Ref. II Ca 1196/18

D E C I S I O N

On the day of November 19, 2018

The Circuit Court in Opole 2nd Civil Appellate Division in the following composition:

Presiding Judge:	Circuit Court Judge Adam Cąkała
Judges:	Circuit Court Judge Lucyna Baran
	Circuit Court Judge Alicja Szwast (Rev.)
Court Clerk:	Senior Court Clerk Dorota Pazdan

Having reviewed on Nov 15, 2018 in Opole at a court hearing
the case brought forward by the District Public Prosecutor in Opole and Aleksandra Cools with participation of [redacted] and the Ombudsman for Children's Rights
for repeal – amendment of the decision on the surrender of a child under the Hague Convention as a result of the appeal of the Participant in the proceedings [redacted]
against the order of the District Court in Brzeg
of June 20, 2018, Ref. III Nsm 100/18
hereby d e c i d e s to: dismiss the appeal.

The original bears correct signatures

S T A T E M E N T O F R E A S O N

By order of June 20, 2018 the District Court in Brzeg amended Item 1 of the decision of this court of October 19, 2016 Ref. III Nsm 334/16 in such a way that it dismissed the request of [redacted] brought on the basis of the Convention on the Civil Aspects of International Child Abduction drawn up at the Hague on October 25, 1980 (*Journal of Law* of 1995, No. 108, Item 528, as amended) for the surrender of his minor daughter Amelie Cools, born on October 23, 2009 in Wrocław, staying at her mother's, Aleksandra Cools' in Brzeg, to her permanent residence in France (Item 2). In addition, the District Court ordered the parties to pay the cost of the legal proceedings to the extent incurred by them (Point 2).

The following factual findings formed the factual basis for the decision in question:

Aleksandra Cools left her husband, [redacted] and, together with her daughter, Amelie Cools left Prana for Poland in September 2015.

By order of October 19, 2016, in the case Ref. III Nsm 334/16, having reviewed the motion of [redacted], the District Court in Brzeg obligated, in accordance with the Convention on the Civil Aspects of International Child Abduction drawn up in the Hague on October 25, 1980, Aleksandra Cools, the mother of minor Amelie Cools, born on October 23, 2009 in Wrocław, to surrender minor Amelie Cools to her father [redacted] within 14 days following the date of the issuance thereof.

At the time of the aforementioned decision, the minor had been in the actual custody of her mother Aleksandra Cools for over a year. Both of them resided in Brzeg.

In the following months, the Participant in the proceedings had personal contact with his daughter on several occasions. These meetings were always held in the presence of Aleksandra Cools, as well as her parents Elżbieta and Wiesław Kondracki. [redacted] also contacted his daughter by phone and via "Skype" instant messaging.

During meetings with the daughter, there were disagreements and arguments between the parties. There were times when Aleksandra Cools asked her father Wiesław Kondracki for help. In several cases, the police intervened. The minor girl witnessed these incidents. The last contact between the minor and her father at her residence took place on February 24, 2017, at which time there was also a brawl involving the parties to the proceedings and Wiesław Kondracki.

In view of the above, on March 8, 2017, [redacted] filed a petition with the District Court for enforcement of contacts resulting from the decision of the Circuit Court in Opole of January 27, 2017, Ref. I Co 233/16.

The last time the Participant saw his daughter was via instant messenger "Skype" in May 2017. Subsequent repeated attempts by the Participant to contact his daughter proved unsuccessful.

The Participant's contacts were further secured by a decision of the District Court of October 10, 2017 in the case Ref. III Nsm 334/16, which were established once a month (on the last Friday of the month) at the Crisis Assistance Point in Brzeg. [redacted] also did not see his daughter after this date.

Meanwhile, in April 2017, Aleksandra Cools filed a report with the District Prosecutor's Office in Brzeg after having formed a suspicion that [redacted] had committed a crime under Article 207 § 1 of the Criminal Code to her detriment. The proceedings are still being conducted in rem by the District Prosecutor's Office in Brzeg under Ref. PR l Ds 619/18.

Following a report filed by Aleksandra Cools on June 6, 2017 the District Court in Brzeg (Ref. II Kp 205/17) questioned Amelie Cools in the presence of a psychologist as a witness.

Between August 7, 2017 and August 9, 2017 Amelie Cools was staying at the Children's Ward of Brzeskie Centrum Medyczne (Brzeg Medical Center) in Brzeg with a diagnosis of functional abdominal pain and weight deficiency. After discharge from the hospital, she was referred to ophthalmological, gastroenterological, and surgical outpatient clinic.

Since September 2015 Amelie Cools has been continuously under the care of her mother, Aleksandra Cools, who provides her with proper housing and living conditions. Amelie Cools is attached to her mother, who is currently her primary caregiver, and is also attached to her maternal grandparents. She attends School of Primary Education No. 5 in Brzeg, where she has a very positive opinion.

As of mid-2017, Amelie Cools has been stating that she does not want to go to France and live with her father. She fears leaving the country and being separated from her mother and has a negative reaction to any information about a possible change of her caregiver. She reacts with anxiety to any information about separation from her mother. She conditions all and any contact with her father on the presence of her mother, or she is not willing to see him, as she fears being taken away by him.

Based on such factual findings, the District Court found that the request of Aleksandra Cools and the District Prosecutor in Opole to amend based on Article 577 the Code of Civil Procedure the final order of the District Court in Brzeg of October 19, 2016, Ref. III Nsm 334/16, ordering Aleksandra Cools, pursuant to the Convention on the Civil Aspects of International Child Abduction drawn up at the Hague on October 25, 1980, to surrender her minor daughter, Amelie Cools to her father, [redacted] within 14 days from the date of the order, deserved consideration. As noted, according to the wording of Article 577 of the Code of Civil Procedure, the Guardianship Court may amend its order, even a final one, if the wellbeing of the person affected so requires. However, according to the resolution of the Supreme Court of

November 22, 2018 (Ref. III CZP 78/17), issued after resolving the legal issue presented by the Circuit Court in Opole by decision of August 17, 2017 (ref. II Cz 969/17), Art. 577 the Code of Civil Procedure also applies to orders ordering the surrender of a child on the basis of the Convention on the Civil Aspects of International Child Abduction drawn up in the Hague on October 25, 1980 (OJ of 1995 No. 108, item 528). Therefore, in view of the content of the cited resolution of the Supreme Court and the legal view expressed therein, it was necessary to decide whether, in the current realities of the case in question, the order for the prompt and urgent surrender of minor Amelie Cools remains in harmony with the wellbeing of the child. In doing so, court of first instance made it clear that it did not question the previous rulings of the District Court in Brzeg, as well as the Circuit Court in Opole ordering the surrender of minor Amelie Cools to her father under the Hague Convention, both in terms of the findings of fact and the conclusions made on the basis of them, as its role in the proceedings in question focused on assessing the condition of the child and the events that occurred after the issuance of these rulings. In the opinion of the court of the first instance, the current situation of Amelie Cools and, above all, her current condition dictates the assumption that a rapid and immediate surrender of the minor to her father, [redacted], would be incompatible with the wellbeing of the child. Indeed, there is currently a serious risk that Amelie Cools' return into her father's custody could result in her suffering serious psychological and even physical harm. In support of this position, the District Court stated that nearly 3 years have passed since Aleksandra Cools' arrival in Poland (the Participant left France in September 2015). In this context, the current situation of the child is significantly different from that of the year 2015. At that time, Aleksandra Cools left with her daughter, who lived with both parents for the past 6 years, including 2 years in a house owned by the Participant. The minor's relationship with her father was closer than it is now. Currently, on the other hand, since the child and her mother came to Poland, her contact with her father has been very limited, and there has been no such contact for the last year or so (regardless of the reason for there not being any contacts). This has undoubtedly resulted in a significant weakening of the minor's relationship with her father and is related to the child's fear of going to France with the Participant and being separated from her mother. This was already expressed during the hearing of the minor on April 19, 2017 in case I Ca 1/17 before the Circuit Court in Opole. At that time, during the conversation with the judge, the girl indicated that she did not want to return to France expressing her desire to stay with her mother. During the hearing of Amelie Cools as a witness before the District Court in Brzeg in the case conducted by the District Prosecutor's Office in Brzeg l Ds. 776/2017 (Court Ref. II Kp 205/17), Amelie Cools also indicated that she wanted to be with her mother in Poland. Similarly, during the last hearing before the court in the case in question on April 17, 2018, Amelie Cools clearly indicated *"I don't want to meet with my dad, because my dad will take me away. I would like my dad to come here, but I don't want to see him. I am a bit scared of my dad."* The child also related an incident when her father tried to take her away by force. *"I spoke with my dad a year ago. My dad then wanted to take me away. Dad said so, and then I hid behind the couch."* Both the hearing conducted by the District Court in Brzeg in case II Kp 205/17 and in the case at hand were conducted with the participation of court expert psychologist Barbara Sadkowska-Jakubów, who gave a written opinion in the first case and a verbal opinion before the court in the second. In the opinion of the District Court, the opinion issued for the case conducted by the District Prosecutor's Office constituted documentary evidence that could be used as such in the proceedings in question. According to this opinion, as early as in June 2017 *"The family situation in which the girl found herself (departure from France and her previous place of residence with her mother, scant contacts with her father due to, among other things, geographical distance) is emotionally difficult for her; on one hand she feels loyalty towards her mother and has a close emotional bond with her and on the other she has an emotionally fading bond with her father, who is still in her life,*

but in a negligible way. The unregulated family situation is not conducive to the child's emotional stability and the establishment of a sense of security. The threat and the fear of returning to France and living without her mother with her father increase the child's sense of insecurity and the lack of emotional stability."

In turn, the verbal opinion provided at the request of the court in the case in question by expert Barbara Sadkowska-Jakubów after hearing Amelie Cools on April 17, 2018 shows that Amelie Cools is intelligent, open, and emotionally developed beyond her age, and that her statements are logical.

The child has a strong emotional bond with her mother, and her emotional bond with her father is beginning to fade. She is afraid of returning to France. Such a situation could affect her and lead her to develop severe emotional disorders and psychosomatic disorders. The above is confirmed by the testimony of witness Michał Kwiatkowski (The Head of the Crisis Help Point at The Municipal Social Assistance Center in Brzeg), who also indicated before the court that after four meetings and conversations with the child (he considered the information from this source the most important and authoritative) in 2017 he found that the child was afraid of going to France. He fully upheld the position expressed in the opinion of August 21, 2017, *"The opinion concerning Amelie Cools' consultation conducted in the family environment regarding the child's psycho-physical functioning,"* where he states, among other things, *"The child's departure to France and the father's assumption of custody right now without the mother may cause permanent irreversible effects in the form of childhood trauma (PTSD). Amelie is certainly in the risk group, as trauma is most often experienced due to sudden, radical changes in daily life, especially when the child is already experiencing somatic symptoms."* Witness Michał Kwiatkowski had contact both with Aleksandra Cools and [redacted]. As he testified, he spoke with both parties about Amelie also after the above-mentioned opinion had been completed. An analogous position regarding concerns about the reaction to the minor's departure to France and her possible reaction to such a development was presented by witness Teresa Gens also upholding the private opinion she had issued, during the questioning before the court. As the District Court pointed out, this evidence was sufficient to determine whether, as of today, it is reasonable to surrender the child to the Participant in an expedited manner under the Hague Convention, and what effects this may have on the child. Thus, in view of the verbal opinion of the expert psychologist Barbara Sadkowska-Jakubów, the testimony given by the witness Michał Kwiatkowski and Teresa Gens, who unanimously upheld their previous positions regarding the minor, the court considered it unjustified to call further experts to examine Amelie Cools, which was reflected in the dismissal in this regard of the requests for evidence of [redacted] and the District Attorney in Opole. In addition, in the opinion of the District Court, subjecting the child to further examinations (hearings) could have adverse effects on the child, which was also confirmed by expert Barbara Sadkowska-Jakubów, indicating that in view of the minor's repeated participation in various procedural activities, her subsequent examination would constitute another stressful situation for the child. For the same reasons, in making its factual findings, the court did not take into account the private opinion prepared by Ewelina Kopeć, whose evidentiary value appeared questionable to the court due to the lack of information on the basis of which trial material the opinion was issued. It was further stated in the Statement of Reasons that the community interviews and the testimony of probation officer Aleksandra Szydło, as well as the school's opinion, proved that Amelie Cools is connected with her mother's family environment and her peer environment and that she functions very well at school. This state of affairs, which is also confirmed by the testimony of Ewe and Wiesław Kondracki, also confirms that the immediate return of the child to France in her father's care, especially after such a long period of separation, could result in serious consequences for the

child. According to the District Court, the presented circumstances presented justify the application of Article 13(1)(b) of the Hague Convention, according to which, notwithstanding the provisions of the preceding article, a judicial or administrative authority of the responding state is not obliged to order the surrender of a child if the person, institution or organization opposing the surrender of the child demonstrates that there is a serious risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. A judicial or administrative authority may also refuse to order the return of a child if it finds that the child opposes the return and that the child has reached an age and a degree of maturity at which it is appropriate to take her opinion into consideration. In the opinion of the court, the possible return of the child to the custody of her father must not be immediate, must not consist of a sudden severance of her ties with the mother and the environment in which she has been for nearly 3 years, and must be preceded by a process of rebuilding the relationship of the minor with the father. The cooperation of both parents is absolutely necessary here, especially the mother of the minor, Aleksandra Cools.

The above order was appealed in its entirety by the Participant of the proceedings, [redacted], requesting its revocation and dismissal of the motions of the District Prosecutor and Aleksandra Cools to revoke - amend the order of the District Court in Brzeg of June 20, 2018 Ref. III Nsm 100/18. At the same time, he requested that in the appeal proceedings evidence be taken from the opinion of a team of court experts – a child psychologist, an educational counselor, and a child psychiatrist – for a comprehensive assessment of the current family situation of Amelie Cools, psychological diagnosis of the child, taking into account all the circumstances, including, in particular, the psychological impact of her entanglement in the struggle for the priority of custody both before the courts and in the media, the impact on her current state and mental health of the fact of isolation from her father and the lack of contact with him, and diagnosis of the existing disorders related to the abovementioned situation.

In addition, the Participant in the proceedings requested that court of second instance submits a legal question to the European Court of Justice under Article 267 TFEU - in connection with the resolution of the Supreme Court of November 22, 2017 Ref. III CZP 78/17, by virtue of which it is possible to challenge and revoke under Art. 577 the Code of Civil Procedure a final decision on the surrender of a child under the Hague Convention, with the following wording: *"Whether Article 11(4) of the Brussels II Bis Regulation is obligatorily applicable in a case for the amendment - revocation of a final order for the surrender of a child under the Hague Convention conducted pursuant to Article 577 of the Code of Civil Procedure of the Republic of Poland, based on the resolution of the Supreme Court of November 22, 2017 Ref. III CAP 78/17 and what is its correct interpretation by clarifying what measures for the protection of the child in the country of her habitual residence should be taken in a situation where there are grounds for refusal to surrender the child referred to in Article 13(l)(b) of the Hague Convention?"*.

The following reservations were raised against the appealed order:

1) Violation of Article 13(l)(b) of the Convention on the Civil Aspects of International Child Abduction issued in the Hague on October 25, 1980 (hereinafter the Hague Convention), by misapplying it and finding that the wellbeing of the child requires the amendment of the final decision ordering the surrender of the wrongfully abducted child to her father [redacted],

2) Violation of the procedural rules of Council Regulation(EC) No. 2201/2003 of 27.11.2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial

matters and in matters of parental responsibility (hereinafter the Brussels II bis Regulation), i.e. Article 11(4) in conjunction with Article 13(l)(b) of the Hague Convention and in conjunction with Article 577 the Code of Civil Procedure as a result of its non-application (omission) and failure to determine in the present proceedings whether the child will be effectively protected in the country of her habitual residence, 3) violation of the principles of due process within the meaning of Article 6(l) of the European Convention on Human Rights and Fundamental Freedoms, in particular, as a result of violation of the principle of equality of arms, including the admission of evidence from documents collected during the proceedings of the SR in Brzeg Ref. II Kp 205/17 and in the course of proceedings of the District Prosecutor's Office in Brzeg Ref. PR IDs 619/18,

3) Violation of Article 278 § 1 of the Code of Civil Procedure as a result of the failure to take evidence from the opinions of expert witnesses of a psychologist, an educational counselor and a child psychiatrist on the circumstances indicated in Participant's request of April 27, 2018,

4) Violation of Article 233 of the Code of Civil Procedure as a result of violation of the principle of free evaluation of evidence and lack of a comprehensive consideration of the evidence gathered in the case,

5) Violation of Article 577 of the Code of Civil Procedure as a result of the application of this regulation as a remedy to challenge a final court decision issued under the Hague Convention.

In response to the appeal, the Petitioner, Aleksandra Cools, as well as the Ombudsman for Children's Rights, requested that the appeal be dismissed in its entirety.

In a pleading of October 22, 2018, the Petitioner additionally requested the admission of evidence from the following:

- the report (assessment) of the Center for Solidarity and Family, Directorate for Integration and Social Support of the Department of Vendee (France) compiled between September 17 and 28, 2018 at the request of the Center for the Protection of Children and the Ministry of Justice of the French Republic, on the circumstances of the current conditions in the Participant's place of residence and the support he can provide for the child, as well as the available forms of support that the child's father can utilize should he need to do so,

- supplemental questioning of the Petitioner, Aleksandra Cools on the circumstances of the current situation of minor Amelie Cools, her whereabouts, and the conditions in which the child is being raised and the persons with the direct custody over her.

The Circuit Court considered the following:

The appeal of Participant [redacted] does not deserve to be upheld.

The District Court made correct and exhaustive findings of fact in the present case and drew accurate conclusions therefrom, while correctly qualifying the legal basis for the decision. In doing so, the evidence gathered in the case was properly evaluated, within the limits of the free evaluation of evidence reserved for the court. Under these circumstances, the court of appeal adopted the factual findings of court of first instance under Article 382 the Code of Civil Procedure as its own.

At the same time, the Circuit Court concluded that in order to conduct a proper substantive review of the appealed decision, there was a need to conduct supplementary evidentiary proceedings in the appeal proceedings. Accordingly, based on the provision of Article 381 of the Code of Civil Procedure, at the hearing on November 18, 2018, the court

admitted the evidence requested in the course of the appeal proceedings by the Participants in the proceedings in the form of:

- A report of the Center for Solidarity and Family, Directorate for Integration and Social Support of the Department of Vendee (France) compiled between September 17 and 28, 2018 at the request of the Center for the Protection of Children and the Ministry of Justice of the French Republic, on the circumstances of the current conditions in the Participant's place of residence and the support he can provide for the child, as well as the available forms of support that the child's father can utilize should he need to do so,

- An affidavit issued by the School of Primary Education No. 5 in Brzeg on the circumstance that Amelie Cools still attends this school,

- A letter addressed by the Participant to Amelie Cools, and its translation - on the circumstance of its content.

The court of appeal, however, dismissed the Appellant's requests for evidence of the opinions of a panel of expert witnesses consisting of a child psychologist, an educational counselor, and a child psychiatrist (for a comprehensive assessment of the current family situation of Amelie Cools, psychological diagnosis of the child, taking into account all the circumstances, including, in particular, the psychological impact of her entanglement in the struggle for the priority of custody both before the courts and in the media, the impact on her current state and mental health of the fact of isolation from her father and the lack of contact with him, and diagnosis of the existing disorders related to the abovementioned situation), from the supplementary questioning of Petitioner Aleksandra Cools on the current situation of the minor Amelie Cools, her whereabouts and the conditions in which the child is raised and who has direct custody of her), as well as the request of Aleksandra Cools from the psychological and linguistic analysis of the text of the letter addressed by the Participant to Amelie Cools, as irrelevant to the resolution of the case.

As for the evidence of a panel of expert witnesses consisting of a child psychologist, an educational counselor, and a child psychiatrist, the Circuit Court considers this evidence not only as irrelevant (as will be discussed below), but also completely inadvisable, in a situation where Amelie Cools has so far been heard by the judge on as many as three occasions. In such a state of affairs, another hearing with her, this time by expert witnesses, will only constitute an unnecessary stress factor for the child, which may impinge on the reliability of the examination itself, as has already been mentioned in her oral opinion by court expert Barbara Sadkowska – Jakubów.

The court of appeal, however, dismissed the Appellant's requests for evidence of the opinions of a panel of expert witnesses consisting of a child psychologist, an educational counselor, and a child psychiatrist (for a comprehensive assessment of the current family situation of Amelie Cools, psychological diagnosis of the child, taking into account all the circumstances, including, in particular, the psychological impact of her entanglement in the struggle for the priority of custody both before the courts and in the media, the impact on her current state and mental health of the fact of isolation from her father and the lack of contact with him, and diagnosis of the existing disorders related to the abovementioned situation), from the supplementary questioning of Petitioner Aleksandra Cools on the current situation of the minor Amelie Cools, her whereabouts and the conditions in which the child is raised and who has direct custody of her), as well as the request of Aleksandra Cools from the psychological and linguistic analysis of the text of the letter addressed by the Participant to Amelie Cools, as irrelevant to the resolution of the case.

There was also no need for supplementary questioning of the child's mother, due to the fact that Aleksandra Cools in the course of the proceedings clarified all the circumstances that were the subject of the Participant's doubts. Namely, her statement shows that she only works in Będzin and has not moved her life center there, which still remains in Brzeg. On the other hand, the affidavit of The School of Primary Education No. 5 in Brzeg submitted by the mother at the appeal hearing confirmed that Amelie Cools still attends School No. 5 in Brzeg. Thus, the request for supplementary questioning of the Petitioner was also therefore completely pointless.

Besides, the psychological and linguistic opinion submitted by Aleksandra Cools at the appeal hearing regarding the content of the letter sent by the Participant to Amelie Cools was also useless for the resolution of the case. It must be emphasized that this is a private opinion, and such opinions are not of binding character. In the jurisprudence of the Supreme Court and common courts, it is a well-established view that if a party submits an out-of-court expert opinion and refers to its claims and conclusions, the expert opinion should be considered a part of the factual and legal arguments cited by the party. When a party submits an expert report with the intention that the court will consider it as evidence in the case, then there are grounds for attributing to it the meaning of private document evidence, as well (Art. 245 the Code of Civil Procedure). An out-of-court expert's opinion as a private document is only evidence that the person who signed it expressed the view contained therein but does not enjoy the presumption of the truthfulness of the statements contained therein (compare, among others, the judgment of the Supreme Court of January 15, 2010 Ref. I CSK 199/09, LEX No. 570114). Thus, a private document is one of the pieces of evidence listed in the Code of Civil Procedure and is subject to evaluation like all other evidence. Thus, as in the case of other evidence, the court evaluates whether this evidence, due to its individual characteristics and objective circumstances, deserves to be given credence or not. The result of this assessment is the granting or refusal (as in the case in question) of documentary evidence to have the value of credibility, with the appropriate consequences in terms of its importance for establishing the factual basis of the judgment (justification of the Supreme Court's judgment of June 30, 2004, Ref. IV CK 474/03, OSNC 2005, No. 6, Item 113).

Similarly, the request articulated in the appeal for court of second instance to submit a legal question to the European Court of Justice under Article 267 of the Treaty on the Functioning of the European Union, drawn up in Rome on March 25, 1957 (hereinafter the "TFEU"), in connection with the resolution of the Supreme Court of November 22, 2017 Ref. III CZP 78/17, by virtue of which it is possible to challenge and revoke under Art. 577 the Code of Civil Procedure a final order on the surrender of a child under the Hague Convention, with the following wording: *“Whether Article 11(4) of the Brussels II Bis Regulation is obligatorily applicable in a case for the amendment - revocation of a final order for the surrender of a child under the Hague Convention conducted pursuant to Article 577 of the Code of Civil Procedure of the Republic of Poland, based on the resolution of the Supreme Court of November 22, 2017 Ref. III CAP 78/17 and what is its correct interpretation by clarifying what measures for the protection of the child in the country of her habitual residence should be taken in a situation where there are grounds for refusal to surrender the child referred to in Article 13(l)(b) of the Hague Convention?".*

This is because it should not be forgotten that the decision to refer a question to the Court of Justice of the European Union (CJEU) for a preliminary ruling under Article 267 TFEU is a power and not an obligation of the national court before which the dispute is pending. In addition, the rule is that a court may ask such a question only if there is a doubt both as to the interpretation of European law and as to the validity of that law, and, moreover, only if the

issue raised in a possible reference for a preliminary ruling is necessary to decide the case. Meanwhile, such a situation did not arise in the case at hand.

Turning to the evaluation of the decision issued in the case, it should be noted that the entire body of evidence gathered before the courts of both instances certainly allows us to conclude that court of first instance correctly found that Aleksandra Cools and the District Prosecutor in Opole pursuant to Article 577 of the Code of Civil Procedure, in conjunction with Article 13 of the Convention on the Civil Aspects of International Child Abduction, drawn up at the Hague on October 25, 1980 (*Journal of Law of 1995*, No. 108, Item 528), in the facts of the case, could successfully call for the amendment of the final order of the District Court in Brzeg of October 19, 2016 Ref. III Nsm 334/16, ordering Aleksandra Cools, in accordance with the aforementioned Convention, to surrender her minor daughter, Amelie Cools, to her father [redacted] within 14 days from the date of the order and dismissing [redacted]' request in this regard.

Thus, the allegations formulated in the appeal filed by the Participant in the proceedings lack legitimate grounds, as do the requests in the appeal.

In particular, in the context of the Supreme Court's resolution of November 22, 2018 (Ref. III CZP 78/17), according to which Article 577 of the Code of Civil Procedure applies to decisions ordering the surrender of a child under the Convention on the Civil Aspects of International Child Abduction drawn up in the Hague on October 25, 1980 (Journal of Law of 1995, No. 108, Item 528) and the reasoning of the Supreme Court presented in the Statement of Reasons of this legal view, the allegation formulated in the appeal of a violation of Article 577 of the Code of Civil Procedure by its defective application in the case under consideration must be considered as misguided. As indicated in the Statement of Reasons of the cited resolution, the provision of Article 577 of the Code of Civil Procedure, especially applicable to Article 523, sentence 1 of the Code of Civil Procedure, allows the Guardianship Court to amend a final order, taking into account the change in the facts in light of which the execution of the order would be incompatible with the wellbeing of the child. The principle of stability and inviolability of court decisions gave way here to the principle of the child's wellbeing being given priority, which was dictated by the need to take into account the peculiarities of cases in which the interference and decisions of the guardianship court are particularly strongly dependent on the specific factual situations in which the child finds herself at any given time. As a result of certain circumstances, also related to the variability and instability of children's life situation, it cannot be ruled out that a final decision will turn out to be unfavorable or even harmful to the child. Enabling the Guardianship Court to reconsider the rationale of the ruling and, if required by the child's wellbeing, to adapt the ruling to the specific situation in which the child finds herself, is the purpose of the norm contained in Article 577 of the Code of Civil Procedure. Since the principle of protecting the child's wellbeing is also adopted in the Hague Convention, Article 577 of the Code of Civil Procedure, the purpose of which is to ensure the child's wellbeing, applies to decisions ordering the surrender (refusing the surrender) of a child also when issued under the Hague Convention.

Of course, the possibility of amending, on the basis of Article 577 the Code of Civil Procedure, a final order ordering the surrender of a child under the Hague Convention, requires a prior finding that, after such a decision was issued, there was a change in the relevant factual circumstances justifying the non-enforcement of the final decision concerning the reunification of one of the parents with the child. However, an examination of the file in the present case leaves no doubt that such a determination was made by the District Court in the present case, while rightly concluding that the prerequisites of Article 13(b) of the Hague

Convention based on which the surrender of a child may be refused in accordance with the provisions of Article 12 of the Hague Convention, were fulfilled.

The detailed and exhaustive evidentiary investigation conducted in this regard showed that Amelie Cools, since mid-2017, began to express conscious and firm opposition to her departure to France and living with her father. She fears leaving Poland and separating from her mother, reacting negatively to information about a possible change of the caregiver. She reacts with anxiety to information about separation from her mother. Any contact with her father is conditioned by the presence of her mother, or she does not want to see him, as she fears she will be taken away by him. This is directly evidenced by the content of the note of the hearing of the minor conducted in accordance with the provision of Article 576 § 2 of the Code of Civil Procedure on April 17, 2018 with the participation of court expert psychologist Barbara Sadkowska-Jakubów, as well as the questioning of Amelie Cools as a witness before the District Court in Brzeg in the case conducted by the District Prosecutor's Office in Brzeg Ref. l Ds. 776/2017, Court Ref. II Kp 205/17 (also conducted with the participation of court expert psychologist Barbara Sadkowska-Jakubów).

Meanwhile, as made clear by the provision of Article 13(b) of the Convention, notwithstanding the provisions of Article 12 (stating the principle that an illegally abducted child must be returned to the parent in the country of his or her abduction), the judicial or administrative authority of the requested state may refuse to order the child's return if it finds that the child objects to the return and that he or she has reached an age and a degree of maturity at which it is appropriate to take his or her opinion into account.

It follows from the above regulation that the possibility of refusing to order the return of a child in the case of his or her objection to return additionally depends on the court's determination of whether the child is mature enough to express an informed objection to the return to his or her place of permanent residence. In the case under consideration, the conclusions of the verbal opinion of court expert psychologist Barbara Sadkowska-Jakubów of April 17, 2018 participating in the hearing of Amelie Cools not only before the District Court in Brzeg in the present case, but also earlier in June 2017 before this court in the case conducted by the District Prosecutor's Office in Brzeg Ref. l Ds. 776/2017 (Ref. II Kp 205/17), allowed a correct assessment of this issue. As the expert stated in her opinion, the child's statements are logical, and the girl is very intelligent, resolute, and open-minded. She is emotionally developed beyond her age. All the changes and experiences have greatly affected her development.

Therefore, there is no doubt that in view of the fact that minor Amelie was heard twice in the presence of the same psychologist, during which she consistently, clearly, and precisely expressed her opposition to her return to France and to living with her father, with the unequivocal confirmation of the expert psychologist, having several contacts with Amelie Cools and thus being able to assess her intellectual and emotional development over the course of several months, confirming that Amelie Cools is an intelligent child, emotionally developed beyond her age, and the District Court rightly took into account the child's opinion, finding the legitimacy of applying, under the current changed facts of the case, Article 13(b) of the Convention in deciding the present case.

At the same time, there is no doubt that in a situation where the child is so strongly opposed to her return to France, it would be incompatible with the child's wellbeing to separate minor Amelie from her mother and her current environment and to order her surrender to her permanent place of residence in France. Indeed, in this state of affairs, not taking into account the minor's wishes could adversely affect her psychologically. This was confirmed both by court expert psychologist, Barbara Sadkowska-Jakubów (according to the

expert, such a situation could affect the child's development of strong emotional disorders and psychosomatic disorders), and by witnesses Michał Kwiatkowski (Manager of the Crisis Assistance Point at MOPS in Brzeg) and Teresa Gens - also having special knowledge in this field - who were questioned in the case.

Thus, in light of the considerations presented, the allegation raised in the appeal in this regard of a violation of Article 233 § 1 of the Code of Civil Procedure turned out to be unjustified. In the opinion of the Circuit Court, court of first instance cannot be accused in this regard of grossly defective or manifestly erroneous evaluation of the evidence gathered in the case. There is no doubt that the framework of free evaluation of evidence, in light of the provision of Article 233 § 1 of the Code of Civil Procedure is determined by the requirements of procedural law, logical reasoning, and life experience. In accordance with these requirements, the court recognizing a particular dispute shall consider the evidence taken as a whole, and then, selecting certain evidence, i.e., that which is material to the decision (Article 227 of the Code of Civil Procedure) and relating it to the rest of the evidence, builds the factual basis of the decision. In connection with the above, the view that the appellant, aiming to show that the court exceeded the limits of free evaluation of evidence, should demonstrate significant errors of logical reasoning, contradiction of the evaluation with life experience, lack of comprehensiveness, or unjustified disregard of evidence that leads to contrary conclusions, should be considered correct. As long as it fails to demonstrate the above, the court cannot be said to have violated Article 233 § 1 of the Code of Civil Procedure. In a resolution of 7 judges of March 23, 1999 (III CZP 59/98, OSNC 1999 No. 7-8, Item 124), the Supreme Court expressed an opinion from which it follows that the higher court, when reviewing the lower court's evaluation of evidence in the context of appellate allegations, does not establish the veracity of the facts. Verification of this Court comes down only to whether the limits of free evaluation were not exceeded. This is because even very serious doubts about the accuracy of the assessment made by the court of first instance alone, as long as it did not exceed the limits set by Article 233 § 1 of the Code of Civil Procedure should not create grounds for court of second instance to take a different position. In the case at hand, there is no doubt that the irregularities referred to above are absent. In the opinion of the court of appeal, the issues raised in this regard by the Appellant only constitute polemics with the correct findings and conclusions derived by the court of first instance in the course of the process of logical reasoning, on the basis of the evidence gathered. As is clear from the grounds of the decision appealed against, this Court, in determining all the prerequisites necessary - in view of the provisions of Article 13(b) of the Hague Convention applicable in the present case - for determining whether, on the grounds of the present case, there were grounds for refusing to surrender an unlawfully abducted child, in accordance with the directives flowing from Article 233 § 1 of the Code of Civil Procedure relied on the entire body of evidence gathered, subjecting all the evidence to a comprehensive analysis. And then, making a selection according to own conviction of those means of evidence that, in its opinion, were of significance for the resolution of the case (such evidence was, in particular, the verbal opinion of court expert Barbara Sadkowska-Jakubów), the court rightly concluded that in the case under review, the occurrence since mid-2017 of a conscious, consistent, and determined opposition of minor Amelie (who is an intelligent child and emotionally developed beyond her age) to her return to France would be incompatible with her wellbeing.

In reviewing the District Court's assessment of the verbal opinion of court expert Barbara Sadkowska-Jakubów, which was deemed defective in the appeal, the court of appeal shared the position of the court of the first instance, which accorded it the value of full credibility. According to the decision of the Supreme Court of November 7, 2000 (Ref. I CKN 1170/98, OSNC 2001, No. 4, Item 64), an expert's opinion is subject to evaluation – with the

application of Article 233 § 1 of the Code of Civil Procedure, on the basis of the criteria appropriate to its subject matter of compliance with the principles of logic and common knowledge, the expert's level of knowledge, the theoretical basis of the opinion, as well as the manner of motivation and the degree of firmness of the conclusions expressed therein (see also the judgment of the Supreme Court of November 15, 2002, V CKN 1354/00). Guided by these indications, court of first instance correctly concluded that the opinion of psychology expert Barbara Sadkowska-Jakubów, provided verbally on April 17, 2018, was prepared in a reliable manner (i.e. based on a thorough analysis of the degree of maturity of minor Amelie, in connection with the participation of the expert in the hearing of Amelie Cools twice before the District Court in Brzeg, i.e. in the present case and in June 2017 in the case conducted by the District Prosecutor's Office in Brzeg Ref. l Ds. 776/2017, Ref. II Kp 205/17) by a person with the appropriate competence and professional experience to prepare it. It should be noted here that the opinion prepared by the abovementioned court expert is a complete response to the evidence thesis presented by the ruling court. It contains no gaps or logical errors. The expert's reasoning was presented by her in detail, in a clear manner, and along with statement of reasons justifying her conclusions.

The Circuit Court, like the District Court, taking into account the content of the expert's verbal explanations, did not of its own motion find any shortcomings in the opinion provided by the expert that could undermine their evidentiary force and thus credibility. The allegations formulated in the appeal against the substantive usefulness of this opinion for the resolution of the case constituted only lip service to the logical conclusions of the expert. In civil proceedings, evidence in the form of an expert's opinion is subject to evaluation on a par with other evidence, and the parties are entitled to challenge the probative value of an expert's opinion by all means of evidence available and provided by law. Therefore, the Appellant's arguments alone, which are not supported by any credible counterevidence, were insufficient to discredit the expert's opinion. It is also not without significance that this opinion, in the part in which Barbara Sadkowska-Jakubów indicated that the separation of minor Amelie from her mother and her current environment and ordering the minor's surrender to her place of permanent residence in France, with the child's such strong opposition to her return to France, could affect the child's development of severe emotional disorders and psychosomatic disorders, was confirmed by the testimony of witnesses Michał Kwiatkowski and Teresa Gens - also having specialized knowledge in the field of psychology.

In light of the above, the charge of violation of Article 278 § 1 of the Code of Civil Procedure raised in the appeal could not be upheld, which boils down, in essence, to the allegation that court of first instance unjustifiably dismissed the request for evidence of the opinions of court experts in psychology, pedagogy, and child psychiatry (for a comprehensive assessment of the current family situation of Amelie Cools, psychological diagnosis of the child, taking into account all the circumstances, including, in particular, the impact on her mental state of her entanglement in the struggle for the priority of custody both before the courts and the media, the impact on her current condition and mental state of the fact of isolation from her father and lack of contact with him, and the diagnosis of existing disorders related to the abovementioned situation). It should be emphasized that the District Court rightly dismissed the abovementioned request for evidence, as the evidence gathered in the course of the proceedings was sufficient to establish the facts of the case and make a correct decision in the case under consideration. In the context of the previous considerations, the conduct of expert evidence on the aforementioned circumstance would have to be dictated by the existence of doubts about the findings made in earlier opinions, and such a state of affairs did not occur. In this situation, the conduct of this evidence was not only pointless, but would have caused an unnecessary prolongation of the proceedings.

Therefore, in the factual circumstances existing on the date of the District Court's decision, having at its disposal the evidence gathered before the courts of both instances, including the informed and issued with sufficient discernment position of the minor (expressing opposition to her return to France), bearing in mind the principle according to which the court considers the possibility of taking into account the reasonable wishes of the minor only if it is consistent with her wellbeing (as in the statement of reasons of the decision of the Supreme Court of December 15, 1998 Ref. I CKN 1122/98, Legalis No. 43808), it should be assumed that the Court of first instance reasonably on the basis of Article 577 the Code of Civil Procedure in conjunction with Article 13 of the Convention on the Civil Aspects of International Child Abduction, drawn up at the Hague on October 25, 1980 (*Journal of Law* of 1995, No. 108, Item 528) amended the final decision of the District Court in Brzeg of October 19, 2016, Ref. III Nsm 334/16 ordering Aleksandra Cools, in accordance with the aforementioned Convention, to surrender her minor daughter Amelie Cools to her father [redacted] within 14 days from the date of the order (the enforcement of which, in light of the changed facts of the case, would be incompatible with the welfare of the child), and dismissed [redacted] request in this regard.

All the more so, since the plea raised in the appeal was completely misguided, alleging a violation of Article 11(4) of Council Regulation (EC) No. 2201/2003 of November 27, 2003 on jurisdiction, and the recognition, and the enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, which stipulates that the court may not refuse to return a child on the basis of Article 13(b) of the 1980 Hague Convention if it is established that appropriate measures have been taken to ensure the protection of the child upon return. Although the Participant in the proceedings in this regard took the evidentiary initiative by submitting to the case file at the stage of the appeal a report by the Center for Solidarity and the Family, Directorate for Integration and Social Support of the Department of Vendee (France) made between September 17 and September 28, 2018 at the request of the Center for the Protection of Children and the Ministry of Justice of the French Republic, indicating that the Participant in the proceedings in France intends to take measures to ensure appropriate conditions for the child upon arrival in France (among other things, he intends to change his job to a less absorbing one, sell his house and purchase another building, or obtain state assistance as to the possible distribution of educational care of the minor child). This, however, regardless of all these measures, the invoked provision of Article 11(4) of Council Regulation (EC) No. 2201/2003 of November 27, 2003 was inapplicable to the realities of the present case, in which the basis for the refusal to order the return of the child in accordance with the provisions of Article 12 of the Hague Convention was the circumstance of the child's opposition to return and the finding that the child had reached an age and a degree of maturity at which it was appropriate to take her opinion into account. Thus, while the abovementioned measures and the measures presented could, in theory, to some extent ensure the protection of the child upon return, they are incapable of changing the conscious, consistent, and decisive position of minor Amelie, expressing her opposition to returning to France and living with her father without her mother, who is her primary caregiver, and without whom the child cannot imagine her life, especially since she has been living with her for the past three years in Poland. In the light of these circumstances, the allegation of a violation of Article 11(4) of Council Regulation (EC) No. 2201/2003 by failure to apply it, i.e., by failing to establish in the present proceedings whether the authorities of the country of the child's habitual residence have taken specific measures to protect the child upon return, is therefore unfounded. For all these reasons, the appeal of Participant [redacted] was subject to dismissal by the Circuit Court pursuant to

Article 385 of the Code of Civil Procedure in conjunction with Article 13 § 2 of the Code of Civil Procedure, as lacking legitimate grounds.