


CROSS BORDER CHILD ABDUCTION
(BRUSSELS II BIS AND THE HAGUE CONVENTION 1980)

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I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

- **1. History**
 - concluded 25.10.1980, entered into force on 1.12.1983
 - as for November 2012: 88 Contracting States
 - see status table on the Website of the Hague Conference on Private International Law: <http://www.hcch.net>
 - all EU Member States are Contracting States



I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

○ 2. Aim and basic principles

- it is in the interest of a child not to be wrongfully retained or removed from the country of its habitual residence, Art. 1
- status quo ante shall be secured
- prompt return of the child is the best way to secure the status ante
- protection of the custody rights of the left behind parent
- fast proceedings, Art. 2



I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

○ 3. Helpful Tools

- specialized child abduction section of the HCCH website
- explanatory documents, good practice guides
- case law databases (INCADAT)
- statistics (INCASTAT)
- European Hotline Number: 116000 reserved by the European Commission for missing children



I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

○ 4. Application of the Convention, Art. 4 and Art. 3

- child under the age of 16 at the time of the breach of custody
- wrongful removal or retention according, Art. 3 lit. a)
- breach of rights of custody, Art. 3, Art. 3 lit. a)
- habitual residence, Art. 3 lit. a)
- exercise of rights of custody, Art. 3 lit. b)

I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

○ 5. Rights of Custody

- autonomous meaning of Rights of Custody according to the law of the state of habitual residence of the child
- but in accordance with Art. 5 > right to determine residence
- under the law of the state of habitual residence or
- granted by a court of the state of habitual residence or
- granted by agreement having legal binding effect
- to find out which is the applicable law on custody in the country of habitual residence of the child:
 - Art. 15 Declaration and/or communication via the International Hague Network of Judges

I. THE HAGUE CONVENTION ON 1980 INTERNATIONAL CHILD ABDUCTION

o 6. Exercise of Custody

- o Actual exercise of custody, Art. 3 lit b)
- o can be held by public authorities or by courts
- o can be held by foster families based on a placement order
- o only complete abandonment of custody rights indicates that rights of custody have not been exercised at the time of removal or retention of the child



I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

o 7. Habitual Residence

- o no definition in the Hague Convention 1980, definition has been avoided
- o factual concept: individual's actual connection to a place
- o not only a question of time to become habitual resident in a Contracting State
- o time, housing, schooling, health care, social and cultural activities, language skills
- o centre of gravity
- o intention of parent/s to move? vs. intention of child to move?
- o more than one centre of gravity?
- o does the interpretation of the ECJ in "Mercredi" and "A" also apply to habitual residence in Art. 3 of the convention?



I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

○ 8. Return of the Child to the state of Habitual Residence

- if there is an unlawful removal or retention of the child the child is going to be returned to the State of Habitual Residence, Art. 12 lit. a)
- if there is no agreement on return the court MUST order the return
- unless an exception applies



I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

○ 9. Exceptions according to Art. 13

- no actual exercise of the custody rights at the time of removal or retention, Art. 13 (1) lit a)
- consent to or subsequently acquisition in the removal or retention, Art. 13 (1) lit a)
- grave risk that would expose the child to physical or psychological harm, Art. 13 (1) lit b)
- grave risk that would otherwise place the child in an intolerable situation, Art. 13 (1) lit b)
- Child's objection to being returned, if it has attained an age and degree of maturity at which it is appropriate to take account of its views, Art. 13 (2)



I. THE HAGUE CONVENTION 1980 ON INTERNATIONAL CHILD ABDUCTION

- **10. Exceptions according to Art. 12 and 20**
 - expiration of a period of one year after the commencement of return proceedings, Art. 12
 - Return order would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms, Art. 20



II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **1. Aim and basic principles**
 - cases involving only Member States
 - new and modified system as a complement to the Hague Convention 1980
 - EU country in which the child was habitually resident (“Member State of origin) immediately before the abduction continues to have jurisdiction until the child is habitually resident in another EU country (“requested Member State”)
 - even more expeditious proceedings
 - the child is given the opportunity to be heard during the proceedings, unless this appears inappropriate due to his or her age and degree of maturity.



II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

○ 2. Aim and basic principles II

- the judge must order the child's return if it is established that adequate arrangements have been made to ensure the protection of the child after his or her return, Art. 11 (4)
- If a court rules that a child is not to be returned, it must transfer the case file to the competent court of the EU country in which the child was habitually resident prior to removal. This court takes the final decision as to whether or not the child is to be returned, Art. 11 (4)-(8)



II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

○ 3. Aim and basic principles III

- Regulation as international agreement on jurisdiction
- National law applying for procedures and to identify courts
- Concentration of courts in some Member States



II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **4. Definitions, Art. 2 Regulation Brussels Iibis**
 - definitions of custody and access rights, Art 2 (9) and (10)
 - wrongful removal or retention, Art. 2 (11) – according Art. 3 and 5 of the Hague Convention 1980



II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **5. Art. 9 and 10 Regulation Brussels Iibis**
 - Concept of Art. 9 and 10 of the Regulation: to avoid “forum shopping” and to secure that only under strict conditions of Art. 10 the requested MS has jurisdiction after an unlawful removal or retention of the child
 - Art. 9 applies, if a child is lawfully removed from a Member State: MS of the child’s former residence retains jurisdiction for a period of three months referring to access rights of the left behind parent



II. THE MODIFICATION WITHIN THE BRUSSELS IIBIS REGULATION

- **6. Art. 10 Regulation Brussels IIBis**
 - Art. 10 applies, if a child is unlawfully removed from a Member State: despite the abduction the Member State of origin retains jurisdiction to decide on the question of custody.
 - Jurisdiction only changes, if
 - acquiescing in the removal or retention
 - child is residing in the new MS for more than one year, is settled and the whereabouts of the child are known
 - no request for return is lodged

II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **7. Art. 11 Regulation Brussels IIBis**
 - Interrelation of Art. 11 of the Regulation and Art. 12 and 13 of the Hague Convention 1980
 - Judgment of return will be based on the rules of Art. 12 and Art. 3 Hague Convention 1980 complemented by Art. 11 Regulation Brussels IIBis
 - Model Application Form
<http://www.hcch.net/upload/recomm28e.pdf>

II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

Request for Return

High Contracting Parties of on the Child Aspects of International Child Abduction

REQUESTING CENTRAL AUTHORITY OR APPLICANT	REQUIRED ACTIVITY
Country (or territory) of child (Art. 10)	Country (or territory) of child (Art. 10)
Age of child at date of filing (Art. 10)	Age of child at date of filing (Art. 10)

NOTE: The following particulars should be completed insofar as possible.

- IDENTITY OF THE CHILD AND ITS PARENTS**
 - Child:**
 - name and first names
 - date and place of birth
 - nationality
 - passport or identity card No., if any
 - Parents:**
 - name and first names
 - date and place of birth
 - nationality
 - occupation
 - habitual residence
 - passport or identity card No., if any
 - Other:** name and first names, date and place of birth, nationality, occupation, habitual residence, passport or identity card No., if any
- IDENTIFYING INDIVIDUAL OR INSTITUTION (WHICH ACTUALLY EXERCISED CUSTODY BEFORE THE REMOVAL OR RETENTION)**
 - name and first names
 - nationality of individual applicant
 - occupation
 - address
 - passport or identity card No., if any
 - children in the child's care
 - name and address of legal adviser, if any
- PLACE WHERE THE CHILD IS TAKEN TO BE**
 - Information concerning the person alleged to have removed or retained the child:
 - name and first names
 - date and place of birth, if known
 - nationality, if known
 - occupation
 - habitual residence
 - passport or identity card No., if any
 - children and address, if female (see annex)
 - Address of the child
- Other persons who might be able to supply additional information relating to the whereabouts of the child**



II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- TIME, PLACE, DATE AND CIRCUMSTANCES OF THE WRONGFUL REMOVAL OR RETENTION**
- FACTUAL OR LEGAL GROUNDS JUSTIFYING THE REQUEST**
- CIVIL PROCEEDINGS IN PROGRESS**
- CHILD IS TO BE RETURNED TO:**
 - name and first names
 - date and place of birth
 - address
 - occupation
 - habitual residence
 - passport or identity card No., if any
 - children and address, if female (see annex)
- OTHER REMARKS**
- LIST OF DOCUMENTS ATTACHED***

Date: _____

Place: _____

Signature and/or stamp of the requesting Central Authority or Applicant: _____

* i.e. Certified copy of relevant decision or agreement concerning custody or access conditions, or affidavit, or in the applicable law, information relating to the needs, background of the child, substantive empowering the Central Authority to act on behalf of applicant.



II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **8. Art. 11 (3) Regulation Brussels Ibis**
 - courts must use most expeditious procedures under national law, Art. 11 (3), the judgment has to be issued not later than six weeks after the application is lodged
 - to guarantee this is a question of national procedural law
 - does this timeframe include appeal proceedings according to national law? How to make sure that national procedural laws do not undermine the aim of Art. 11 (3)?



II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **9. Art. 11 (2) and (5) Regulation Brussels Ibis**
 - child has the opportunity to be heard unless this appears inappropriate in regard to his age or degree of maturity, Art. 11 (2)
 - the way how the child is heard is a question of national procedural law
 - a court can not refuse a return unless the requesting party did not have the opportunity to be heard, Art. 11 (5)



II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **10. Art. 11 (4) Regulation Brussels IIBis**
 - Art. 11 (4) of the Regulation and Art. 13 lit. b) of the Hague Convention – grave risk
 - the court of the “requested MS” can not refuse the return of the child on the basis of Art. 13 b) Hague Convention 1980 if precautions were taken to protect the child in the “state of origin”
 - This involves
 - Direct juridical communication via The International Hague Network of Judges > www.hcch.net and the European Network of Judges (EJN)

II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **11. Art. 11 (6) and (7) Regulation Brussels IIBis**
 - new procedure foreseen in the exceptional case that the court of the requested Member States decides that the child is not returned
 - procedure allows the court of the MS of the habitual residence of the child prior to the abduction to have the final say
 - procedure regulates in detail what has to happen when a court decides that a child is not returned

II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

o 12. Art. 11 (6) Regulation Brussels IIBis

- o court must transmit a copy of the order, all documents, esp. the protocol of the hearing to the Central Authority (CA) or the court of the MS where the child was habitually resident before the abduction (“state of origin”)
- o the court of the state of origin shall receive all documents within **one month** of the date the non-return order was entered
 - o European Judicial Atlas in Civil Matters
http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm
 - o Central Authorities in every MS
http://www.hcch.net/index_en.php?act=conventions.authorities&cid=24
 - o European Network of Judges (EJN): <http://www.hcch.net>

II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

o 13. Art. 11 (7) Regulation Brussels IIBis

- o unless there are not already custody proceedings pending in the “state of origin” the court of the “state of origin” must invite the parties to make submissions to the court according to national law **within three months** of notification so that question of custody of the child can be examined before the court of the “state of origin”
- o if this timeframe elapses and no submission is lodged the court can close the file

II. THE MODIFICATIONS WITHIN THE BRUSSELS IIBIS REGULATION

- **14. Art. 11 (8) Regulation Brussels Iibis**
 - even if there is a judgment of non-return issued by the court of the “requested MS” pursuant to Art.13 Hague Convention 1980 any subsequent judgment which requires the return of the child issued by a court of the “MS state of origin” is enforceable;
 - Section 4 of Chapter III (Art. 21ff. – recognition and enforcement) Brussels Ibis applies to secure the safe return of the child
 - underlines the “last say” of the courts of the state of habitual residence of the child



(BRUSSELS II BIS AND THE HAGUE CONVENTION 1980)

THANK YOU – let’s discuss !

