

COMMISSION OF THE EUROPEAN COMMUNITIES

COM (80) 174 final

Brussels, 15th April 1980

REPORT FROM THE COMMISSION TO THE COUNCIL
ON THE QUESTION OF RECOGNITION OF LEGAL DECISIONS
RELATING TO THE CUSTODY OF CHILDREN

Following the Council's Decision of 9 October 1978 (Council Doc. R/3578/78 (JUR 188) of 22 December 1978), the Commission submitted to the Council on 21 June 1979 a report on the problem of the recognition of legal decisions relating to the custody of children (Council Doc. 8495/79 of 27 July 1979).

This report assessed the work in progress on the subject in the Council of Europe and at the Hague Conference on Private International Law and raised the question of whether an additional or alternative solution was desirable at Community level. Since insufficient progress had been achieved in the work of these two institutions, the report submitted was merely provisional. In view of the fact that the work has since advanced, the present report may be regarded as definitive. It will deal first with the work carried out by the Hague Conference, then with that of the Council of Europe, followed by any work to be undertaken at Community level, and end with a brief summary of the wider problem of mutual assistance of an administrative and judicial nature in civil and commercial matters. It should be noted that a Commission representative took part as an observer in the work carried out in Strasbourg and at the Hague.

The Hague Conference has produced a preliminary draft convention on civil aspects of the international abduction of children. This preliminary draft convention was adopted by a special committee of the conference on 16 November 1979. It will be finalized during the conference session which is to be held from 6 to 24 October 1980.

The basic aim of the preliminary draft convention is to set up a system of mutual assistance of an administrative nature by providing for the creation of a central authority in each Contracting State.

These central authorities will be required to cooperate to ensure that in every Contracting State the right of custody as well as the right of access are effectively enjoyed and also to secure the immediate return of children unlawfully removed to or detained in, any Contracting State. They are to be returned even without the need to institute legal proceedings in the State in which the children are located. The latter consideration highlights the importance of the Hague Conference's draft convention, which will enable an amicable settlement to be reached in numerous cases without having recourse to legal or administrative action. But, of course, such action may be necessary. In such cases, the draft convention imposes an obligation on the central authority of the State in which the child is to be found to take whatever steps are necessary to ensure that the child is voluntarily returned before legal proceedings are initiated. Where such proceedings subsequently prove necessary, the draft convention provides for the use of emergency procedures. Furthermore, where the right of custody is violated, the judicial or administrative authorities of the State in which the child is located must order his immediate return where an application has been submitted within six months of the improper removal. However, there is an exception to this principle whereby the court of the State addressed may in such cases decline to order the child's immediate return where the person detaining the child shows that there are good reasons for not returning the child.

This exception has been severely criticised by some delegations on the ground that in circumstances where the child has been unlawfully abducted and expeditiously reclaimed, there should be no discretion in the court to determine the child's interests. To allow such an exception is tantamount, in their opinion, to introducing a dangerous element of subjectivity which is unnecessary in the circumstances and has in numerous cases proved harmful to the child.

In any event, where legal decisions are given in the State from which the child was removed, the question arises whether they will be recognised and enforced in the State in which the child is located. The Council of Europe has given special attention to this matter.

The draft convention of the Council of Europe provides for a system of mutual administrative aid and deals particularly with the recognition and enforcement of decisions relating to the custody of children and restoration of custody of children. Accordingly, it seems reasonable to conclude that the Strasbourg draft convention is not incompatible with the Hague convention (1). Work on the Strasbourg draft has now been completed. The Committee of Ministers of the Council of Europe approved the draft Convention on 28 November 1979 and decided to open it for signature at the XIth Conference of European Ministers of Justice which is to take place in Luxembourg on 20 May 1980. (2)

- (1) It will be noted that the scope of the Hague draft convention differs from that of the Strasbourg draft convention. The former concerns the removal across international frontiers of a child by its parents and, in particular, creates a system of mutual aid of an administrative nature as a means of redress. The second draft convention goes beyond the problem of abduction and extends to every decision relating to custody. Moreover the two conventions differ in their territorial scope.
- (2) It will be remembered that another draft convention, the "draft European convention relating to an international tribunal to settle conflicts in matters of custody of children", is at present being studied by the Council of Europe.

With regard to the crucial matter of the restoration of custody, the draft convention covers the three following matters:

1. The preconditions for the child's repatriation have been kept to a minimum, namely that the two parents and the child should be nationals of the State in which the decision was given, that the child should have his habitual residence there and that the application be made within six months of the child's removal. The child's repatriation would not be subject to any other conditions.
2. Where one of those three conditions is not satisfied, repatriation is subject to a small number of grounds for refusal.
3. In other cases, the grounds for refusal are more numerous because the child may already have been integrated into his new environment.

Furthermore, with the aim of making the convention acceptable to a larger number of States, it is provided that the Contracting States may enter a reservation for the purpose of extending the grounds for refusal specified in paragraph 3 to the situations outlined in paragraphs 1 and 2. Apparently, some delegations intend to exercise this right on the ground that the court of the State addressed must in each case be able to take the child's interests into consideration and, where necessary, refuse to return him. However, other delegations take the attitude (as has already been seen in connection with the work of the Hague Conference)

that there are certain perfectly clear cases in which the court of the State addressed should not have to consider the child's interests, for the court might very often make an error of judgment and view the problem solely in the light of criteria applicable in its own State.

It should be emphasized that this controversy has divided not only the Member States of the Council of Europe but also the Member States of the Community. It would therefore be highly desirable that, before they sign the draft convention of the Council of Europe, the Member States of the Community should seek to establish, by means of a coordination meeting at Council level, a common position with regard to the problem of reservations. It would be inadvisable in such a vital matter for the Member States of the Community not to be bound by mutual undertakings. It is important to recall

in this connection that the very foundations of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters are based on the concept of mutual confidence between the Contracting States in the validity of the decisions given by each other's courts.

If, however, the Member States of the Community fail to agree on a common standpoint and enter reservations that differ in extent, the Commission proposes that they should reach agreement at least to ensure that these reservations should not apply as between the Member States of the EC.

The draft convention of the Council of Europe lays down that every State shall apply in respect of the recognition and enforcement of a child custody order a simple and expeditious procedure. To that end, it is to ensure that a request for enforcement may be lodged by simple application. This type of procedure is provided for in the Brussels Convention. As has already been stated in the provisional report, such a procedure could be adopted by the nine Member States to supplement the Council of Europe's convention. This could be an additional contribution from the Community to the work in progress, which the Commission supports wholeheartedly. However, it is important not to lose sight of the fact that in this matter the legal position differs from that obtaining under the Brussels Convention. The latter is a dual convention comprising rules both on jurisdiction and on recognition and enforcement. In that case, the rules governing enforcement can be simplified since the dual convention contains identical measures for the protection of the party who fails to appear when the proceedings are opened.

At all events, Community action in this area would be premature for the time being. If the Member States reserve the right to invoke different grounds for refusal, it would appear to be difficult to adopt a common procedure for applications.

Moreover, some Member States have been extremely unreceptive to any Community initiative concerning the custody of children. However, other Member States have favoured the creation of a uniform Community enforcement procedure which would supplement the forthcoming Convention of the Council of Europe.

These States took the view that this procedure could be introduced on the basis of Article 220 of the EEC Treaty, which does not by any means exclude family law. It was left out of the Brussels Convention on grounds of expediency, primarily with a view to accelerating the introduction of the Convention.(1)

Pursuing another line of thought, the Commission could seek in conjunction with the Member States a practical solution to the problem of setting up - as far as this is possible - a central authority in each Contracting State, as proposed by the French delegation (2). General powers should be vested in this central authority to deal with any matters connected with mutual assistance of an administrative or judicial nature.

Not only could this make it easier - even before any convention is brought into force - to resolve problems relating to the return of children but it could also be useful in many other fields of civil and commercial law, thereby making an initial contribution to the attainment of a European law enforcement area in civil and commercial matters.

Mutual assistance in matters of law enforcement could, for example, make it easier to apply the Brussels Convention of 27 September 1968 with regard to service and notification of instruments, whether or not in the context of legal proceedings, as has already been emphasized in the provisional report. It should, moreover, be noted that several other international conventions, whose signatories have always included a number of Community Member States, provide for recourse to central authorities for the purpose of their application, but that these central authorities often differ, depending on the subject-matter of the conventions concerned. It would accordingly be more efficacious to place all the powers of these different central authorities in the hands of a single authority in each State. Frequently, there are several different aspects to any given matter. It would be in the interests of all concerned for its different facets to be dealt with by a single authority rather than by several.

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Report on the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (OJ.EC. n° C.59/10, 5/3/1979).

(2) There will be a problem, however, for Member States consisting of two or more territorial units, each with its own legal system.

CONCLUSIONS

1. A coordination meeting must be held at Council level in order to reach agreement on a common position with regard to the problem of any reservations that the Member States might enter when the Council of Europe Convention is signed. It should be noted that it will be opened for signature in May next.

2. An alternative Community solution should not be contemplated for the time being, for the Council of Europe has completed its work and the Hague Conference will do likewise this year. On the other hand, an additional Community solution could be considered following the entry into force of the Council of Europe's convention, depending upon the results achieved.

3. It would be desirable for an effort to be made at an earlier date to rationalize, simplify and render more incisive at international level the role of the various central authorities currently in existence in the Member States with regard to the application of conventions in civil and commercial matters.