Cross-Border Family Mediation
International Parental Child Abduction, Custody and Access Cases

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Introduction

Introduction by the Editors

Globalization brings with it an increasing number of bi-national and bi-cultural partnerships. These are often felt to be enriching for both the couples and their children due precisely to their international nature. However, separation and divorce are resulting in a significant increase in cross-border and bi-national conflicts involving children. If one of the parents returns to his / her homeland and takes the child with him / her without the permission of the other parent, the conflict escalates. Legal systems are thus confronted with a constantly rising number of parental child abductions – more than 100,000 each year world-wide – and cross-border custody and access disputes.

The Hague Convention on the Civil Aspects of International Child Abduction (1980 Hague Convention) provides the legal framework for those countries that have signed and thus recognized it; see the chapter by Nehls for more details on this. The situation between signatory and non-signatory countries is considerably more complicated; this question is discussed in the chapter by Keshavjee. Child abduction often causes great suffering in families and it is especially the children who must endure the conflicts and extreme insecurity that arise. All parties concerned are therefore called upon to react sensitively, adequately and promptly in order to deal appropriately with the interests of the affected children. Besides the children and their parents, attorneys, judges, staff of the central authorities, youth welfare agencies, international social services and foreign consulates, prosecution services and increasingly mediators are potentially involved.

This book has been written for all these professionals involved with such conflicts and especially for mediators working in this field. It should be on the shelves of every court library and law firm dealing with cross-border child abduction, custody and access proceedings. For mediators who have discovered this particular area of work for themselves, the book provides essential tools and sample case studies that are otherwise only available in excerpts in specialized further training seminars; see the chapter by Kiesewetter and Paul and the case studies. These examples demonstrate the extent to which mediation and thus the
mediators themselves must be open for 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 association “Mediation in International Conflicts involving Parents and Children”), the British foundation reunite and the Dutch child abduction center IKO (International Child Abduction Center) have multiplied over the past few years. 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 have 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 back 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 are worried that the other parent will have a certain “home advantage” with courts and authorities in his / her home country. In this situation many parents feel at a disadvantage, misunderstood and powerless.

The courts and all other professionals involved in family law proceedings are also confronted with seemingly insurmountable challenges which can only be solved when a considerable amount of time and effort is invested – if at all. Extended communication routes and language difficulties are the very least of such 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 group than their own or of not considering certain possible solutions to the conflict. In 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 (for more on this topic see the chapter by Carl and Erb-Klünemann).
Over the past several years country-specific projects for mediation in bi-national conflicts involving children were instituted. The project participants have since accumulated a wealth of practical experience; Carl and Walker discuss this in detail in their chapter. The Franco-German mediation project was developed in 1999 and initiated by the French and German justice ministries. Initially, three French and three German parliamentarians were asked to mediate politically-sensitive cases involving parental custody and access arrangements as well as abductions. Starting in 2003 the task of mediation was placed into the hands of trained mediators experienced in family matters. In Germany, the main incentive towards 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 which aims at integrating mediation into court proceedings involving cross-border child abduction. For more than eight years now, the Berlin-based NGO MiKK has specialized in mediation. MiKK delivers comprehensive counsel and advice to parents and all professionals involved in a 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 therefrom differ greatly from normal domestic family mediation, the mediators active in this field require additional qualification. The more than 100 mediators who have now been trained by MiKK alone have gathered a vast amount of experience in this field and are able to mediate in 17 languages. Their Dutch counterparts at IKO have trained 18 mediators since 2009 and themselves offer mediation in child abduction cases. Another important step towards the training of qualified mediators and building effective networks is the TIM-project “Training in International Family Mediation” which is co-financed by the EU. TIM is a joint project by the Belgian NGO Child Focus, MiKK and the Catholic University of Leuven as well as IKO. One of the main goals is to train 54 mediation trainers from 27 EU Member States for this special field, thus enabling them to set up structures similar to MiKK and IKO in their own countries and to provide training for interested family mediators – preparing them to take on child abduction cases. In our view, these very laudable efforts should absolutely be continued and extended beyond the borders of the EU and the Hague Convention signatory states.
The Hague Conference on International Private Law has also recently addressed the topic of mediation and drafted a Guide to Good Practice on Mediation with the support of an international group of experts in this field. With the Malta Process it established a working group to promote cooperation between Hague Convention states and non-Hague states. While this book examines mediation in cases of child abduction between Hague Convention signatories, 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 activities in this area are increasing.

The book *Mediation bei internationalen Kindschaftskonflikten* (“Mediation in international conflicts involving parents and children”) was published in German in 2009. With this new, updated edition in English we strive to give a more international audience an overview of the wealth of experience gathered to date and provide both work aids for practical activity and training materials for mediation training in cross-border conflicts involving parents and children. This book is the result of lively interchanges with experienced and committed colleagues. Their support has been instrumental in developing the basic elements of our practical work as mediators and as trainers – both in Germany and abroad.

We wish to extend our heartfelt thanks to our co-authors who have shared their practical experience with us, who have been intensely involved in the creation of the English edition and with whom we share a passion for the implementation of mediation in those highly complex cases involving child abduction. We would also like to thank the law firm Paul & Partner for their financial assistance and Anna Metzner of the Wolfgang Metzner Verlag for her pragmatic and uncomplicated cooperation.

As this book is a “work in progress,” we invite you, our readers, to share your own experiences, suggestions and ideas for future editions, and thus contribute to the continuing development of the field (info@mikk-ev.de).

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 onto the well-being and needs of their child. For this reason we would like to give special thanks to all parents who have committed themselves to the mediation process. They have given us the opportunity to lis-
ten and to learn from them and their experiences of separation, collaborating for the sake of their children’s future.

Berlin, August 2011

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Chapter 1: Cross-Border Family Mediation – An Innovative Approach to a Contemporary Issue

I. The Legal Framework for International Child Abduction Cases and International Proceedings concerning Custody and Access Rights

by Kyra Nehls

International child custody conflicts present a special challenge to all participants, confronting them with foreign regulations, legal systems and cultures. This chapter deals primarily with the conventions and laws that have a practical relevance to resolving such conflicts.

A. International Child Abduction


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.
1. Scope

The convention is applicable only to relations between the eighty-three contracting states (an updated list of signatories can be found at 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 article 4, sentence 2, the convention ceases to apply once the child turns sixteen.

Moreover, under article 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. Substantive requirements for return

a) Wrongfulness of removal or retention

A definition of removal and retention is found in article 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 center 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 article 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\(^1\) came into force, it has become complicated in many cases to clarify rights of custody. This topic is treated in greater depth in the section 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 (article 5, 1980 Hague Convention). 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 article 15 of the convention. In this case, the requesting state issues a decision or determination that the removal or retention was wrongful under applicable law.

\(b\) 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 (article 3(b), 1980 Hague Convention). The determination of whether custody rights were effectively exercised may not be subject to excessively strict requirements.

\(c\) 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.

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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 (article 12 (2), 1980 Hague Convention).

3. Ban on a decision on the merits of custody rights (article 16)

Pursuant to article 16 of the 1980 Hague Convention, after receiving notice of the wrongful abduction of a child within the meaning of article 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.

4. Exceptions from the obligation to return the child immediately

a) Non-exercise of custody rights/consent
Under article 13 of the 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.

b) 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 (article 13(b), 1980 Hague Convention). 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 large distance to his or her native country, a new language, a new kindergarten or school, etc., do not principally 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.

c) Objections/wishes of the child
Under article 13, paragraph 2 of the 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, etc.

d) 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 article 12 (2) of the convention.

e) Violation of fundamental principles relating to the protection of human rights and fundamental freedoms (article 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.
5. Procedural steps

a) Requirements for making an application (article 8)
If the left-behind parent decides to institute proceedings under the convention, he or she has various options to do so, but an application is always required.

Under article 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 Authorities). The left-behind parent may also apply directly to the courts of the contracting states.

b) Legal costs
Article 25 of the 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 article 22 of the convention, no security, bond or deposit is required.

c) 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:
Chapter 1

- 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.

6. 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 article 11(2-5), which takes precedence over the corresponding rules in the convention.

Article 11(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 article 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.

Article 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.
7. 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 article 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 persecution, etc. Common law countries have been using so-called undertakings for 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 articles 12 and 13(b) of the 1980 Hague Convention provides a basis for such demands – provided that the pledges or obligations whose fulfillment is considered necessary and appropriate eliminate a grave risk for 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 accommodations.
- 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 promptly institute proceedings on custody rights in the state of origin and/or to cooperate in such proceedings.
- Participation in a mediation process or family or parental counseling.

Pledges that must be fulfilled before the child’s return are not problematic. In such cases, the court issue 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 harbor orders or mirror orders can be an additional solution:

**Safe harbor 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 article 11(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.

It must be noted that 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 in 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.

II. 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 articles 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