

ABSTRACT

Introduction

According to the 1980 Hague Convention on the Civil Aspects of International Child Abduction every contracting state is to establish a Central Authority (CA) responsible for the implementation of the Convention. In the Netherlands there was much discussion recently concerning the role and the functions of the Dutch CA in the adjudication of cases where a child has been wrongfully removed or retained from another country and brought to the Netherlands, the so-called *incoming abduction cases*. In the first place, there was critique of the initial task of the CA to encourage the parents to reach an agreement and, in the second place, in the absence of such an agreement, to start a return procedure before the court, representing itself (namely the Ministry of Justice) and the applying parent,* – the so-called ‘double role’ of the CA. On the top of that, it has been submitted that the fact that the CA represents the applying parent in the court procedure, would give the applying parent such an advantage above the abducting parent, that the principle of the *equality of arms* would be violated.

The direct incentive for this research was the question of the Second Chamber MP Teeven (VVD), 31 January 2007, who asked for explanations regarding the application of The Hague Child Abduction Convention and the role of the Dutch CA in the conventional abduction cases.

The objective of this study is to collect vital information in regard to foreign law, in order to enable the Policy Department of the Dutch Ministry of Justice to make an analysis of the role and functioning of the CA in the framework of the implementation of the Hague Child Abduction Convention; and to deliberate on whether or not the function of the Dutch CA in the incoming return cases should be amended.

According to the commission of the *WODC* of the Ministry of Justice this study is limited to the role and function of the CA in Germany, England & Wales, France and Sweden. It is anticipated that the law and the organisational structure of these countries would provide important information for rethinking the Dutch situation.

* The terms ‘the parent, who is left behind’, ‘the applying parent’ and the ‘applicant’ are further used to specify a person, who is claiming the return of the child on the basis of the Hague Child Abduction Convention.

Research question

This study attempts to answer the following research question:

What are the functions of the Central Authorities in Germany, England & Wales, France and Sweden in the incoming return cases in the light of the correlation between these functions and the principle of the equality of arms?

This main research question can be divided into two sub-questions, namely: Do the foreign Central Authorities have functions which give rise to questions regarding their mutual compatibility (double role)? How does the functioning of the foreign CA relate to the principle of the *equality of arms* in the other jurisdictions?

In order to answer this question it is necessary to look beyond the mere function of the CA, but also other governmental bodies charged with a role similar to that which in the Netherlands constitutes the double role of the CA: trying to encourage the parents to reach an agreement and representing the applying parent. The issue of the *equality of arms* cannot be tackled without taking into consideration such other important factors like, for instance, the accessibility of legal aid and the way in which legal representation of the parties is arranged.

Methodology

Answering the research questions commences with a literature study. During this stage the researchers try to answer the research questions as far as possible. At the following, second stage, additional information was asked from the previously selected experts from the countries in question. This has been done with the help of the questionnaires. For each country a special questionnaire has been constructed in order to acquire information not available from the literature study. When necessary, additional questions have been posed.

Structure of the report

After the introduction (Chapter 1), the subsequent chapters dealt with handling the incoming return cases in Germany (Chapter 2); England & Wales (Chapter 3); France (Chapter 4) and Sweden (Chapter 5). Chapter 6 comprises the analysis during which the research questions have been answered and a comparison with the Netherlands was made.

Findings and conclusions

Double role of the CA

This research shows that the double role of the CA (or another governmental body), which is seen as a problem in the Netherlands,– also exists in Germany and France: although in a

somewhat different form. However, in those countries this double role is not experienced as a problem.

In Germany, the double role of the CA manifests itself even stronger than in the Netherlands because Germany, in contrast to the Netherlands, upholds the so-called two-track policy. This means that the German CA functions as an intermediary between the parents and a formal representative of the applicant simultaneously rather than consequently. On the one hand, this means that the confusion with regard of the unification of these functions in one body manifests itself even stronger. On the other hand, the German CA is only a formal representative of the applicant (the court procedure is conducted by a private lawyer), which means that the representation by the German CA of the applicant is much less visible. In practice both the applicant and the defendant parent are represented in court by their own private lawyer. This could be one of the reasons why the double role of the CA does not lead to any criticism in Germany.

In France the *Procureur de La République* is charged both with the task of encouraging an agreement between the parents and of legal representation both of which functions are entrusted to the CA in the Netherlands. A formal difference is that in the Netherlands the CA represents the applicant and itself (namely the Ministry of Justice) and in France the *Procureur* represents the State of France. Practically speaking, this makes no difference in the perception of the double role by the abducting parents. In both cases the parents see the intermediary transforming into the representative of his/her procedural counterparty. However, no evidence of dissatisfaction with this situation in France has come across during this study. The possible explanation may lie in the fact that in France the applicant is often represented by a private lawyer, so that both parents are having each own private lawyer.

Struggle with the principle of the equality of arms

The fact that the Dutch CA – a governmental body with the experience and expertise in child abduction cases – represents the applying parent free of charge, while the abducting parent has to do with an often less experienced private lawyer, whom the parent has to pay him/herself (unless he/she gets legal aid), gave rise to the question regarding compliance with the principle of the *equality of arms* in the Netherlands. This study reveals that in three out of four examined countries there is an advantage on the part of the applying parent. This advantage takes shape in the assistance by a governmental body or a privileged access to legal aid. England & Wales is the only jurisdiction where people experience this inequality as a

problem. In Germany and France the procedural inequality between the applying and abducting parent in incoming return cases is not seen as violating the principle of the *equality of arms*. In contrast, in Germany it is believed that the assistance of the CA to the applicant compensates the procedural inequality between the parties and therefore re-establishes the *equality of arms*. In Germany and France – like in the Netherlands – the procedure on the part of the applicant is conducted by a governmental body. In Germany the applying parent is represented by the CA (the CA is in turn represented by a private lawyer) and in France by the *Procureur de La République*. In Germany and England & Wales the applying parent has privileged access to legal aid.

a. representation by a governmental body

In **Germany** the CA is a formal representative of the applying parent; however, in practice the CA does not conduct the procedure itself but rather avails itself of a private lawyer, who is to be paid by the applicant. This means that the position of the applying parents is in two aspects less privileged than in the Netherlands. In the first place, the representation of the applicant in the Netherlands is entirely free of charge; while the abducting parent has to pay his/her lawyer. In contrast, in Germany both the applying and the abducting parent have to pay their own private lawyers. In the second place, in the Netherlands, the applicant is represented by the CA which normally does all the incoming return cases and therefore has developed considerable specialisation and expertise in these cases. In Germany the applying parent is represented in court by specialised private lawyers selected by the CA. However, some of these lawyers frequently appear to lack the necessary expertise with the conventional child abduction cases and sometimes advise their clients wrongly.

In **France** the *Procureur de La République* conducts procedure as a representative of the State of France rather than the representative of the applicant. Therefore the *Procureur* represents not the interests of the applicant but rather the interest of the State as well as the public interests. Formally speaking, the applying parent is placed in a rather privileged position as the abducting parent has to defend him/herself against the ‘State’. However, in practice the position of the applicant is hardly any better than in the Netherlands or any of the other examined countries. This is so because the *Procureurs* are not experienced in the conventional cases. For this reason the French applicants are advised to hire their own private lawyer, whom they have to pay themselves. Furthermore the fact that the *Procureur* represents public interests could beforehand give an impression that the abducting parent has acted against the public interests. Also the argument, used in the Dutch discussion, that the

judge would be more inclined to grant a petition defended by a governmental body, would be even more valid in the French system because in France the *Procureur* represents the State itself. Yet, the procedural inequality created by the role of the State of France and the free of charge representation by the *Procureur*, is not considered in France as a violation of the principle of the *equality of arms*. Also in Germany the formal representation of the applicant by the CA is not seen as problematic. In contrast it is believed that the assistance of the CA contributes to re-establishing the equality of arms. The abducting parent most often defends the case in his/her home country, speaks the language of the court and can rely on the support of the family and other networks. In contrast, the applying parent in most cases has to conduct procedure in the 'alien' country, does not speak German, has no knowledge of German legal system and often cannot even be physically present in the country during the proceedings. Such *de facto* inequality on the part of applying parent is supposed to be compensated by the assistance of the German CA and this way the *equality of arms* is arguably re-established.

b. Privileged access to legal aid

In the Netherlands the applying parent is represented by the CA free of charge, while the abducting parent has to resort to the system of legal aid, which always presupposes a payment of a contribution. In Germany and in France the positions of the parents regarding access to legal aid are somewhat unequal as well. However, the inequality in England & Wales is even stronger than in the Netherlands. Only in Sweden the position of both parents regarding access to legal aid is equal.

In **Germany** the CA is a formal representative of the applicant, but in practice the applicant has to pay the private lawyer employed by the CA. For acquiring legal aid both the applying as the abducting parents have to satisfy the means and merits test and the prospects of success test. Although the German courts are generally quite generous in granting legal aid to abducting parents, it is more difficult for the abducting parent to pass the prospects of success test. Consequently one can speak of a certain inequality. This inequality is however less strong than in the Netherlands.

In **France** the representation by the *Procureur* is free of charge; however the *Procureur* does not represent the applying parent, but rather the State of France. In order to get a qualified representative, the applying parent has to hire a private lawyer. Both applying and abducting parents are eligible for legal aid on the basis of a means and merits test only. The position of the parents with regard to access to legal aid is therefore equal.

In **England & Wales** the applying parent is represented by a private lawyer. The costs of this lawyer are fully covered by legal aid without a need to satisfy any tests. In contrast, an abducting parent needs to satisfy both means and merits and prospects of success tests. Satisfying the later test appears almost impossible, unless a strong defence under art. 13 of the Hague Child Abduction Convention has been put forward. Therefore, the inequality between the parents in England & Wales is even stronger than in the Netherlands. This inequality has also been criticised there in connection with the violation of the principle of the *equality of arms*.

Representation of both parents by private lawyers – the best solution?

The analyses of the situation in the four examined countries at a first sight induces a suggestion that a system where both parents are represented by their own private lawyers, formally speaking, seems to be the best solution to all problems regarding the principle of *equality of arms*. Also the problem of the double role of the CA can be helped this way. Yet, the issue appears to be more complicated. The comparison between the four examined countries reveals that such a system could not be introduced just like this, but seems to be workable only under certain preconditions. This research shows that before introducing such a system it is important to take a close look at the concentration of jurisdiction and the maximum amount of available legal aid.

In **England & Wales** and **Sweden** – two countries where both parents are *de-jure* and *de-facto* represented in court by private lawyers – the jurisdiction is highly concentrated. The conventional cases are heard in these countries by one first instance court, situated in the capital of the country. This system facilitates the development of a small pool of law firms (lawyers) highly specialised in the conventional cases and well qualified in this area. In **Germany** and **France**, where, like in the Netherlands, the level of concentration of jurisdiction is lower, such specialisation among the lawyers has not been developed, and there are complaints about the competency of the lawyers. In Germany it seems that even among the specialised lawyers (chosen by the CA) there are some lawyers, who advise their clients wrongly due to insufficient familiarity with the Child Abduction Convention.

The amounts of legal aid available for reimbursement of the costs of the private lawyers are relatively high in **England & Wales** and **Sweden**. In **France**, where these amounts, like in the Netherlands, are relatively low, the quality of legal representation in the conventional cases is a point of concern. International child abduction cases are complex and time-consuming and require good acquaintance with the Hague Convention, whereas the

reimbursement is too low (legal aid in France is limited to a certain maximum). Due to the lack of money for hiring a good lawyer the representation of the parents appears not always to be of a high quality. Also in **Germany** there has been some criticism that parties may not be well represented by legal aid counsel because of the low remuneration under the scheme. One can of course employ a specialised lawyer at his/her own expense, but this is costly. This leads to an undesirable inequality between 'rich' and 'poor' parents.

Closing remarks

At the end of this study it can be noticed that *de facto* material inequality between the abducting and the applying parent is in one way or another compensated in three of the four examined countries. In this respect the Netherlands does not stand alone. Yet the degree of compensation in the Netherlands is higher than in the countries in question. Remarkably enough, the double role of the CA and the alleged violation of the principle of the *equality of arms*, which have been criticised in the Netherlands, as far as we know, are non issues in Germany and France. Only in England & Wales, the unequal access to legal aid is raised in connection with the principle of the *equality of arms*. Therefore, it can be concluded that the Dutch situation is by no means exceptional.

The second important conclusion is that an apparently obvious solution to both the problem of the double role of the CA and the tension with the principle of the *equality of arms* – namely the introduction of the system wherein both parents are represented by private lawyers – could not be introduced just like that. In case of introducing such a system, it is, in any event, important to take into consideration at least the concentration of jurisdiction and the available amount of legal aid.