

# **International child abduction in Brussels IIa Regulation (Articles 10 and 11)**

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# Legal notions

## Article 2

9. the term '**rights of custody**' shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;
11. the term '**wrongful removal or retention**' shall mean a child's removal or retention where:
- (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; **and**

# Legal notions

(b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

# Article 10

- **General rule:** Article 8 - child's habitual residence at the time the court is seized
- Article 8 is overridden by special rules, like Article 10
- **Article 10:** In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction

## Article 10

The **courts** of the Member State where the **child was habitually resident** immediately before the wrongful removal or retention retain their jurisdiction until the child has acquired a habitual residence in another Member State **and**:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or

# Article 10

or

(b) the **child has resided in that other Member State** for a period of **at least one year** after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least **one of the following conditions is met:**

(i) within one year after the holder of rights of custody has had or should have had **knowledge** of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

## Article 10

- (ii) a **request for return** lodged by the holder of rights of custody has been **withdrawn** and no new request has been lodged within the time limit set in paragraph (i);
- (iii) a **case** before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been **closed** pursuant to Article 11(7);
- (iv) a **judgment on custody** that does not entail the return of the child has been **issued** by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.



# Article 11

## Articulation with the **1980 Hague Convention** **(article 11, section 1):**

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, in order to obtain **the return** of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

# Article 11

- **Expeditious proceedings and deadline (Article 11, Section 3):**

3. The court shall, except where exceptional circumstances make this impossible, issue its judgment no later than **six weeks** after the application is lodged.

**Decision of the court of the country of abduction:** preferably a return decision, but may also result in a retention order.

- **Grounds** provided for in the 1980 Hague Convention.
- **Article 13 (b) of the 1980 Hague Convention:** the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that (...) there is a **grave risk** that his or her **return** would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

# Article 11

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that **adequate arrangements** have been made to secure the protection of the child after his or her return.

# Article 11

**Safeguard** of the position of the person who made the request for return (Article 11, **section 5**):

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to **be heard**.

# Priority of the court of habitual residence of the child:

- Article 11, Section 6, 7 and 8

CJEU, 11.07.2008, C-195/08 PPU, *Rinau*

CJEU, 1.07.2010, C-211/10 PPU, *Povse*

CJEU, 9.10.2014, C-376/14 PPU, *C c. M*

CJEU, 9.01.2015, C-498/14 PPU, *Bradbrooke*

# Article 11

6. If a court has issued an **order on non-return** pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, **to the court with jurisdiction** or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

# Article 11

7. Unless the **courts in the Member State where the child was habitually resident** immediately before the wrongful removal or retention have already been **seised** by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must **notify** it to the parties and **invite** them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.



## Article 11

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

## Right of the child to be heard (Article 11, section 2)

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be **ensured** that the **child** is given the **opportunity to be heard** during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

# Summarising conclusions

- Jurisdiction: Article 10
- Return: Article 11(2) to (5)
- Non return order: Article 11(6) to (7)
- Return decision: Article 11(8)

## **International child abduction in Brussels IIa Regulation (Articles 10 and 11)**

### **Case study**

#### **FACTS**

António and Beatriz, a Portuguese couple, who live in Paris. The divorce proceedings are pending.

Beatriz takes their 4 years old child, Mathieu (Portuguese nationality, born in Paris), to Portugal to visit their relatives, for a short two-week vacation.

António agreed to the visit.

After two weeks, they did not return as planned.

António phones Beatriz, and she tells him that she and Mathieu are going to stay in Portugal and they are not going back to Paris.

Beatriz has started looking for an apartment and a school for Mathieu.

#### **Related questions**

- 1) What is the legal instrument applicable?
- 2) What can António do?
- 3) What documents should he submit?

#### **VARIATION No. 1**

The Central Authority of France contacted the Central Authority in Portugal.

The Central Authority in Portugal contacted Beatriz and attempted to establish the voluntary return of the child, with no success.

The Portuguese Central Authority assists in instituting legal proceedings for the return of the child.

#### **Related questions**

4) What should be done, taking into consideration that the Portuguese court has ruled that Mathieu must not return, because the abduction took place more than a year earlier and the child has become settled in his or her new environment (Article 12 Hague Convention)?

5) What should be done, taking into consideration that the Portuguese court has ruled that Mathieu must not return, because there is a grave risk that returning the child would expose him to physical or psychological harm, or would place him in an

intolerable situation, while no adequate measures to protect the child have been taken in the State to which the child is to be returned?

**LEGAL INSTRUMENT(S) TO BE APPLIED**

Regulation No 2201/2003

1980 Hague Convention

## Questions with guidelines

### 1) What is the legal instrument applicable?

The Brussels IIa Regulation and the 1980 Hague Convention apply.

#### Possible issues to be discussed:

Scope of application: Article 2(11) Brussels IIa Regulation and Article 3 Hague Child Abduction Convention.

### 2) What can António do?

Article 12 of the Hague Convention: return proceedings are to be conducted in the State where the child was abducted. However, the person claiming that the child has been abducted may apply to the Central Authority of the child's prior habitual residence in securing the return of the child (article 8 of the HC) – António should start proceedings in Portugal.

The Brussels IIa Regulation holds that the State of the child's habitual residence still has the final say on the return. The Regulation allows parallel proceedings concerning custody rights in the State of the child's habitual residence – António should start parallel proceedings concerning custody rights in the State of the child's habitual residence in France.

### 3) What documents should he submit?

Article 8 Hague Child Abduction Convention provides the documents the applicant (António) must/may submit to the Central Authority.

#### Possible issues to be discussed:

- The tasks of the Central Authority: Art. 7, 9 and 10 Hague Child Abduction Convention; Consideration 25 and Articles 11(6), 54 and 55 Brussels IIbis Regulation.

**4) What should be done, taking into consideration that the Portuguese court has ruled that Mathieu must not return, because the abduction took place more than a year earlier and the child has become settled in his or her new environment (Article 12 Hague Convention)?**

**5) What should be done, taking into consideration that the Portuguese court has ruled that Mathieu must not return, because there is a grave risk that returning the child would expose him to physical or psychological harm, or would place him in an intolerable situation, while no adequate measures to protect the child have been taken in the State to which the child is to be returned?**

The court that has issued the non-return order informs the court that has jurisdiction or the Central Authority in the State where the child was habitually resident immediately prior to the removal or retention. The first court may send the information directly, or through the Central Authority of its State. The information includes a transcript of the hearings and must be received within one month following the order.

The court in the State where the child was habitually resident immediately before the removal or retention, notifies the parties and invites them to make submissions so that the court can examine the question of the custody of the child. The submissions must be made within three months.

If the court receives no submissions, it closes the case.

If the court receives submission, it deals with the merits of the case.

If the decision of the French court entails that Mathieu must stay in Portugal, Portugal becomes her new habitual residence.

If the decision of the French court entails that Mathieu must return to France, this decision will prevail over the Portuguese non-return order. The French court issues a certificate with the judgment entailing Mathieu's return. With this certificate, the French judgment is directly enforceable in Portugal, and throughout the EU, notwithstanding the prior Portuguese non-return order.