CJEU on acquisition of new habitual residence under the 2007 Hague Protocol subsequently to a wrongful removal, case W.J., C-644/20

Under the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, maintenance obligations are governed by the law of the State of habitual residence of the creditor, save where the Protocol itself provides otherwise [Article 3(1)]. Echoing the issues pertaining to the so-called conflit mobile, the Protocol provides also that in the case of a change in the habitual residence of the creditor, the law of the State of the new habitual residence is to apply as from the moment when the change occurs [Article 3(2)].

If the creditor is a child, does a wrongful removal – followed by an order commanding to return the child to the State in which he/she habitually resided immediately prior to the wrongful removal – constitute an obstacle to the acquisition of a new place of habitual residence by the creditor? This is the legal issue that the Court addresses in its judgment handed down this Thursday in the case W.J., C-644/20.

The Court decided to answer the preliminary question without first requesting its Advocate General to present an Opinion. It did so in a negative: **the fact that a court of a Member State has ordered, in separate proceedings, the return of that child to the State in which he/she was habitually resident immediately before his/her wrongful removal is not sufficient to prevent that child from acquiring new habitual residence in the Member State to which the child was removed**.

In brief, its reasoning may be summarized as follows:

- also for the purposes of the Hague Protocol, the notion of 'habitual residence' calls for it autonomous interpretation (paragraph

62);interestingly, while the Court has jurisdiction to interpret the Protocol and does so with a binding effect with regards to the Member States, the Protocol is also binding for non-Member States; that being said, the plead for autonomous interpretation seems justified also from the perspective of extra-EU parties to the Protocol, although it is yet to be seen whether they will align with the interpretation provided for by the Court, its methods of said interpretation and references to Charter.

- the habitual residence of the maintenance creditor is that of the place where on the facts his or her habitual centre of life is located, taking into account his or her family and social environment (paragraph 66),
- as a connecting factor for determination of law applicable to maintenance obligations, the notion of 'habitual residence' is heavily factual – it is the presence with a territory of a particular State that matters the most; as a consequence, it is only in the context of an assessment of all the circumstances of the case before it that, while taking into due consideration the best interests of that child, the national court hearing the case may find it necessary to take into account the potentially wrongful nature of the removal or retention of that child and conclude that the degree of stability of presence within the territory of a Member State does not allow to conclude that the child habitual resides in that State (paragraph 73).

The judgment is available here, in French. A press release in English can be found here.