

# **International child abduction: general overview**

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# International child abduction

European Court of Human Rights (ECtHR):

- Case *Ignaccolo-Zenide v. Romania*, App. No. 31679/96.
- Case *Bianchi v. Switzerland*, App. No. 7548/04.
- Case *Susanne Paradis and Others against Germany*, App. No. 4065/04.

# International child abduction

Court of Justice of the European Union (CJEU):

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*

## Relevant legal texts

- **Regulation 2201/2003** concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000 (Brussels IIa Regulation).
- **Hague Convention of 25 October 1980** on the civil aspects of international child abduction (Hague Convention).

# Relevant legal texts

## Article 60 BIIa Reg.

### Relations with certain multilateral conventions

In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

(e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

## Relevant legal texts

- when a child is abducted from one **EU Member State** to another, the Hague Convention applies, but is complemented by the Brussels IIa Regulation;
- when a child is abducted from a Hague Convention Contracting State **3<sup>rd</sup> State** to the EU to an EU Member State, or from an EU Member State to a Hague Convention Contracting State **3<sup>rd</sup> State** to the EU, the Hague Convention applies.

# Objectives of the Hague Convention

## «Article 1

The objects of the present Convention are

- a) to secure the **prompt return** of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that **rights of custody and of access** under the law of one Contracting State are effectively **respected** in the other Contracting States».

# Scope of application of the Hague Convention

## Article 3

The **removal or the retention** of a child is to be considered **wrongful** where

- a) it is in breach of 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 was habitually resident immediately before the removal or retention; **and**

# Scope of application of the Hague Convention

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The **rights of custody** mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

# Scope of application of the Hague Convention

## Article 5

For the purposes of this Convention

- a) "**rights of custody**" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
- b) "**rights of access**" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence

# Scope of application of the Hague Convention

- The Hague Convention applies to **children habitually resident in a Contracting State** before the breach of the right of custody or access and its application ceases when the child reaches the **age of 16 (Article 4)**.
- The Hague Convention has 100 contracting States: all EU Member States, Brazil, Argentina, Australia, Canada, Chile, Japan, Paraguay, Switzerland, United States of America, China, Russia (update Oct. 2019)

# Central Authorities

## Functions of the central authority:

- to locate the child;
- to prevent further damage to the child or to the parties concerned by the promotion of precautionary measures;
- to seek a friendly solution or voluntary return of the child;
- if it is useful, to exchange information on the social situation of the child;
- to exchange information about the law of their State within the scope of the Convention;

# Central Authorities

- if necessary to obtain a return decision, it shall initiate or facilitate the opening of judicial or administrative proceedings for that purpose;
- to facilitate or advise legal aid;
- to guarantee the safe return of the child, taking all necessary administrative measures;
- to exchange information with the other central authorities to remove obstacles to the implementation of the Convention.

# Central Authorities

## Article 55 Brussels IIa

### **Cooperation on cases specific to parental responsibility**

The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to:

- (a) collect and exchange information:
  - (i) on the situation of the child;
  - (ii) on any procedures under way; or
  - (iii) on decisions taken concerning the child;

# Central Authorities

## Article 55 Brussels IIa

- (b) provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child;
- (c) facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15;
- (d) provide such information and assistance as is needed by courts to apply Article 56; and
- (e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end

# Central Authorities

- [https://e-justice.europa.eu/content\\_matrimonial\\_matters\\_and\\_matters\\_of\\_parental\\_responsibility-377-pt-en.do?member=1](https://e-justice.europa.eu/content_matrimonial_matters_and_matters_of_parental_responsibility-377-pt-en.do?member=1)
- <https://www.hcch.net/en/instruments/conventions/authorities1/?cid=24>

# Hague Convention System

## Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the **return of the child**.

The **application** shall contain -

- a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b) where available, the date of birth of the child;
- c) the grounds on which the applicant's claim for return of the child is based;
- d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

# Hague Convention System

- The application may be accompanied or supplemented by -
- e) an authenticated copy of any relevant decision or agreement;
  - f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
  - g) any other relevant document.

# Hague Convention System

## Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the **child is in another Contracting State**, it shall directly and without delay **transmit the application** to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

# Hague Convention System

## Article 10

The Central Authority of the State where the child is shall take or cause to be taken all **appropriate measures** in order to obtain the voluntary return of the child.

# Hague Convention System

## Article 11

The judicial or administrative authorities of Contracting States shall **act expeditiously in proceedings** for the return of children.

If the judicial or administrative authority concerned has not reached a decision **within six weeks** from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

# Hague Convention System

## Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may **take notice directly of the law** of, and of judicial or administrative **decisions**, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

# Hague Convention System

## Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a **period of less than one year has elapsed from the date of the wrongful removal or retention**, the authority concerned shall order the **return** of the child forthwith.

# Hague Convention System

## (Article 12)

The judicial or administrative authority, even where the **proceedings** have been **commenced after the expiration of the period of one year** referred to in the preceding paragraph, shall also order the **return** of the child, **unless it is demonstrated that the child is now settled in its new environment.**

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

# Hague Convention System

## Grounds for the decision of retention:

1. The child has been abducted more than a year earlier and has become settled in his or her new environment (Article 12, Section 2).
2. The person requesting the return has not actually exercised his or her rights of custody at the time of the removal or retention or had subsequently acquiesced in the removal or retention [Article 13, Section 1 (a)].

# Hague Convention System

3. There is a grave risk that returning the child would expose him or her to psychological harm or otherwise place him or her in an intolerable situation retention [Article 13, Section 1 (b)].
4. The child objects to the return while it is appropriate to take account of his or her views, given his or her age and degree of maturity (Article 13, Section 2).
5. Returning the child is not permitted under the law of the requested State as it would be contrary to the fundamental principles (Article 20).

# Hague Convention System

## Two options:

- After considering the grounds of retention, the court of the abducted State orders the return of the child.
- Using one of the grounds of refusal listed in the Hague Convention, the court of the abducted State rules that the child must not return.

# Summarising conclusions

- Rapid procedure for the return of the child
- Cooperation among Central Authorities

HCCH official publications at

[https://www.hcch.net/en/instruments/conventions/publications1/?dtid=3  
&cid=24](https://www.hcch.net/en/instruments/conventions/publications1/?dtid=3&cid=24)

## **International child abduction: general overview**

### **Case study**

#### **FACTS**

António and Beatriz, a Brazilian couple, who live in Portugal. They have been married for 10 years and decided to move to Portugal 8 years ago.

They have a 4 years old child, Tomás, born in Portugal, that has Brazilian and Portuguese nationality.

António and Beatriz decided to get a divorce and the divorce proceedings are still pending.

Beatriz takes Tomás to visit their relatives in Brazil. António has agreed with the visit to Brazil during the summer vacation for two weeks.

Beatriz and Tomás did not return as planned. António tried to phone to Beatriz, unsuccessfully, until he gets an e-mail, on 15 September 2018, from Beatriz, where she states that she does not like Portugal, and she will stay with Tomás in Rio de Janeiro. She also states that she already rent an apartment and she is looking for a school for Tomás.

#### **Related questions**

- 1) What is the legal instrument applicable?
- 2) What can António do?

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

Consider that no amicable solution was found.

#### **Related questions**

- 3) What should be done?

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

Regulation No 2201/2003

1980 Hague Convention

## Questions with guidelines

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

The 1980 Hague Convention applies. The Hague Convention applies when a child is abducted from a Hague Convention Contracting Third State to an EU Member State, or from an EU Member State to a Hague Convention Contracting Third State.

#### Possible issues to be discussed:

- Spatial scope of the Hague Convention: Article 4: Applies to children habitually resident in a Contracting State before the breach of the right of custody or access and its application ceases when the child reaches the age of 16. Portugal and Brazil (Third State) are Contracting States of the 1980 Hague Convention.
- Scope of application of the Hague Convention: Definition of removal, retention, wrongful, custody rights. Art. 2(11) Brussels IIa Regulation and Art. 3 Hague Child Abduction Convention.

### 2) What can António do?

António should start proceedings in Brazil because the 1980 Hague Convention adopts the principle that the child return procedure should be started in the State where the child currently is (article 12).

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 can contact the Central Authority in Portugal.

#### Possible issues to be discussed:

- Art. 8 Hague Child Abduction Convention: the documents the applicant (António) must submit to the Central Authority and the documents the applicant (António) may submit to the Central Authority.
- 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 IIa Regulation.

### 3) What should be done?

If no amicable solution can be found The Brazilian Central Authority will assist in instituting legal proceedings for the return of the child. The Brazilian court considers the application for the return of the child. In doing so, it respects certain procedural requirements and it considers the limited number of grounds for refusal.

#### Possible issues to be discussed:

- Procedural possibilities: Arts. 14 and 15 Hague Child Abduction Convention.
- Grounds for refusal: Arts. 12 and 13 HC