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# **Cross-border Family Mediation**

International Parental Child Abduction, Custody and Access Cases

Second and updated edition

Edited by

**Christoph C. Paul and Sybille Kiesewetter**

in co-operation with

**MiKK e.V.**



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We know from our own experience as mediators what it means for parents to embark on the difficult path of mediation: they must put an end to smoldering conflicts, actively seek new opportunities for constructive communication and shift their focus back to the well-being and needs of their children. For this reason our special thanks are due to the many parents from all over the world who have committed themselves to the mediation process. They have given us the opportunity to listen and to learn from them and their experiences of separation and collaboration for the sake of their children's future.

Christoph C. Paul and Sybille Kiesewetter

Berlin, April 2014

## ■ Foreword

Globalization brings with it an increasing number of bi-national and bi-cultural relationships. The couples themselves and their children often experience the resulting cosmopolitan family background as enriching. However, if the parents' relationship falters and separation and divorce are on the table, a trend that is increasingly evident almost worldwide, then we unfortunately see more and more cross-border and bi-national conflicts involving children. In Europe alone, over 170,000 bi-national divorces are registered each year. When one of the parents returns to their home country and takes the child or children with them without the permission of the other parent, their conflict invariably escalates.

Legal systems are thus confronted with a constantly growing number of parental child abductions – more than 100,000 each year throughout the world. These, as well as cross-border custody and access disputes, are a phenomenon of our times that has become even more prevalent since the first edition of this book. Child abduction often causes great pain in families and it is the children in particular who suffer under the burden of the conflicts and the extreme insecurity that ensues.

As a result, all parties involved in cross-border family conflicts are called upon to react sensitively, adequately and promptly in order to deal appropriately in the interests of the affected children. In addition to the children and their parents, it is also lawyers, judges, staff of Central Authorities, youth welfare offices, international social services and foreign consulates, prosecution services and, more and more often, mediators, who need to understand more about the legal and other aspects of parental child abduction.

The Hague Conference encourages professionals and parents to use mediation as a resource to settle cross-border family conflicts. In 2012 the Guide to Good Practice on Mediation was published by the Hague Conference and provides standards for the use of mediation in this field. The second edition of this book once again takes up the issues of cross-border mediation in order to examine the bigger picture and throw more light on relevant aspects.

The Hague Convention on the Civil Aspects of International Child Abduction (1980 Hague Convention) provides the legal framework for the Contracting States that have signed and thus recognized the Convention.

At the present time 91 countries are signatory states of the 1980 Hague Convention, a number that is – fortunately – steadily growing. In her article Kyra Nehls looks in detail at the intricacies of the Hague Convention and other relevant regulations.

The situation between Contracting States and non-signatory countries is considerably more complicated than meets the eye at first glance, however. This aspect is taken up and discussed in the article by Mohamed M. Keshavjee. The Hague Conference established a Working Party on Mediation to promote cooperation between Hague Convention states and non-Hague states – the so called Malta Process. While this book examines mediation in cases of child abduction between Hague Convention Contracting States, it also provides suggestions for cases in which children have been abducted to non-signatory countries. Experience in implementing mediation in these cases is currently in its early stages, but as Keshavjee points out, activities in this area are increasing.

Since, as mentioned above, this book has been written for all professionals who in one way or another become involved in the course of their work with the resolution of conflicts arising from parental child abduction and especially for mediators working in this field, it is only fitting that it provides essential tools and case studies that are otherwise only available in excerpts in specialized further training seminars. The article by Kiesewetter & Paul and the case studies are aimed at mediators in particular. The case studies demonstrate the extent to which mediation and thus the mediators themselves must be open to solutions worked out by the parents, which can subsequently provide a viable alternative to a court order.

Inquiries from all over the world to the editors and to professional mediation bodies such as MiKK (the German NGO Mediation in International Conflicts Involving Parents and Children), the British foundation reunite and the Dutch child abduction centre IKO (International Child Abduction Centre) have multiplied over the past few years. Other mediation centres such as the Irish Centre for International Family Mediation and the Greek Family Mediation Centre are increasingly being set up to deal with this special field of mediation. One of our goals is to see the establishment of mediation services like MiKK in every country throughout the world to provide a pre-mediation service, counselling for all involved and networking, training and supervision for the mediators handling these cases.

Cross-border abduction, custody and access cases are often marked by particularly sensitive conflict dynamics and the legal instruments available inevitably fail to take the complex network of relationships involved adequately into account. Mediation is often the only answer since it considers both the emotional and the legal aspects of the conflict. The

parties' anxieties and insecurities are often particularly exacerbated when the parents are of different nationalities and religions and live in different countries. In an intact relationship the other culture is generally considered attractive, while it is perceived as a threat in the event of separation. In the separation scenario, with all its inherent conflicts and insecurities, the parties (unconsciously) retreat to what is familiar to them and what feels right, plausible, normal and meaningful.

As a rule, parents are only familiar with their own legal system and they tend to be worried that the other parent will have a certain "home advantage" with courts and authorities in their home country. In this situation many parents feel disadvantaged, misunderstood and powerless.

The courts, lawyers and all other professionals involved in family law proceedings are also confronted with seemingly insurmountable challenges which can only be solved, if at all, with a considerable investment of time and effort. Extended communication routes and language difficulties are the very least of the problems. More significant is the fact that everyone involved perceives the conflict and its potential resolution through the prism of their own cultural imprint and experience. They thus run the risk of not adequately appreciating the specific perspective of the party from a different cultural background than their own and of not considering certain possible solutions to the conflict. In the light of this complex situation, which even seasoned professionals experience as particularly challenging, it is essential to improve judicial cooperation and promote the development of other promising methods of conflict resolution such as bi-national family mediation. The article by Carl & Erb-Klünemann looks at ways in which this can be accomplished.

In this second edition we have added two important aspects to the range of issues addressed: mediation style, especially when linked to co-mediation, and the question of language, examining the potential need of parties to speak their mother tongue and the pros and cons of working with an interpreter. Our experience shows that it is often very helpful to draw on mediators from different countries. Co-mediation is a common way of working in these international cases. In their article, Schwartz and Wendenburg provide insight into the different mediation styles and approaches. They also focus on how to collaborate well as co-mediators and how to prepare effectively for mediation sessions.

Language can be another obstacle which requires prior consideration. For practitioners it is important to have given thought to the management of language in cross-border cases in which the parents have different mother tongues and to consider whether and how interpreting might be required



to obtain optimum outcomes. Mary Carroll examines this aspect in her article.

In recent years, several country-specific projects have been set up to develop mediation in bi-national conflicts involving children. The project participants have accumulated a wealth of practical experience that is being effectively implemented. Carl & Walker introduce such projects and discuss this subject in detail in their article.

It is encouraging to see the development of various mediation projects for cross-border parental child abduction and the growth in interest in the welfare of the affected children. The Franco-German mediation project, which was initiated by the French and German justice ministries and launched in 1999, is one such project.

In Germany, the main incentive for the use of mediation in proceedings involving the Hague Convention came from Eberhard Carl as early as 2001. Another important impulse was provided by England and Wales. Here cooperation between the High Court in London and the NGO reunite was established with the aim of integrating mediation into court proceedings involving cross-border child abduction.

For more than eleven years now, the Berlin-based NGO MiKK has specialized in cross-border family mediation. MiKK delivers comprehensive counselling and advice to parents and all professionals involved in any particular case. If both parents consent to mediation, they are referred to well-trained and experienced mediators worldwide. Since the legal framework and the implications arising in each case differ greatly from domestic family mediation, mediators working in this field require additional qualifications. The more than 150 mediators who have now been trained by MiKK alone have gathered a vast amount of experience in this field and together are able to mediate in over 25 languages. Their Dutch counterparts at IKO have trained 18 mediators since 2009 and offer mediation in child abduction cases.

Another important step towards the training of qualified mediators and building effective networks was the TIM project “Training in International Family Mediation” which was co-financed by the EU. The project’s website – [www.crossbordermediator.eu](http://www.crossbordermediator.eu) – is updated regularly by Child Focus and MiKK who jointly trained 54 mediation trainers from 27 EU Member States for this special field. Currently, the EU is co-financing the LEPCA project (Lawyers in Europe on Parental Child Abduction – [www.lepca.eu](http://www.lepca.eu)). The IKO Centre and MiKK are the main partners in this project which targets European law firms and lawyers.

Other initiatives such as the co-financed EU MED-ENF project involving Child Focus and MiKK as well as Spanish and Greek partners are also underway. The latter project deals with mediation in the enforcement phase of 1980 Hague Convention court orders. The Hague Conference has also launched a Working Group on the enforcement of mediated agreements which looks very promising. In our view, these very laudable efforts should definitely be continued and extended beyond the borders of the EU and Hague Convention Contracting States.

The book *Mediation bei internationalen Kindschaftskonflikten* (Mediation in international conflicts involving parents and children) was published in German in 2009. In 2011 the first English edition of this book followed with the aim of giving international readers an overview of the wealth of experience gathered to date and provide aids for practical application and training materials for mediation training in cross-border conflicts involving parents and children. The first edition sold out quickly, which demonstrates the interest in mediation in cross-border family disputes. We have learnt from the publishing house that the book has been shipped all over the world, to Japan, Australia, the US, Russia, Argentina and various other countries.

With this second edition we would like to continue to spread the message of mediation. We have taken the opportunity to review the content and language of the first edition and have added two new articles by three new authors. This book is the result of lively exchange with experienced and committed colleagues. Their support has been instrumental in developing the basic elements of our practical work as mediators and as trainers – in Germany, Europe and further afield. We look forward to continuing this collaboration and promoting the development of cross-border family mediation wherever the need arises.

Christoph C. Paul and Sybille Kiesewetter

Berlin, April 2014



**■ Section 1**  
**The Bigger Picture**

# ■ The Legal Framework of Child Abduction Cases

*Kyra Nehls*

## 1. Introduction

International child custody conflicts present a special challenge to all participants, confronting them with foreign regulations, legal systems and cultures. This article deals primarily with the conventions and laws that have practical relevance when resolving such conflicts and it outlines the legal framework for international child abduction cases and international proceedings concerning custody and access rights.

## 2. The legal framework of the Hague Convention on the Civil Aspects of International Child Abduction (1980 Hague Convention)

The objective of the 1980 Hague Convention is to secure the prompt return of children wrongfully removed to and retained in a Contracting State and to ensure that rights of custody and/or access in one Contracting State are effectively respected in the other Contracting State.

The Convention's guiding principle is that the child's welfare is best protected by a rapid response to the parent who has resorted to a wrongful "self-help" tactic and that abductions must be prevented in general. It aims to restore the previous conditions of custody in the state from which the child was abducted ("state of origin") so that a judgment can be rendered on custody rights there.

### 2.01 Scope

The Convention is applicable only to relations between the ninety-one Contracting States (status: January, 2014; an updated list of signatories can be found at [www.hcch.net](http://www.hcch.net) → conventions). The 1980 Hague Convention must have been in force in both states at the time of the wrongful removal or retention. Furthermore, the Convention must apply between the state of

abduction and the state of origin. This is not the case for all the Contracting States.

Pursuant to art. 4, sentence 2, the Convention ceases to apply once the child turns sixteen. Moreover, under art. 4, sentence 1, the child must have had his or her habitual residence in a Contracting State directly before the rights of custody or access were breached.

## **2.02 Substantive requirements for return**

The arguments of the application for the return of a child must explain in essence the wrongfulness of removal/retention, the circumstances of how the rights of custody have been exercised and the adherence of the deadline of a year.

### **2.02.01 Wrongfulness of removal or retention**

A definition of removal and retention is found in art. 3 of the 1980 Hague Convention. The removal or retention is considered wrongful when it violates the rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child had his or her habitual residence before the removal or retention.

Determining the child's habitual residence can pose difficulties in individual cases. "Habitual residence" is defined as the effective centre of the child's life.

Only the substantive law of the state of origin is of relevance to the question of a breach of custody rights. Pursuant to art. 14 of the 1980 Hague Convention, there is no need for a decision to be formally recognized. The rights of custody may be based on law, a judicial or administrative decision or an agreement. The legal conditions in the state of origin must be borne in mind. Ever since the 1996 Hague Child Protection Convention came into force, it has become complicated in many cases to clarify rights of custody. This topic is treated in greater depth below in sub-section 5.03 on the Hague Child Protection Convention.

The term "rights of custody", the violation of which forms the focus of the 1980 Hague Convention, encompasses the care of the child or aspects of that care including all related duties and responsibilities, particularly the right to determine the child's place of residence (1980 Hague Convention, art. 5). It suffices if joint custody rights are breached.

A child is considered wrongfully retained if he or she has not been released after a stay that is initially within the bounds of the law, e.g., if the child

does not return within the stipulated time when the rights of access are exercised.

If there is uncertainty as to the legal situation, the court may request the applicant to provide a so-called certificate of wrongfulness in the sense of art. 15 of the Hague Convention. In this case, the requesting state issues a decision or determination that the removal or retention was wrongful under applicable law.

#### **2.02.02 Effective exercise of rights of custody**

The rights of custody must have been effectively exercised, either jointly or alone, at the time of the removal or retention (1980 Hague Convention, art. 3 b). The determination of whether custody rights were effectively exercised may not be subject to excessively strict requirements.

#### **2.02.03 Filing the application within one year**

The application for the return of an abducted child must be filed within one year at the appropriate court. In the case of wrongful removal, this period begins on the day on which the abduction was carried out. In the case of wrongful retention, it begins when the child should have been returned to the other parent under the law, the judicial decision or the relevant agreement.

If the application for the child's return is filed at the court after this period, the court is nonetheless bound to order the child's return, unless it is demonstrated that the child is now settled in his or her new environment (1980 Hague Convention, art. 12, para 2).

### **2.03 Ban on a decision on the merits of custody rights (art. 16)**

Pursuant to art. 16 of the 1980 Hague Convention, after receiving notice of the wrongful abduction of a child within the meaning of art. 3, courts are prohibited from deciding on the merits of the rights of custody. If a decision on the rights of custody has been made in the requested state, it is not to be considered pertinent to the child's return. This ban does not apply to the state of origin.

### **2.04 Exceptions from the obligation to return the child immediately**

Certain exceptions exist which can obviate the obligation to return the child immediately. These are described below.

**2.04.01 Non-exercise of custody rights/consent**

Under art. 13 of the Hague Convention, states are not bound to return the child if the rights of custody were not exercised at the time of removal or retention or if the person charged with the child's care consented to the child's removal or retention. The parent who abducted the child must prove that the parent filing the application gave his or her consent. Consent generally does not need to be given in any particular form. The determination of whether joint custody rights were exercised may not be subject to excessively strict requirements, particularly if the parents lived apart before the abduction.

**2.04.02 Grave risk**

Considerable attention is devoted to the question of whether the return of the child would expose him or her to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation (1980 Hague Convention, art. 13 b). The person opposing the application must establish that the child's return is linked to such a risk.

The Convention makes the assumption that the return of the child best serves his or her welfare. Allowing the child to stay with the abductor is justified only if a return would expose the child to unusually severe harm. The risk must be grave, specific and immediate. Difficulties linked to the child's return, such as a new central figure in the child's life, the long distance to his or her native country, a new language, a new kindergarten or school, etc., do not in principle provide justifiable grounds to apply this exception.

One issue that continues to be debated is how to handle situations where the parent that previously took care of the child – in this case the abductor – refuses to return to the state of origin together with the child. Courts cannot order this parent to return to the state of origin, though they can set a time limit for a voluntary return. The facilitation of such returns through so-called undertakings is addressed below.

**2.04.03 Objections/wishes of the child**

Under art. 13, para 2 of the Hague Convention, the authorities are permitted to refuse to order the child's return if they determine that the child objects to being returned and the child has attained an age and a degree of maturity at which it seems appropriate to take his or her views into account. Here the details of the individual case must be considered; a rigid age limit is not stipulated. In addition, the sole focus of deliberations must be the child's return to the state of origin, not any facts relevant to rights of custody, such as the child's preference for living with the abductor.

**2.04.04 Social integration of the child**

If the application for return is not lodged within the one-year limit, the objection of social integration can be brought forward pursuant to art. 12, para 2 of the Hague Convention.

**2.04.05 Violation of fundamental principles relating to the protection of human rights and fundamental freedoms (art. 20)**

This exception must also be interpreted quite narrowly. It pertains to violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the UN Convention on the Rights of the Child, and basic rights recognized at the national level.

**2.05 Procedural steps**

The legal proceedings depend on local law but the Hague Convention intends a framework of rules with regard to the costs, preventive measures and safeguards, especially to ensure that the child will not be taken to a third country.

**2.05.01 Requirements for making an application (art. 8)**

If the left-behind parent decides to institute proceedings under the Hague Convention, he or she has various options to do so, but an application is always required.

Under art. 6, all Contracting States are required to designate a Central Authority to discharge the duties imposed on such authorities to implement the Convention. To receive support in obtaining a child's return, the applicant may contact the Central Authority either in his or her state of origin or in the state of abduction (a list of all the Central Authorities is available at [www.hcch.net](http://www.hcch.net) → Authorities). The left-behind parent may also apply directly to the courts of the Contracting States.

**2.05.02 Legal costs**

Art. 25 of the Hague Convention states that legal aid must be granted to nationals of Contracting States on the same conditions as to habitual residents of the state of abduction. National regulations apply. In individual cases, travel expenses and hotel costs may also be assumed, depending on national laws. Pursuant to art. 22 of the Hague Convention, no security, bond or deposit is required.

**2.05.03 National procedural law**

The procedural law of the requested state determines how proceedings are to be carried out under the Convention. In some cases, there are general



laws or special statutory regulations governing such proceedings. In a number of states, these laws and regulations have led to special jurisdiction being granted to central courts. In England, for example, sole jurisdiction is exercised by the Family Division of the High Court, in Germany by the *Familiengericht* (family court) at the state courts of appeals. Furthermore, provisional measures may be taken in the requested state to ensure that the child remains in that state during the proceedings. Especially important in this regard are preventive measures and safeguards that include:

- Travel bans;
- The surrender of identity documents;
- The obligation to register with the authorities;
- Third-party accommodations;
- Access rights during proceedings.

Appeals, time limits and enforcement are based on national law.

## **2.06 Special features of the Brussels II *bis* Regulation**

In the European Union, the 1980 Hague Convention has been supplemented by the Brussels II *bis* Regulation with the aim of improving international proceedings involving families and children. Brussels II *bis* strengthens the rights codified in the 1980 Hague Convention, especially through art. 11, para 2–5, which takes precedence over the corresponding rules in the Hague Convention. Art. 11, para 6 deserves special attention. Under this provision, if the courts of the state of abduction have refused to order the child's return pursuant to art. 13 of the 1980 Hague Convention, the courts of the state of origin may invite the parties to participate in additional proceedings that may lead to child's return. The parents concerned should be made aware of this prospect. As a result, a decision in the state of abduction against the return of the child does not create any final clarity on the child's place of residence, but can be overridden by a different decision in the state of origin. If the above conditions are met, this decision can be recognized and enforced in a simplified procedure under Brussels II *bis*.

Art. 55 of Brussels II *bis* states that the authorities are bound to cooperate in certain cases at the request of the Central Authority or the holder of parental responsibility to achieve the purposes of the regulation. Specifically, they must collect information on the situation of the child, any procedures underway, and any decisions concerning the child.

Brussels II *bis* does not contain any provisions on substantive law. Rather, it promotes a uniform system of jurisdiction in family law proceedings in the

European region while providing a simplified procedure for recognizing and enforcing decisions and addressing the topic of legal aid and advice.

### **2.07 De-escalation measures to end proceedings**

When the 1980 Hague Convention was drawn up in the 1970s, its authors faced a different situation from the one that regularly appears today. Experience has shown that in family conflicts it is usually the primary carer in the child's life that abducts the child and travels back with him or her to the parent's native country. Since courts cannot order the abductor to return with the child, the child's return to the other state can cause a separation from this primary carer. The 1980 Hague Convention provides only for the return of the child. This constellation can lead to problems and special challenges when the return of the child is ordered.

Various scenarios are conceivable if art. 13 b) of the 1980 Hague Convention is applied (e.g., a baby that is still being breastfed, domestic violence) but the Convention's objective – a decision on custody rights in the state of origin – cannot be guaranteed.

The abductor may have different reasons for refusing to return with the child: financial problems, an uncertain future, criminal prosecution, etc. Common law countries have been using so-called undertakings for many years to surmount these difficulties.

Because the 1980 Hague Convention does not make explicit mention of undertakings, it is legitimate to question whether there is a legal foundation for demanding such pledges from the left-behind parent. Some experts argue that the relationship between arts. 12 and 13 b) of the 1980 Hague Convention provides a basis for such demands – provided the pledges and obligations which are considered necessary and appropriate eliminate a grave risk to the child's welfare. However, it must be emphasized that the child is always the point of reference, not any imminent harm to the abducting parent.

Undertakings must be addressed to the court, not to the abducting parent.

Undertakings = Pledges that are made by one or both parents to the court deciding on the child's return. These pledges are not enforceable in the state of origin if they have not been declared binding by the authorities or courts there.

Example: The father certifies in the court of the state of abduction that he wishes to pay support for the mother and the child. In this case he is under no legal obligation to pay support to his spouse in the state of origin.

Uncertainty arises because the mother cannot legally enforce the pledge in the event of non-compliance.

Additional examples:

- Agreement to have the child return with one or both parents, cover of travel expenses;
- Cover of the costs of court proceedings and lawyers for the child and/or the abducting parent;
- Assistance with entry formalities, issue of passports;
- Surrender of identity documents;
- Arrangement of (temporary) support for the child and/or spouse, health insurance;
- Use of the couple's apartment or provision of substitute accommodation;
- Agreement not to pursue criminal prosecution, withdrawal of charges;
- Arrangement of conditions of custody for the child, rights of access;
- Agreement not to execute/enforce previous decisions on custody rights;
- Obligation to register with the appropriate court or youth authorities within a specified time after returning to the state of origin;
- Obligation to institute proceedings on custody rights in the state of origin promptly and/or to cooperate in such proceedings;
- Participation in a mediation process or family or parental counselling.

Pledges that must be fulfilled before the child's return are not problematic. In such cases, the court issues an "interlocutory order".

Example: The time limit for a voluntary return does not begin until the mother provides the necessary plane tickets for the father and child.

Safe harbour orders or mirror orders can be an additional solution:

Safe harbour orders = Obligations imposed on the left-behind parent that are intended to secure the child's return and subsequent residence in the state of origin and that are enforceable in the state of origin due to an order from a court in that country.

Example: The child's father draws up an enforceable document in the state of origin concerning the payment of support for the child and the spouse.

Mirror Orders = Identical orders from courts in the two participating states or an order from the court in the state of origin which mirrors the content of an undertaking and renders it enforceable in the state of origin.

Example: The mother agrees that, after returning from the state of origin, the child will remain in the father's care until the question of custody rights is settled in court. The parents agree on access rights for the mother during

this time. The courts in the state of origin and the state of abduction adopt the parents' agreement verbatim in the form of an order.

There is no legal foundation for this procedure in the 1980 Hague Convention. Uncertainties concerning the enforcement of obligations can be clarified by an order issued in the state of origin, but applicable national law must provide for such arrangements and also allow for compulsory enforcement. Close cooperation and communication between the judges in the two participating states is essential for answering many relevant questions. Where appropriate, assistance can be sought from the liaison judges responsible for communication on this matter; the European Judicial Network (EJN, <http://ec.europa.eu/civiljustice>) or the Central Authorities.

Undertakings can take the form not only of a court order, but also of a performance settlement between the two parties. Pursuant to art. 11, para 4 of Brussels II *bis*, a court cannot refuse to return a child if it is established that adequate measures have been taken to guarantee the child's protection after his or her return. Many states have resorted to issuing a return order that imposes on the abducting parent a (usually short) time limit for voluntary return before granting the left-behind parent the right to enforce the child's release.

The conditions for the child's voluntary return to the state of origin are also a regular topic in mediations. The same principles apply, particularly with respect to the binding nature of such arrangements. Undertakings cannot be ordered by courts, but must be based on the commitment and willingness of the parents involved. They are instruments that are a useful tool to get the parents to agree on supplementary supportive measures in the mediation process – measures that can ultimately help settle the dispute. Court settlements are often impeded by one parent's fear of being separated from the child in the event of his or her return or by constraints such as insufficient financial reserves. In such cases mediation provides additional options.

### **3. European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (European Custody Convention)**

Securing the prompt return of abducted children is also one of the declared goals of the European Custody Convention. However, the 1980 Hague Convention generally takes precedence. The European Custody Convention has lost a great deal of its importance due to the Brussels II *bis* Regulation

and applies only between a small number of states. Its application is considered only if the child is not yet sixteen. In terms of substantive law, recognition of decisions is based on arts. 7, 9 and 10.

This European Custody Convention was essentially conceived as an instrument for recognizing and enforcing custody decisions. Abduction cases were later included under the heading of “the restoration of the custody of children which has been arbitrarily interrupted”. In contrast to the 1980 Hague Convention, this field includes custody decisions that are applied for after the removal of the child across a border and that retroactively declare this removal to be unlawful pursuant to art. 12 of the European Custody Convention.

#### **4. Abductions in Contracting States not party to the 1980 Hague Convention**

Child abductions in states that have not signed international agreements (non-Contracting States) can only be dealt with by measures in the state of abduction. Such measures include the involvement of local lawyers, non-governmental organizations and, if necessary, government ministries. It must be pointed out that, depending on the legal system, enforcing a parent’s rights can prove very difficult. He or she must carefully examine whether charges can be pressed against the abductor for criminal acts. However, such measures can lead to disastrous results such as the complete severance of ties with the child.

In such cases, mediation is a viable option. Given the principles of international mediation such as the use of a bi-national team of mediators (see Wroclaw Declaration on Mediation of Bi-national Disputes over Parents’ and Children’s Issues in Section 2 of this volume), mediation can provide a valuable opportunity to raise the parents’ awareness of their responsibility in resolving the conflict (see the detailed contribution by Keshavjee in this volume).

#### **5. International rights of custody and access**

Experience in the field of family law has demonstrated the need to regulate rights of custody and access at international level. Several conventions have thus been signed to ensure a uniform legal framework to solve conflicts between parents in an international context.

## 5.01 Brussels II *bis* Regulation

This regulation contains rules on court jurisdiction, recognition, enforcement and cooperation between Central Authorities in matters relating to parental responsibility. The term “parental responsibility” is broadly defined to mean not only rights of custody, but also rights of access and other aspects such as guardianship and housing.

The jurisdiction rules are set forth in arts. 8 to 14, with art. 20 permitting provisional measures in urgent cases even if another court has jurisdiction over the substance of the matter.

This regulation creates uniform rules within the European Union for international cases involving custody and access rights. Its objective is the quick and unhindered recognition and the enforcement of decisions.

### 5.01.01 Recognition and enforcement

A key factor for recognizing and enforcing the decisions of one member state in the territory of another is the issuance of a certificate in accordance with arts. 40 and 41 of Brussels II *bis*. This certificate ensures that the stipulated preventive measures have been observed when the decision is rendered. In other words:

- The parties concerned were given the opportunity to be heard.
- The child was given the opportunity to be heard unless a hearing was considered inappropriate because of his or her age or degree of maturity.
- If the judgment was given in default, the person defaulting was served with the document that initiated the proceedings in sufficient time and in such a way that that person could arrange for his or her defence; or if these conditions were not observed when the document was served, it has nevertheless been established that the person accepted the decision unequivocally.

An appeal cannot be lodged against the issuance of the certificate. Upon request, the initial decision is immediately recognized and enforced.

### 5.01.02 Rights of custody

If the court of the state of abduction refuses to order the return of the child pursuant to art. 13 of the 1980 Hague Convention, the courts of the state of origin are entitled to review the rights of custody and, if necessary, the release of the child. To this end the court implementing the Convention must pass on the relevant documents to the court or the Central Authority of the state of origin. The court must invite the parties to make submissions, provided that no application has been made to initiate proceedings. If the parties do not make submissions, the case is closed; in other words, the

court ends the proceedings on the rights of custody. If at least one party makes submissions, the court examines the custody of the child.

In the latter case, pursuant to art. 42 of Brussels II *bis*, the following conditions of procedural law must be met for the judgment to be subsequently recognized and enforced:

- The parties concerned must have been given the opportunity to be heard.
- The child must have been given the opportunity to be heard unless a hearing was considered inappropriate because of his or her age or degree of maturity.
- When rendering its decision, the court must have considered the reasons for and evidence underlying the decision that was made pursuant to art. 13 of the 1980 Hague Convention.

The hearing of the child often represents the greatest challenge since the child is often still in the state to which he or she was abducted and cannot always be expected to return to a hearing in the state of origin. International cooperation between authorities and courts is therefore an imperative. If necessary, evidence must be taken directly in the other member state or the other member state must be requested to take evidence.

Because of the simplified requirements (no exequatur procedure) for quickly recognizing and enforcing a return order, there is an urgent need in all proceedings under the 1980 Hague Convention to convince the parents to reach an amicable agreement that quickly clarifies the legal situation of the child. Furthermore, notwithstanding a decision under art. 13 of the 1980 Hague Convention, any court with appropriate jurisdiction may rule on the rights of custody pursuant to art. 11, para 8 of Brussels II *bis*. Its judgment will be recognized and enforced, based on the provisions described.

### **5.01.03 Rights of access**

In the case of access rights, the point in time at which a certificate is issued under art. 41 of Brussels II *bis* for the purpose of recognizing and enforcing a decision is based on whether a cross-border situation is deemed to exist at the time of the decision (art. 41, para 1 and 3). This is the case, for example, if one parent has moved or plans to move. The certificate is issued when the decision becomes enforceable, even if only provisionally.

After an application is made to recognize and enforce a decision without an exequatur procedure in the member state, it is principally impossible for the other party to oppose recognition. In such cases, art. 23 of Brussels II *bis* (“Grounds of non-recognition for judgments”) does not apply.

To prevent enforcement from becoming difficult or impossible due to a de-

cision that contains insufficient modalities for the exercise of access rights, art. 48 of Brussels II *bis* enables the courts of the member state enforcing the decision to make practical arrangements if such arrangements have not or have not sufficiently been made in the decision and provided that the essential elements of the decision are respected.

### **5.02 Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants (1961 Hague Convention)**

The primary aim of the 1961 Hague Convention was to improve the international protection of minors. In terms of its scope, it was eclipsed by various other international agreements and replaced entirely by the Hague Child Protection Convention in the states where this convention came into force in 2011.

### **5.03 Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Hague Child Protection Convention)**

The Hague Child Protection Convention has been in force in thirty-two countries since 2011 (an updated list of the Contracting States can be found at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=70](http://www.hcch.net/index_en.php?act=conventions.status&cid=70)). It covers jurisdiction, applicable law, recognition, enforcement and cooperation in matters of parental responsibility and with respect to measures designed to protect children. An additional aim of the Convention is to improve the cooperation between courts and authorities. It has replaced the 1961 Hague Convention in relations between the respective Contracting States.

Some of the rules in the Hague Child Protection Convention can also be found in the Brussels II *bis* Regulation. Brussels II *bis* takes precedence if provisions can be found on the same subject in both instruments.

The Child Protection Convention applies to children up to the age of eighteen. In contrast to Brussels II *bis*, measures are possible under civil and public law.

#### **5.03.01 Jurisdiction**

Jurisdiction is defined in arts. 5 to 14 of the Hague Child Protection Convention. The child's habitual residence is generally the key criterion, but an exception can be found in art. 10, which stipulates that divorce proceedings can also establish jurisdiction.



To avoid any difficulties arising from art. 16 of the 1980 Hague Convention (which prohibits a decision on the merits of custody rights in the state of abduction), art. 7 of the Hague Child Protection Convention contains a jurisdiction rule for a change of residence in cases of abduction. As in art. 10 of Brussels II *bis*, the courts and authorities of the state of origin retain jurisdiction if the change of residence was not consented to and/or the following three conditions are met: (a) the child has not stayed for at least one year in the requested state after the person, institution or other body, having rights of custody had or should have had knowledge of the child's whereabouts; (b) no request for return is pending that was lodged during this time; and (c) the child has settled into his or her new environment. Art. 7, para 3 of the Hague Child Protection Convention refers to art. 11 of the same document, under which, jurisdiction exists during this time to take protective measures in cases of urgency.

The transfer of proceedings to another court requires an agreement between the two courts of the Contracting States (arts. 8 and 9, Hague Child Protection Convention). This has indeed led to improved cooperation and communication.

### **5.03.02 Applicable law**

One of the main distinctions to Brussels II *bis* is the system governing any possible conflict of laws presented in the Hague Child Protection Convention under Chapter III – Applicable Law. The rules in art. 16 of the Hague Child Protection Convention deserve special attention. Under art. 16, para 3, parental responsibility is based primarily on the law of the state of previous residence. In other words, the legal framework in that state continues to apply.

Example: The child's parents, who are unmarried, live in France and have joint custody of the child. They move to Germany and continue to have joint custody there despite the different legal situation in the country.

Art. 16, para 4 of the Hague Child Protection Convention addresses the situation in which one parent previously did not have parental responsibility.

Example: The child's parents are unmarried and live in Germany. In accordance with the legal situation in the country, the mother has sole parental responsibility for the child. The child's parents then move to France, where the child's father acquires joint rights of custody by operation of law.

In light of these rules, proceedings under the 1980 Hague Convention, in particular, require a careful, thorough examination of the situation that existed concerning custody rights at the time of abduction. The exercise of court jurisdiction and parental responsibility is generally based on the

law of the state in which the child habitually resides. If the child changes its residence, the law of the new state of habitual residence applies.

In order to avoid gaps in the rules designed to protect the child, art. 14 of the Hague Child Protection Convention stipulates that the measures taken by the previous state of residence remain in force until new arrangements are made. Only the narrowly defined conditions in art. 23 of the Child Protection Convention can be cited as grounds for refusing recognition.

### **5.03.03 Recognition and enforcement**

Decisions under the Hague Child Protection Convention are recognized and enforced in the Contracting States pursuant to arts. 23 to 28 of the Convention.

### **5.03.04 Cooperation between courts and authorities**

Cooperation between the courts and authorities of the Contracting States is defined in greater detail in Chapter V of the Hague Child Protection Convention. Like the 1980 Hague Convention and the European Custody Convention, the Child Protection Convention provides for the establishment of Central Authorities. According to the German Central Authority, one of the main focuses of the work, under Brussels II *bis* as well, is to draw up reports on the situation of the child for disputes on custody and access rights (see, e.g., art. 32, Hague Child Protection Convention). Explicit mention must also be made of the obligation set forth in art. 31 c of the Child Protection Convention to assist in determining the whereabouts of children in cases where their welfare is at risk.

There is justifiable reason to hope that the explicit rules on international cooperation among authorities in custody matters can bring about quicker and more effective solutions in the proceedings.

## **5.04 Access rights under the 1980 Hague Convention**

Art. 21 of the 1980 Hague Convention contains the only rule on access rights in the entire document. It states that an application can be presented to the Central Authority for organizing or effectively exercising access rights in the same manner as an application for the return of a child. The Central Authority is responsible for promoting the exercise of access rights and removing any obstacles. However, it is not permitted to take any coercive measures. In cases where the parents' efforts to resolve the dispute outside the court have failed or a court judgment has been disregarded for a long time, it is only realistic to assume that the dispute will lead to court

proceedings. Under art. 29 of the 1980 Hague Convention, the parent making the application may also apply directly to the court.

The 1980 Hague Convention does not provide for special procedural conditions for the organization or recognition of access rights. This means that arrangements must be based on national law. A strategically interesting question concerns the concentration of jurisdiction at the courts if it exists at a national level since such a concentration allows judges to gain greater experience in dealing with cross-border custody conflicts. The rules on summary proceedings in arts. 8 to 12 of the 1980 Hague Convention do not apply to proceedings on access rights.

### **5.05 Rights of access under the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody and Children**

The European Custody Convention also addresses the recognition and enforcement of rights of access. The relevant rules are found in art. 11. The court of enforcement may independently set conditions under which visitation rights take place.

### **5.06 Convention on Contact Concerning Children (Contact Convention)**

Negotiations are still underway for an international convention regulating cross-border rights of access. The objective of this convention is to adapt general principles and fix appropriate safeguards and guarantees in order to ensure the proper exercise of contact and the immediate return of the child at the end of the period of contact. In this context it is interesting to note that measures may be taken against the parent possessing access rights to secure the return of the child or against the parent who blocks access.

### **5.07 Autonomous law**

If the previous conventions do not apply, cases of custody and access rights must be settled on the basis of autonomous law. In order to secure contact and protect against possible abduction risks, particularly in cases of cross-border contact, an attempt should be made to reach an effective agreement using undertakings and mirror orders as instruments. A few examples:

- Supervision of access (visits or handovers in the presence of a third party).
- Obligation of a person to cover the travel or accommodation expenses of the child and, if appropriate, of any person accompanying the child.
- Obligation of a person to accompany the child on parts of the trip.
- A security to be deposited by the person with whom the child usually lives to ensure that the person seeking contact with the child is not prevented from such contact (if necessary, the deposit can be used to cover the cost of a trip not taken or the cost of cancelling a holiday apartment due to blocked contact).
- A fine to be imposed on the person with whom the child usually lives if this person refuses to honour the contact order.
- The surrender of passports or identity papers and, where appropriate, a document establishing that the person seeking contact has informed the appropriate consular authority as to the surrender during the period of contact.
- Financial guarantees (the deposit of money or securities; the possibility of making this deposit available to the left-behind parent in the event of an abduction as “advance payment of trial costs”).
- Encumbrance of assets (mortgage, charges on property).
- The obligation of the person who has contact with the child to report with the child regularly to a competent body such as a youth welfare authority or a police station in the place where contact is exercised.
- The obligation of the person seeking contact — before a contact order is issued or contact takes place — to present a document issued by the state in which contact is to take place, certifying that a custody order or a contact order is recognized and declared to be enforceable.
- The imposition of conditions concerning the place where contact is to be exercised and, where appropriate, the registration in any national or international information system of an order prohibiting the child from leaving the state where the contact is to take place (travel ban); entry of the child and the potential abductor into the INPOL system and the Schengen Information System (SIS).
- Transfer of the right to determine the child’s place of residence to a third party.

Many of the above safeguards and guarantees are mentioned in art. 10 of the draft Convention on Contact Concerning Children.

## 6. Conclusion

In international child custody conflicts, the international conventions, laws

and conflict-of-law rules provide legal professionals with a wide range of instruments to protect the children involved. However, these instruments do not always do justice to the actual circumstances of the individual cases. For this reason, the professional whose aid has been enlisted to resolve family conflicts must convince the parents to act responsibly and strengthen their resolve in finding an adequate solution for their child.

## 7. References

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