Article 425 of the Code of Civil Procedure or cases to determine or deny parentage, to determine the ineffectiveness of acknowledgment of paternity and on dissolution of adoption – Article 453 of the Code of Civil Procedure) and others in non-contentious proceeding (for example, matters of parental responsibility – Article 579).

II. Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

Article 13(1)(b)

1. Are you aware of how often the "grave risk of harm" defence under Article 13(1)(b) is used successfully in your jurisdiction? If so, please comment on the frequency of successful defences under Article 13(1)(b) in your jurisdiction.

Some interesting statistics on Poland with respect to application of 1980 Hague Convention are gathered by the HCCH. As follows from the 2015 HCCH statistical analysis when it comes to the situation within EU, Poland was among EU Member States with high proportion of applications for the return of a child, which come from fellow Brussels IIa Member States (namely 88%).[8] It is worth underlining that at that time, the proportion of applications received from the UK seemed to increase significantly – from no applications in 2003, to 16% (11 applications) in 2008 and 31% (15 applications) in 2015.[9]

for the return of a child under the 1980 Hague Convention in the light of the Brussels IIb Regulation, JPIL 2021, no. 3, p. 560-586.

[8] N. Lowe, V. Stephens, *Part II — A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Regional report – provisional edition*, p. 4.

[9] N. Lowe, V. Stephens, *Part II — A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — Regional report – provisional edition*, p. 5.

The outcomes of return applications received by Poland in 2015

	Poland	Global
Rejection	1 (2%)	3%
Voluntary return	8 (17%)	17%
Judicial return	7 (15%)	28%
Judicial refusal	17 (35%)	12%
Access agreed or ordered	0 (0%)	3%
Pending	0 (0%)	6%
Withdrawn	14 (29%)	14%
Other	1 (2%)	16%
Total	**48 (100%)**	**≈100%**

This graph published by HCCH shows the outcome of return applications received globally by Poland in 2015. In 2015, 31% of applications received by Poland ended with a return, lower than the global return rate of 45%. By contrast, a high proportion of applications were pending (35%) or withdrawn (29%). **Out of the 24 cases that went to court, 17 (71%) were refused, compared with 28% globally**.[10]

Statistics on proceedings in Poland under 1980 Hague Convention were published by the Ministry of Justice until 2017[11], now might be found in legal literature if Authors obtains them from the Ministry of Justice (under - as I assume - the general right of access to public information).[12] For example, in 2016 105 application were received by Poland, including 43 coming from UK.

2. How has the "grave risk of harm" defence under Article 13(1)(b) been interpreted by the courts of your jurisdiction? Are there any notable differences in your jurisdiction that you are aware of as opposed to relevant case-law of the UK Supreme Court[13] and/or the European Court of Human Rights?[14]

Not long ago, a comprehensive study of cases in which an application under 1980 Hague Convention was made has been carried in Poland.[15] The author conducted his analysis between October 2019 – February 2020 (so before COVID pandemic) and analysed cases with final decision handed down. The author analyzed 30 such cases.[16] When discussing the application of Article 13(1)(b), the author states that:

> 'The exception invoked contains, de facto, three different types of risk: a) a serious risk that return would expose the child to physical harm; b) a serious risk that return would expose the child to psychological harm; c) a serious risk that return would otherwise place the child in an intolerable situation (…). Each type of risk can be raised independently to justify an exception to the obligation to surrender the child without delay, and thus, depending on the specific facts, these exceptions must be treated on a case-by-case basis. These three types of risk, although

[10] N. Lowe, V. Stephens, *Part III — A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — National Reports*, p. 103-107.
[11] See: the website of the Ministry of Justice at: https://arch-bip.ms.gov.pl/pl/ministerstwo/wspolpraca-miedzynarodowa/konwencja-haska-dot-uprowadzenia-dziecka/ (access: 1 March 2023).
[12] J. Pawliczak, *Reformed Polish court proceedings ….* [note 7], p. 561.
[13] In particular, *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, *Re E* [2011] UKSC 27, and *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10.
[14] In particular, *X v Latvia* Application no. 27853/09, Grand Chamber [2013].
[15] M. Białecki, *Orzekanie w sprawach o wydanie dziecka w trybie Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę sporządzonej w Hadze w dniu 25 października 1980 r*., Instytut Wymiaru Sprawiedliwości: Warszawa 2021. Available at: https://iws.gov.pl/wp-content/uploads/2021/04/IWS_Bialecki-M._Orzekanie-w-sprawach-o-wydanie-dziecka-w-trybie-Konwencji.pdf (access 1 March 2023).
[16] M. Białecki, *Orzekanie w sprawach*… [note 15], p. 7.

> constituting separate grounds for dismissal of an application for surrender of a child, are often used together and the courts do not always clearly distinguish between them in the reasons for their orders.'[17]

It is submitted in the literature that the grave risk of harm may occur in two situations. Firstly, when the child after the return would be exposed to direct danger, for example war, famine or epidemic. Secondly, where the child could be subject to neglect or abuse. This might happen when a child is subject to violence, abuse or when the risk results from pathological behaviour caused by alcoholism, drug addiction or mental illness.[18] When it comes to domestic violence it explained that the violence should be directed towards the child to be equated with "grave risk of harm" and not towards the other parent.[19] A different approach was presented by the Supreme Court in its decision of 14 April 2021[20]. The Court suggested that the sufficiently serious violence against the other parent must be considered as a "grave risk" towards the child. This decision was criticized in the legal literature, as the violence was incidental and foreign authorities took measures to prevent it for the future.[21]

3. Are you aware of cases in which Article 13(1)(b) has been interpreted inconsistently within your jurisdiction? If so, please briefly elaborate.

Yes, there are instances where the Supreme Court while elaborating on the "grave risk of harm" exception focuses on different aspects and different passages from the jurisprudence of the European Court of Human Rights. It seems that the trend in Poland is to rather keep abducted children in Poland, instead of returning them to the country of their habitual residence.[22] For the purpose jurisprudence of the European Court of Human Rights in is used (for example, *X v. Latvia* or *Neulinger and Shuruk v. Switzerland*) but interestingly in order to justify a non-return.

4. Please consider Article 13(1)(b) in conjunction with Article 11(4) of the Brussels IIa Regulation.[23] Can you identify a difference in the treatment of the grave risk of harm defence in intra-EU and non-intra EU cases? What do you consider to be the most problematic points?

The author of the above-mentioned study explained that among the cases that were examined it was not possible to find such a case where Article 11(4) of the Brussels II bis Regulation was applied.[24] I am not aware of differences in application of the "grave risk of harm" exception based on the EU or non-EU character of the case.

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[17] M. Białecki, *Orzekanie w sprawach* ….[note 15], p. 52.
[18] J. Wierciński, *Uprowadzenie dziecka za granicę* w: P. Mostowik (ed.), *Międzynarodowe prawo rodzinne. Filiacja. Piecza nad dzieckiem. Alimentacja*, Wolters Kluwer: Warszawa 2023, p. 352.
[19] J. Wierciński, *Uprowadzenie dziecka za granicę* …[note 18], p. 353.
[20] Decision of the Supreme Court of 14 April 2021, signature: I NSNc 36/21. The Decision of the Extraordinary Control and Public Affairs Chamber of the Polish Supreme Court of April 14, 2021, I NSNc 36/21
[21] J. Wierciński, Uprowadzenie dziecka za granicę … [note 18], p. 354. Z. Kubicka-Grupa, A review of the polish Supreme court case law in international family law matters (from January 2015 to April 2021), Polski Proces Cywilny 2021, number 4, p.
[22] O. Bobrzyńska, M. Pilich, *Cases of cross-border child abduction in times of populism: Polish perspective*, submitted for publication to JPIL.
[23] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, Article 27.
[24] M. Białecki, Orzekanie w sprawach o wydanie dziecka w trybie Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę sporządzonej w Hadze w dniu 25 października 1980 r., Instytut Wymiaru Sprawiedliwości: Warszawa 2021. Available at: https://iws.gov.pl/wp-content/uploads/2021/04/IWS_Bialecki-M._Orzekanie-w-sprawach-o-wydanie-dziecka-w-trybie-Konwencji.pdf (access 1 March 2023), p. 54.

5. Please consider Article 13(1)(b) in conjunction with Article 11(6)-(8) of the Brussels IIa Regulation.[25] Has the application been smooth and explain why/why not?

I am not aware of any problems arising at the stage of transmitting documents from Poland to other Member States pursuant to Article 11(6) and Article 11(7) of the Brussels IIa Regulation.

The application of Article 11(8), which provides for the enforcement of any subsequent judgement (of the court of origin) which requires the return of the child in accordance with Section 4 of Chapter III, seems far more problematic. Pursuant to Article 42(1) of the Brussels IIa Regulation a return order is to be recognised and enforceable without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin. I am not aware of the comprehensive statistics which would concern such cases in Poland, however I am aware of one case, which resulted in the infringement procedure launched by the European Commission against Poland recently (Infringement No INFR (2021)2001). The UK return order supplemented with the certificate instead of being recognized and enforced was subject to time-consuming proceedings on recognition in two instances and refused recognition.[26]

Article 13(2)

6. Please consider Article 13(2) - the "child's views." What is the main approach in your jurisdiction in respect of matters such as the minimum age of the child to use this provision, possible automatic hearing of the child in non-intra EU cases, court's approach to the hearing of the child (e.g., direct communication with the judge; through a child psychologist report; separate representation, etc.)? Please note any differences in approach between your jurisdiction and other jurisdictions that you are aware of.

Pursuant to Article 13(2) of the Hague Child Abduction Convention, the return of the child may be refused if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. The hearing of the child is proceeded with in accordance with Article 576 § 2 Code of Civil Procedure, which states that in cases involving the person or property of a child, the court hears the child if child's mental development, health and maturity permits so, if possible, considering the child's reasonable wishes. The hearing takes place outside the courtroom.

The court will not hear the child if it would be inappropriate in terms of age and maturity of the child. As explained in the jurisprudence, hearing is not appropriate if the child is unable to comprehend the long-term consequences of his or her possible wishes to stay in the new country or to return to the country where he or she previously lived.[27] Hence the hearing of a child is not automatic.

While assessing the child's degree of maturity the court may (but is not obliged to) make recourse to the opinion of the specialist, most frequently a psychologist or the court's specialists.[28] In the mentioned study, the author explained that in general the court would ask court's specialists to assess:

[25] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, Article 29.

[26] G. Cuniberti, A. Wysocka-Bar, *Infringement Procedure against Poland: Failure to Enforce English Return Orders*, EAPIL blog on 22 March 2023. Available at https://eapil.org/2023/03/22/infringement-procedure-against-poland-failure-to-enforce-english-return-orders/ (access: 22 Mar

[27] Decision of the Supreme Court of 14 January 2021, signature: II Ca 217/16.

[28] M. Białecki, Orzekanie w sprawach …[note 15], p. 54.

> "(…) the current life situation of the child after arriving in Poland, the child's attitude to the overall family situation, the child's level of development, including the bond with his or her parents, the child's actual attitude towards staying in Poland, and to determine whether the child's statements are his or her autonomous statements or whether they indicate the possibility of manipulation, or are they statements that are suggested and, if so, what is the basis for this, whether the child's statements can be considered credible, including whether they meet the criteria of accuracy and psychological credibility, including what impact a subsequent change in the child's living situation will have on the child in the context of the legitimacy of the application for the surrender of the child."[29]

There is no standard age, where a child is perceived as fit to be heard. It is submitted in the literature that children below 12 years of age should not in general be heard[30], whereas there is a recent case where a 9-year-old child was heard and found to have a sufficient understanding of the long-term consequences of the objection to return.[31]

It was submitted in the legal literature that different approaches exist in courts in respect to how the hearing is in practice conducted.[32] As the adequate one, observed in one of the courts in Poland, should be perceived the following:

> In this court, the judge conducts the hearing of the child in person. He talks in the presence of a psychologist in the so-called blue room without the parties. The mother and father remain outside the hearing room. The attorneys of the parties are allowed to observe the hearing from an adjacent room separated by a venetian mirror. They may communicate with the judge (ask questions or ask to see photographs of the child) using an audio system. The child does not hear what the attorneys have to say, as the judge listens to what they have to say through headphones. The hearing is included in the minutes and recorded.[33]

Article 4 – "habitual residence"

7. Is the concept of "habitual residence" interpreted differently in your jurisdiction in: 1.) intra-EU cases, 2.) cases involving third states, and 3.) cases involving states that are not contracting parties to the 1980 Convention (i.e., when applying national PIL rules)? Please explain.

In its decision of 26 September 2000, the Supreme Court[34] explained that:

> Whether or not there is a habitual residence is determined by objective events, consisting of continuous presence in a specific place by physical presence and the repeated performance of activities satisfying the current needs of life, both in terms of rights and obligations, while there

[29] M. Białecki, Orzekanie w sprawach…[note 15], p. 54-55.
[30] J. Wierciński, Uprowadzenie dziecka za granicę … [note 18], p. 367.
[31] Decision of the Court of Appeal of 9 September 2020, signature I ACa 177/20.
[32] A. Wierciński, Cywilne aspekty uprowadzenia dziecka za granicę w Unii Europejskiej, Zeszyty Prawnicze. Uniwersytet Kardynała Stefana Wyszyńskiego" 2021, no 3, p. 66.
[33] A. Wierciński, Cywilne aspekty uprowadzenia dziecka za granicę w Unii Europejskiej, Zeszyty Prawnicze. Uniwersytet Kardynała Stefana Wyszyńskiego" 2021, no 3, p. 66.
[34] The decision of the Supreme Court of 26 September 2000, signature: I CKN 776/00.

> is no parallel other place intended for the fulfilment of these activities. The place of habitual residence is thus the result of objective events and not of the will to cause these events. To this understanding of the place of habitual residence, the intention to reside permanently is obviously not an obstacle, which means that any place of residence can also constitute a place of permanent residence. However, the intention to reside permanently is not a condition for the existence of a place of habitual residence; in particular, the absence of an intention to reside permanently does not exclude the possibility of assuming the existence of a place of habitual residence.

In the literature it was submitted that the above understanding excluding the importance of the intention of parents is not necessarily in line with how the notion of habitual residence is understood in other jurisdictions (for example, US) or by CJEU as explained in *Mercredi* case.[35]

I am not aware of cases where the notion of habitual residence would be interpreted differently depending on whether the case was an intra-EU one, a case involving third states, or a case involving a state that is not contracting party to the 1980 Convention.

III. Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

Jurisdiction

8. Do the courts of your country examine their jurisdiction *ex officio* or only if raised by the parties?

In accordance with Article 1099 § 2 of the Code of Civil Procedure lack of jurisdiction constitutes one of the premises of the nullity of the civil proceeding. Lack of jurisdiction is examined *ex officio* by the court at each stage of the proceeding and requires the court to reject the claim or application (Article 1099 § 1 Code of Civil Procedure). Hence, it follows from the above that courts must apply rules on jurisdiction *ex officio*. This rule applies no matter the source of jurisdictional rules, be it domestic law, an EU regulation, or an international convention.

9. Do you consider the approach taken by the courts of your country to be different from the approach taken in other countries, especially non-EU countries? Please mention any notable examples of case law that demonstrate the difference.

As I understand the examination by the court of its jurisdiction *ex officio* seems to be a dominant approach in the EU.[36]

10. Is the process of determining jurisdiction by the courts of your country different intra-EU cases and cases involving third countries? Please mention any notable examples that demonstrate such differences.

[35] A. Wierciński, Miejsce stałego pobytu dziecka. Cywilnoprawne aspekty uprowadzenia dziecka za granicę, Forum Prawnicze 2020, p. 6.

[36] See for example, with respect to EU instruments on jurisdiction: M. Requejo-Isidro, The Application of European Private International Law and the Ascertainment of Foreign Law in: J. van Hein, E.-M. Kieninger, G. Rühl (eds.), How European is European Private International Law? Sources, Court Practice, Academic Discourse, Intersentia: Cambridge 2019, p. 141

The process of determining jurisdiction by the courts should be the same no matter if an intra-EU case or a case involving a third state is at hand. I am not aware of any difference in practice in the process of determining jurisdiction by Polish courts in intra-EU cases as opposed to cases involving third states.

Applicable law

11. Do the courts of your country apply applicable law rules *ex officio* or only if raised by the parties?

In accordance with Article 51a of the Law on the organisation of common courts[37], the court applies private international law rules on its ex officio and if foreign law is applicable, it again ex officio ascertains the content of foreign law. This rule applies irrespective the source of private international law rule, be it a domestic law, EU regulation, or an international convention.

12. How do you consider the approach taken by the courts of your jurisdiction to be different from the approach taken in other jurisdictions, especially non-EU jurisdictions? Please mention any notable examples of case law that demonstrate the difference.

As I understand, the process of determining applicable law is consistent with the approach of civil law jurisdictions, which in general provide for the *ex officio* application and ascertainment of foreign law.[38] This is however different to the approach of common law jurisdictions, which in general treat foreign law as 'fact' and require that parties plead and prove foreign law.[39]

13. Do you consider the process of determining applicable law by the courts of your jurisdiction to be different in intra-EU cases and cases involving third states? If so, what are the differences? Please mention any notable examples that demonstrate such differences.

The process of process of determining applicable law should be the same no matter if an intra-EU case or a case involving a third state is at hand. I am not aware of any difference in the process of determining applicable law by Polish courts in intra-EU cases as opposed to cases involving third states.

Recognition and Enforcement

14. How does the ease of recognition and enforcement of foreign judgments compare between intra-EU (Brussels IIa Regulation) and third states' judgments (1996 Convention)? Are you aware of any examples of relevant cases decided by the courts of your jurisdiction?

Chapter IV of 1996 Hague Convention is devoted to recognition and enforcement. These rules seem to address recognition and enforcement in a general way only. Article 23(1) provides for recognition of measures taken by the authorities of a contracting state by operation of law. In accordance with Article 24, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure. The procedure is governed by the law of the requested State. Then, pursuant to Article 26(1), if a measures taken in one Contracting State and enforceable there require enforcement in another

[37] Ustawa z dnia 27 lipca 2001 r. Prawo o ustroju sądów powszechnych
[38] Y. Nishitani, Treatment of Foreign Law: Dynamics Towards Convergence? — General Report in: Y. Nishitani (ed), Treatment of Foreign Law - Dynamics towards Convergence? p. 12
[39] Y. Nishitani, Treatment of Foreign Law: Dynamics Towards Convergence? — General Report in: Y. Nishitani (ed), Treatment of Foreign Law - Dynamics towards Convergence? p. 15-16.

Contracting State, they are, upon request by an interested party, declared enforceable in that other State according to the procedure provided in the law of the latter State. Article 23(2) lists exclusive grounds of refusal. This list includes lack of indirect jurisdiction, lack of hearing of the child, lack of hearing of the person having parental responsibility, public policy and incompatibility with a later measure. Pursuant to Article 26(2) 1996 Hague Convention, each Contracting State shall apply to the declaration of enforceability a simple and rapid procedure. In accordance with Article 27, a measure taken should not be reviewed as to the merits.

In Poland, in its domestic law (excluding EU instruments and international conventions), recognition and enforcement is subject to rules contained also in Code of Civil Procedure (Articles 1145–1152). In accordance with Article 1145 Code of Civil Procedure a foreign judgment (and also other decision of a foreign authority) issued in a civil matter is recognized in Poland by virtue of law (*ex lege, de plano*), unless there exists one of the grounds specified in Article 1146. A person who seeks recognition is obliged to present an official copy of the judgment and a document certifying that it is final (unless the content of the judgment makes it obvious) and, in general, a certified translation of the above documents (Article 1147 §1 Code of Civil Procedure). If a judgment was issued in a proceeding, in which the defendant have not disputed the merits of the case, additionally a document (together with its certified translation) confirming that the document instituting this proceeding was properly served on the defendant must be presented (Article 1147 §1 Code of Civil Procedure). Any person who has a legal interest in it may apply to Polish court for a judgment whether a foreign judgment is or is not recognized in Poland (Article 1148 §1 Code of Civil Procedure). A judgment issued as a result of the application may be appealed and, subsequently, also appealed in cassation to the Supreme Court (Article 11481 §3 Code of Civil Procedure).

In accordance with Articles 1150 and 1151 Code of Civil Procedure a foreign judgment (and also other decision of a foreign authority) in a civil matter may be enforced in Poland if it is enforceable in the country of origin and obtained a declaration of enforceability (*exequatur*) in Poland. Exequatur may not be issued if there exists any of the grounds specified in Article 1146. Exequatur is issued on the application of the interested party. The application should be supplemented by the documents listed in Article 1147 Code of Civil Procedure and a document indicating that the judgment is enforceable in the country of origin (unless the content of the judgment makes it obvious). Exequatur Judgment may be appealed and subsequently appealed in cassation to the Supreme Court. Enforcement proceeding may be initiated once the exequatur judgment becomes final (Article 11512 §1 Code of Civil Procedure).

A judgment may neither be recognized nor enforced if at least one ground for refusal provided for in Code of Civil Procedure exist. I understand however that grounds of refusal as listed in Code of Civil Procedure do not apply to judgements falling within the scope of 1996 Hague Convention.

Once a foreign judgment is equipped with declaration of enforceability it constitutes in Poland an execution title (1150 §1 Code of Civil Procedure), based on which the creditor may initiate the execution proceeding in accordance with provisions of Part III 'Execution Proceeding' of the Code of Civil Procedure.

The above rules differ from rules of Brussels II ter Regulation when it comes to, for example, lack of exequatur proceeding with respect to decisions on parental responsibility (Article 34 Brussels II ter Regulation) or recognition and enforcement of certain privileged decisions (Articles 42-50 Brussels II ter Regulation).

I am aware of one case concerning recognition and enforcement under 1996 Hague Convention, which reached the Supreme Court. In this case the recognition of a Danish decision on parental

responsibility was refused based on public policy (Article 23 of the 1996 Hague Convention).[40] The reason for the refusal is that the Danish decision attributed parental responsibility to the Danish father, whereas the child was living in Poland with the mother for several years already, following a child abduction. This decision was criticized in the legal literature.[41]

Please note that this decision is not specific because it was given under 1996 Hague Convention. A public policy clause is understood in Poland in the same way no matter if under Brussels I bis Regulation / Brussels II ter Regulation or 1996 Hague Convention. In another judgement, concerning this time Brussels II bis Regulation, the Supreme Court refused to apply public policy clause against foreign judgement attributing parental responsibility only to the father living abroad, from where the child was abducted by the mother.[42] Once again I wanted to underline that the different outcomes of these two cases is not due to application of 1996 Hague Convention in the first case and Brussels II bis Regulation in the second, but might be due to the composition of the court in a given proceeding and judges' understanding of the public policy clause and best interest of the child principle.

International cooperation of authorities

15. Please comment on how international cooperation is approached in your jurisdiction, noting any case law or other secondary sources you consider important. E.g. are separate or the same authorities responsible for these instruments?

The Central Authority in Poland for 1980 Hague Convention, 1996 Hague Convention and Brussels II ter Regulation is the Ministry of Justice and within this Ministry - the Department of Family and Juvenile Matters, Division of International Proceedings in Family Matters.

There is a separate legal act describing rules and procedure in front of the Polish Central Authority. It states that Ministry of Justice[43] is the central authority with respect to the following instruments: 1980 Luxembourg Convention, 1980 Hague Convention, 1996 Hague Convention and Brussels II ter Regulation.

As underlined by the author of the above-mentioned empirical study:

> "(…) high standards, as far as the required qualifications are concerned, have been introduced within the structures of the Polish central authority, which I have had the opportunity to observe on many occasions not only during my file investigations, but also as an attorney appearing in Hague cases. The professionalism of the Polish central authority and the commitment of the entire team dealing with Hague cases makes the proceedings at the central authority stage very efficient and dynamic, and there is even exemplary cooperation with foreign central authorities and courts as regards the exchange of information and transfer of documents (…)."[44]

There is a separate governmental website on cross-border child abduction, parental responsibility and maintenance with basic information and forms available: LINK.

[40] The decision of the Supreme Court of 31 January 2018, signature: IV CSK 442/17.
[41] See: Z. Kubicka-Grupa, A review of the Polish Supreme Court case law in international family law matters (from January 2015 to April 2021), Polski Proces Cywilny 2021, no 4, p. 656-658.
[42] The decision of the Supreme Court of 13 November 2019, signature: V CSK 389/19.
[43] Ustawa z dnia 26 stycznia 2018 r. o wykonywaniu niektórych czynności organu centralnego w sprawach rodzinnych z zakresu obrotu prawnego na podstawie prawa Unii Europejskiej i umów międzynarodowych, Dz. U. z Dz.U. 2018 poz. 416.
[44] M. Białecki, *Orzekanie w sprawach*…, p. 62.

IV. Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations

16. If relevant, please comment on the use, operation, and notable case law concerning the 1970 Convention in your jurisdiction. Otherwise, please comment on what you consider to be the obstacles to your jurisdiction becoming a Contracting Party to the Convention.

Recognition of divorces and legal separations is done in Poland by the Civil Status Registrars while updating civil status records. It is possible to apply directly to the court asking for the recognition of a divorce / separation judgement, but it happens that the courts would redirect such application to Civil Status Registry. Hence, in practice the convention might be applied by Civil Status Registrars, who make recourse to domestic law on recognition of foreign judgements / decisions.

The relation between the 1970 Hague Convention and domestic law was nicely explained in one of the decisions by the Supreme Court:

> (…) the Hague Convention defines only the scope of its application and the substantive prerequisites for the recognition of divorces and separations, but does not rule on the mode of recognition, i.e. whether this is done by operation of law or requires a deliberative proceeding. Assuming in this regard the applicability of the law of the recognizing state, it must be taken into account that in Poland foreign judgments are subject to recognition by operation of law, without the need for separate proceedings in this regard (Article 1145 of the CCP). This means that the court before which a foreign judgment is invoked assesses independently, ad casu and premise, whether it is subject to recognition in Poland.[45]

Additionally, pursuant to Article 17 of the 1970 Hague Convention it does not prevent the application in a Contracting State of rules of law more favourable to the recognition of foreign divorces and legal separations. Domestic rules in place in Poland are perceived more favourable and applied in practice by Civil Status Registrars.

In accordance with Article 1145 Code of Civil Procedure a foreign judgment (and also other decision of a foreign authority) issued in a civil matter is recognized in Poland by virtue of law (*ex lege, de plano*), unless there exists one of the grounds specified in Article 1146. A person who seeks recognition is obliged to present an official copy of the judgment and a document certifying that it is final (unless the content of the judgment makes it obvious) and, in general, a certified translation of the above documents (Article 1147 §1 Code of Civil Procedure). If a judgment was issued in a proceeding, in which the defendant have not disputed the merits of the case, additionally a document (together with its certified translation) confirming that the document instituting this proceeding was properly served on the defendant must be presented (Article 1147 §1 Code of Civil Procedure).

A judgment may not be recognized if at least one ground for refusal exist. A judgment, which is not final in the country of origin or was issued in a case falling within the exclusive jurisdiction[46] of Polish courts will not be effective in Poland (Article 1146 §1(1) and (2) Code of Civil Procedure). Recognition and enforcement should be refused in a situation, in which a defendant, who have not defended on the merits, was not properly served in due time to enable the defence (Article 1146 §1(3) Code of Civil Procedure or a party to the proceeding was

[45] Decision of the Supreme Court of 23 March 2016, signature: III CZP 112/15.

[46] Please note however that under Brussels II ter Polish courts might not have exclusive jurisdiction, and under domestic law such jurisdiction exists only with respect to parties who are Polish nationals, domiciled in Poland and having their habitual residence in Poland.

deprived of the possibility of defence (Article 1146 §1(4) Code of Civil Procedure). Further grounds for refusal include lis pendens where a proceeding is pending in Poland (Article 1146 §1(4)) Code of Civil Procedure or res iudicata, meaning that a there already is a final Polish judgment or a foreign judgment recognized in Poland on the same matter. Also, a classical public policy clause is provided for in Article 1146 §1(7) Code of Civil Procedure.

V. Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

17. We note that there is limited case law in the UK interpreting the 2007 Maintenance Convention. Are you aware of any case law that links to the UK or is otherwise significant for this jurisdiction? If so, please briefly outline such case law.

Unfortunately, I am not aware of any cases decided by courts in Poland which would directly interpret 2007 Hague Convention.

Applicable law (especially where different from the *lex fori*)

18. We understand that a challenging point can be establishing the contents of foreign law when the applicable law is different from the *lex fori*. For example, when a party purports to apply foreign law in UK courts, that party must plead foreign law as facts before the court. What are the methods and techniques used by the courts of your jurisdiction to establish the contents of foreign law?

As already mentioned, there is a principle of *ex officio* application of private international law rules. Hence, the court is obliged to assess which law is designated as applicable by PIL rule, which (at least theoretically) does not depend on the parties' request in this matter. Additionally, parties are not obliged to prove the content of foreign law either. If, during the proceedings, the court finds the existence of circumstances indicating the applicability of a foreign law, it should apply it in the case as the basis for a substantive decision. Foreign law is treated as a law, not as a fact. When applying it, the court should consider its place in the catalogue of sources of law of a foreign legal order and apply appropriate rules of interpretation in the same way as a foreign court would do it. The consequence of non-application of the applicable law or its incorrect application constitutes a breach of substantive law and may be the basis for an appeal to a court of second instance or a cassation appeal.

The court is obliged to ascertain properly the content of foreign law to apply it. Article 51a of the Act on the System of Common Courts provides that the court may ask the Ministry of Justice for the text of foreign law and explanations as to the foreign legal practice. To ascertain the content of foreign law and foreign legal practice the court may also use other means, including asking for opinion of an expert witness. The use of word 'may' suggest that the court is not obliged to use these means indicated in Article 51a but may instead ascertain content of foreign law using such means as it finds appropriate.

19. If you are aware of case(s) where UK law (either the law of England and Wales or Scots law) was the applicable law, how did the court(s) interpret the said UK law?

I am not aware of a case, in particular not with respect to maintenance, where the law of England and Wales or Scots law would be applied. There is however a jurisprudence explaining how the foreign law should be applied. For example, the Supreme Court underlined that:

> "(…) gathering information on the content of the foreign law is the duty of the court, and the party can only be helpful in this respect and no procedural disadvantages can result for it from the fact that it does not manage to provide relevant information in this respect. The provision of Article 1143 of the Code of Civil Procedure [predecessor of the

current Article A51a of the Act on the System of Common Courts – AWB] obviously leaves to the Court a certain freedom to choose the means to ascertain the content of the foreign law. (...) The mere ascertainment of the content of a foreign legal norm does not always allow to remove all doubts as to its meaning, as it is often necessary to make use of various interpretative directives as well, or even the use of a well-established line of foreign case law (...) the correct application of foreign law is subject to an instance review (...)."[47]

20. In the same context, do you consider the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and/or the 1968 European Convention on Information on Foreign Law ('the London Convention') to be a useful tool?

Poland has been party to 1968 European Convention on Information on Foreign Law and its 1978 Additional Protocol since 1992. Poland has been party to 1970 Hague Convention since 1996. While accessing to the Convention Poland declared, pursuant to Article 23, that it will not execute letters of requests issued for the purpose of obtaining "pre-trial discovery of documents" as known in common law countries. Additionally, Poland excludes the application on its territory of the provisions of Article 4(2), namely letter of request in French or English and the provisions of Chapter II, allowing for the taking of evidence by diplomatic officers, consular agents and commissioners.

The Conventions foresees that contracting states supply to each other information concerning their law and procedure in civil and commercial matters as well as on their judicial system. Each contracting state is supposed to appoint bodies called a 'receiving agency', to receive requests for information and to respond to these requests, and a 'transmitting agency' to receive requests for information from its judicial authorities and to transmit them to foreign agencies.

In Poland it is the Ministry of Justice that assumes the role of both receiving and transmitting agencies. Information about Poland is available at the HCCH website (LINK).

Recognition and enforcement

21. If you are aware of case(s) where recognition and enforcement was sought in jurisdictions outside the EU, please comment on the procedural or other practical differences between the Brussels IIa Regulation and the 2007 Maintenance Convention regimes. Where relevant, please comment also on pertinent cases under the Lugano Convention.

I am not aware of cases where recognition and enforcement would be sought in jurisdictions outside of the EU.

VI. Convention of 13 January 2000 on the International Protection of Adults

As already explained Poland has not ratified the Hague Convention on the International Protection of Adults and therefore Polish courts and authorities do not apply this convention. Poland is still party to the 1905 Deprivation of Civil Rights Hague Convention. This Convention entered into force in 1912. The UK was a contracting party to this Convention but renounced it in 1977. As a result, the source of private international law rules in Poland which would govern recognition of protection measures granted in the UK would be domestic law, namely Code of Civil Procedure when it comes to jurisdiction and recognition and enforcement and 2011 Private International Law Act when it comes to applicable law.

[47] Judgement of the Supreme Court of 11 August 2004, signature: II CK 489/03

Recognition and enforcement

22. Please comment on how recognition and enforcement of measures of protection are approached in your jurisdiction. If possible, please refer to examples from case law.

As I understand, "measure of protection" should be understood as in 2000 HCCH Protection of Adults Convention, namely as a "measure" dealing with one of the issues listed in Article 3 of this Convention. I also understand that the "measure of protection" existing in Scotland is guardianship pronounced by a court.[48]

Looking from the Polish perspective, pursuant to Article 1107 of the Code of Civil Procedure, the jurisdiction of Polish courts does not have exclusive character in matters of guardianship and curatorship. Thus, judgments of foreign courts in matters relating to those matters are recognized in Poland. Pursuant to Article 1145 of the Code of Civil Procedure, judgments of foreign courts in civil matters are - as a rule - recognized *ex lege*. This means that it is not necessary to conduct any proceedings in which a Polish court or another authority would recognize a given foreign judgment. Hence, pursuant to Article 1145 Code of Civil Procedure judgements issued by the foreign courts - as a rule – are recognized in Poland and do not require exequatur. Pursuant to 1149^1 Code of Civil Procedure, the same rules apply to recognition of decisions given by other public authorities (than courts) in civil matters. Hence, the above applies to decisions given by "courts" and "other public authorities", but not private documents.

23. Please comment on how and to what extent foreign powers of attorney are capable of recognition and enforcement in your jurisdiction. If possible, please refer to examples from case law.

As I understand this question refers to "powers of attorneys" within the meaning of Article 15 of the 2000 HCCH Protection of Adults Convention and not an "ordinary" power of attorney to – for example – purchase a property. Hence, it refers to:

> "the situation in which the adult himself or herself organises in advance his or her protection for the time when he or she will not be in a position to protect his or her own interests. He or she does this by conferring on a person of his or her choice, by a voluntary act which may be an agreement concluded with this person or a unilateral act, powers of representation (…) The situation envisaged here is characterised by the fact that, on the one hand the powers of representation cannot in general begin to be exercised until after the adult who has conferred them is no longer able to protect his or her own interests, and that on the other hand their taking effect requires, at least in certain legal systems such as Quebec, the intervention of the judicial authority to establish incapacity. The powers thus conferred may be very varied. They have to do with the management of the adult's property as well as his or her personal care. One often finds in them the instruction given to the person mandated to refuse any persistent course of treatment in the event of incurable illness. This type of mandate, which seems to be quite common in certain States, and particularly in North America, is unknown in a number of European States, including France, where the

[48] See: Responses for Scotland to the 2021 Questionnaire on the practical operation of the HCCH 2000 Protection of Adults Convention, p. 6 (question 3.2.) available at https://assets.hcch.net/docs/0b38d630-5ab2-4736-8094-82e381f3482e.pdf

> mandate necessarily comes to an end in the event of the onset of incapacity (…).”[49]

As I understand in Scotland such powers of attorney might be granted and are registered by the Office of the Public Guardian. Assuming that such power of attorney might be classified in Poland as decisions of courts or other public authorities, it might be recognized in accordance with the rules explained above. Hence, comments made to question 22 above, should apply here. I am not aware of any case law where Polish courts would discuss the question of effectiveness in Poland of such powers of attorney drafted abroad, in particular in Scotland.

Please note that the institution of powers of attorney within the meaning of Article 15 2000 HCCH Protection of Adults Convention does not exist in Polish substantive law, even thought it was proposed to be introduced into Polish legal system few years ago.[50] Currently, the Council of Ministers informs on its website on the works aimed at amendment to current laws modernizing institution of incapacitation and introducing powers of attorneys granted in case of future vulnerability.[51]

If the commented power of attorney would be classified in Poland as an “ordinary” power of attorney, and not a decision of a court or other public authority, its effectiveness in Poland – as I understand - should be subject to a multiple step analysis.[52] First, in accordance with Article 1138 of the Code of Civil Procedure foreign official documents have the same probative value as Polish ones. However, a document involving the transfer of ownership of an immovable property located in Poland (or a document, whose authenticity was denied by a party) should be certified by a Polish diplomatic mission / consular office. In case of official documents coming from the UK, “certification” would be replaced by *apostille* pursuant to the Hague Apostille Convention[53], to which both Poland (since 2005) and the UK (since 1965) are contracting parties. Secondly, when it comes to the form, pursuant to Article 25 of the Private International Law Act it is governed by the law applicable to the juridical act (so *lex causae*, in case of the power of attorney, the law designated in accordance with Article 23). It suffices however to satisfy formal requirements provided for in the law of the state where the juridical act was made (*lex loci actus*). Thirdly, material validity of the act would be analyzed in accordance with Article 23 of the 2011 Private International Law Act. Article 23(1) provides that a power of attorney is governed by the law chosen by the principal. However, the chosen law may be invoked towards a third party with whom the proxy has effected a legal transaction only if the third party was aware of the choice of law or could easily have become aware of it. The principal may invoke the chosen law against the proxy only if the latter was aware of the choice of law or could easily have become aware of it. Pursuant to Article 23(2) of the 2011 Private International Law Act, in the absence of a choice of law, the power of attorney shall be governed by: (1) the law of the State of the domicile of the representative where he/she is

[49] P. Lagarde, *Explanatory Report on the 2000 HCCH Protection of Adults Convention*, p. 71-72.
[50] See for example: J. Greguła, *Przedstawicielstwo opiekuńcze - projekt nowej instytucji w prawie rodzinnym*, „Krakowski Przegląd Notarialny” 2016, no 2, p. 17-48.
[51] See: Projekt ustawy o zmianie ustawy – Kodeks cywilny oraz niektórych innych ustaw available at: https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy--kodeks-cywilny-oraz-niektorych-innych-ustaw.
[52] See on the example of a power of attorney for the purpose registration in Polish Land Register of a transfer of an immovable property located in Poland: P. Czubik, *Pełnomocnictwa zagraniczne dotyczące nieruchomości – moc dowodowa dokumentu i skuteczność czynności z perspektywy wieczostoksiegowej*, “Nieruchomości@” 2021, no 2, p. 27-49.
[53] It is unclear whether the consular agreement between Poland and UK abolishes certification or not. See: P. Czubik, *O konsekwencjach wskazania przez stronę czynności prawa wyłącznie właściwego co do formy. Kilka uwag na marginesie pełnomocnictw z londyńskiej kancelarii Salinger*, „Nowy Przegląd Notarialny” 2012, no 4, p. 5.

habitually acting, or (2) the law of the State in which the principal's business is situated, if the principal has his habitual residence there, or (1) the law of the state in which the proxy has in fact acted in representing the principal or in which the principal wishes the proxy to act.

Applicable law

We note that determining the law applicable to *ex lege* powers of representation highlights several existing issues, which are explored in the following questions.

24. Is it possible for *ex lege* powers of attorney to arise under the 2000 Convention in your jurisdiction?

N/A

25. How is the above question classified in your jurisdiction, as a matter of personal law or protection?

As I understand, by *ex lege* powers of attorneys one should understood as an institution existing in some states that provide for powers of representation to arise by operation of law for the purposes of protecting an adult (for example, between spouses in case of a severe illness of one of them).[54] Authors suggests, that any *ex lege* protection measures are covered in Poland by the scope of Article 60 of Private International Law Act.[55]

In Poland, pursuant to Article 60(1) Private International Law Act establishing a guardianship, curatorship or other protective measures for an adult is governed by that person's national law. Hence, establishment of the ex lege powers of attorneys is governed by the national law of an adult. Pursuant to Article 60(3) Private International Law Act exercising the measures referred to in Article 60(1) is subject to the law of the state in which the person affected by these measures has his or her habitual residence. One might have doubts which issues are covered by Article 60(1) and which by Article 60(3).[56] Hence, I would say it is not that straightforward to know whether *ex lege* power of attorney would be fully effective in Poland.

26. What do you consider the greatest pitfall of the 2000 Convention to be in this regard?

N/A

VII. Cooperation and training

27. Do you consider the cross-border cooperation between courts and other authorities involved in handling international family cases under the Hague Conventions listed above to be efficient?

The two instruments often applied in practice is: (1) 1996 HCCH Child Protection Convention and (2) 2007 HCCH Maintenance Convention. One of the cross-border cooperation aspects in which the former comes into play is the "transfer of jurisdiction" to Poland ask my Polish authorities, in cases where parents file for divorce in Poland. Polish authorities claims that UK authorities are not willing to cooperate in that respect. With respect to the latter, the cooperation is effected through REMO Unit e-mail. Polish authorities claim that responses are sent from UK with huge delays.

28. Can you compare its functioning among EU Member States on one hand and between EU Member States and third states on the other hand?

[54] Report of the European Law Institute. The Protection of Adults in International Situations, p. 47.
[55] A. Kozioł, P. Twardoch, Rozdział 14. Opieka i kuratela in: M. Pazdan (ed.), Prawo prywatne międzynarodowe. Komentarz, Wydawnictwo C.H. Beck 2018, p. 527.
[56] A. Kozioł, P. Twardoch, Rozdział 14. Opieka i kuratela in: M. Pazdan (ed.), Prawo prywatne międzynarodowe. Komentarz, Wydawnictwo C.H. Beck 2018, p. 531.

Cooperation with other EU MS is easier, as legal instruments are known and provide for efficient tools (for example, videoconferencing).

29. Is the usage of modern technologies in cross-border cooperation equally represented in EU and non-EU cooperation?

Modern technologies (available thanks to e-Codex or iSupport projects) are rather represented in cross-border cooperation in cases between EU MS than in cases with non-EU states. Starting from 1 May 2025 cooperation among EU MS will be fully digitalized.

30. What steps should be taken to make cross-border cooperation more efficient, timely and successful?

Creation of centralized and specialized units in courts would definitively make cross-border cooperation more efficient. Another step would be digitalization like in intra-EU cases, use of multilingual forms, which would be automatically translated as in EU. Language trainings for employees are very important

31. Is judicial training in international family matters contributing to better understanding, interpretation and uniform application of EU Regulations and/or Hague Conventions listed above?

There is a special body in Poland responsible for training of judges, namely National School of Judiciary and Public Prosecution (KSSiP - LINK), which is a member of EJTN. It offers trainings (online and on-site) on various topics, including judicial cooperation in civil matters. Trainings are organized by KSSiP itself or within international cooperation, for example with EJTN, ERA. Similarly, trainings are also available to attorneys at law through their bars, who also participate in international cooperation (see for example, CIVILaw project with European Lawyers Foundation). I would say that there are trainings available, however needs are exceeding the available options. More trainings, including language trainings, are needed. Additionally, the information on these trainings should be more efficiently distributed among partitioners. Also, there is a need for trainings which are not aimed at general public, but dedicated to practitioners in a given state (Poland).

32. Is information on the Hague Conventions listed above accessible to judges and other relevant officials in your country? For example, is the information available to them in their language, and do they possess skills to find the information in the digital format from reliable online sources?

There is a governmental website dedicated to cross-border parental responsibility, child abduction and maintenance cases (LINK). It provides for the legal acts, forms, database with case law of Polish courts, as well as Q&A section – in Polish language. The information about available resources (for example, HCCH guides or their translations) should be more efficiently distributed among practitioners.