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PRIVAT INTERNATIONAL LAW - CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

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With an important ruling delivered following an urgent precautionary proceeding, the Court of Appeal of Luxembourg accepted the appeal of the Italian desk of the law firm OMILIA Avocats regarding the civil aspects of the international abduction of minors.

The judge of second instance was called upon to decide whether the minor's best interests were to remain in the place of unlawful detention or to return to the State of habitual residence. The Hague Convention of 25 October 1980 establishes the principle according to which the immediate repatriation of the minor must be ordered if his or her abduction or unlawful detention in a State other than that of habitual residence has been judicially ascertained.

By virtue of the art. 13 of the aforementioned Convention, the judge who ascertained the kidnapping or unlawful detention of the minor can deny repatriation if the return exposes the minor to serious harm.

The Court of Appeal of Luxembourg confirmed this principle while stating that the protection of the best interests of the minor, in this case not allowing the minor to return to the State of habitual residence where he could have been exposed to a serious risk, cannot depend exclusively on declarations of the minor, it being clear that those declarations may arise from the manipulation of the minor by the cohabiting and abducting parent.

The protection of the best interests of the minor must depend on the overall evidentiary framework which also includes the minor's declarations. The same, underlines the Court, cannot be considered in isolation but in light of the other circumstances of the specific case. The Court further indicated that it is the judge's duty to evaluate the best protection of the best interests of the child, especially if he does not have a level of maturity to consciously express his will. In fact, neither the Hague Convention of 25 October 1980 nor other Conventions on the protection of the best interests of the minor indicate exactly the age threshold for reaching this level of maturity.

As was indicated in the appeal of the Italian desk of the law firm OMILIA Avocats, the Strasbourg Convention of 25 January 1996 states that, although it is essential to listen to the minor's opinion, 1) he must be heard if he has capacity for discernment sufficient and 2) he must not be heard if taking his opinion is manifestly against his interests.

In short, listening to the minor is a fundamental but not absolute principle (European Court of Human Rights, case **Sneersone et Campanella v. Italy**, ruling of 12 July 2011, in the same sense Court of Justice of the EU, case C -491/10 Zarraga, sentence of 22 December 2010).

The judges of second instance have adhered to the prevailing orientation within the jurisprudence of the European Court of Human Rights according to which the Hague Convention of 25 October 1980 does not give the minor the right to choose the place in which to live nor his refusal to return to the State of habitual residence prevents the national judge from deciding on his repatriation in light of the best interests of the child. By virtue of the aforementioned principles, the Court of Appeal of Luxembourg, upholding the appeal of the sentence of the judge of first instance who had rejected the request for immediate repatriation of the minor despite having ascertained that the international kidnapping had occurred, ordered the immediate return of the child in the State of habitual residence as demanded by the parent represented by us.

We also supervised the arrival of the minors in Italy and we will continue to make sure that parental relationship between the children and the parent represented by us, will be upheld without interference by the abducting parent.

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