The Hague Convention 1980

History

- as for April 2016: 94 Contracting States
  
- all EU Member States are Contracting States

- Problem:
  
  Acceptance of Accession of new Contracting States by EU MS
The Hague Convention 1980
Aim and basic Principles

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

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The Hague Convention 1980
Helpful Tools

- specialized child abduction section of the HCCH website
- explanatory documents, good practice guides
- case law databases (INCADAT)
- statistics (INCASTAT)
- European Hotline Number: 116000 reserved by the European Commission for missing children
- Model-Application Form
  
  http://www.hcch.net/upload/recomm28e.pdf

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The Hague Convention 1980
Application, Art. 4 and Art. 3

- child under the age of 16 at the time of the breach of custody
- wrongful removal or retention according, Art. 3 lit. a)
- breach of rights of custody, Art. 3, Art. 3 lit. a)
- habitual residence, Art. 3 lit. a)
- exercise of rights of custody, Art. 3 lit. b)
autonomous meaning of Rights of Custody according to the law of the state of habitual residence of the child, but in accordance with Art. 5 > right to determine residence under the law of the state of habitual residence or granted by a court of the state of habitual residence or granted by agreement having legal binding effect.

To find out which is the applicable law on custody in the country of habitual residence of the child:

- Art. 15 Declaration and communication with Hague Network Judges
The Hague Convention on 1980 Exercise of Custody, Art. 3 lit. b)

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

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The Hague Convention 1980
‘Habitual Residence’

- no definition in the Hague Convention 1980, definition has been avoided
- **factual concept**: individual’s actual connection to a place
- not only a question of time to become habitual resident in a Contracting State
- **time, housing, schooling, health care, social and cultural activities, language skills**

**center of gravity**
- intention of parent/s to move? vs. intention of child to move?
- more than one center of gravity?

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The Hague Convention 1980
Return of the Child, Art. 12

- if there is an unlawful removal or retention of the child the child is going to be returned to the State of Habitual Residence, Art. 12 lit. a)
- if there is no agreement on return the court MUST order the return
- unless an exception applies
The Hague Convention 1980
Exceptions, Art. 13

- no actual exercise of the custody rights at the time of removal or retention, Art. 13 (1) lit a)
- consent to or subsequently acquisition in the removal or retention, Art. 13 (1) lit a)
- grave risk that would expose the child to physical or psychological harm, Art. 13 (1) lit b)
- grave risk that would otherwise place the child in an intolerable situation, Art. 13 (1) lit b)
- child’s objection to being returned, if it has attained an age and degree of maturity at which it is appropriate to take account of its views, Art. 13 (2)
The Hague Convention 1980
Exceptions, Art. 12 and 20

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

- burden of proving all facts concerning the exceptions of Articles 12, 13 and 20 is imposed on the person who opposes the return of the child
The Modifications within the Brussels II a Regulation
Aims and basic Principles

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

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The Modifications within the Brussels II a Regulation
Aims and basic Principles (2)

- the judge must order the child’s return if it is established that adequate arrangements have been made to ensure the protection of the child after his or her return.

- If a court rules that a child is not to be returned, it must transfer the case file to the competent court of the EU country in which the child was habitually resident prior to removal. This court takes the final decision as to whether or not the child is to be returned.
The Modifications within the Brussels II a Regulation
Aims and basic Principles (3)

- Regulation as international agreement on jurisdiction
- **National law applying for procedures** and to identify courts
  (procedural implementation law by some MS)
- Concentration of courts in some Member States

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The Modifications within the Brussels II a Regulation
Definitions, Art. 2

- definitions of custody and access rights, Art 2 (9) and (10)

- wrongful removal or retention, Art. 2 (11) – according Art. 3 and 5 of the Hague Convention 1980

- concept of the child’s ‘habitual residence’ does not and cannot differ from the ECJ judgments to Art. 8 and 10 Brussels II a

  (C.v.M, C-376/14 of 9 October 2014, § 54)
The Modifications within the Brussels II a Regulation
Art. 9 and Art. 10

- Concept of Art. 9 and 10 of the Regulation: to avoid “forum shopping” and to secure that only under strict conditions of Art. 10 the requested MS has jurisdiction after an unlawful removal or retention of the child.

- Art. 9 applies, if a child is lawfully removed from a Member State: MS of the child’s former residence retains jurisdiction for a period of three months referring to access rights of the left behind parent.
The Modification within the Brussels II a Regulation
Art. 10

- Art. 10 applies, if a child is *unlawfully* removed from a Member State: despite the abduction the Member State of origin retains jurisdiction to decide on the question of custody.

- Jurisdiction only changes, if
  - acquiescing in the removal or retention
  - child is residing in the new MS for more than one year, is settled and the whereabouts of the child are known
  - no request for return is lodged
The Modifications within the Brussels II a Regulation

Art. 11

- Interrelation of Art. 11 of the Regulation and Art. 12 with Art. 13 of the Hague Convention 1980:
  - Judgment of return will be based on the rules of Art. 12 and Art. 3 Hague Convention 1980 complemented by Art. 11 Regulation Brussels II a
  - concept of the child’s ‘habitual residence’ does not and cannot differ from the ECJ judgments to Art. 8 and 10 Brussels II a (see C.v.M, C-376/14 of 9 October 2014)
The Modifications within the Brussels II a Regulation

Art. 11 (3)

- courts must use **most expeditious procedures** under national law, Art. 11 (3), the judgment has to be issued not later than six weeks after the application is lodged

  - to guarantee this is a question of national procedural law
  - does this timeframe include appeal proceedings according to national law? How to make sure that national procedural laws do not undermine the aim of Art. 11 (3)?

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The Modifications within the Brussels II a Regulation
Art. 11 (2) and (5)

- child has to be heard unless this appears inappropriate in regard to his age or degree of maturity, Art. 11 (2)
  - the way how the child is heard is a question of national procedural law

- a court can not refuse a return unless the requesting party did not have the opportunity to be heard, Art. 11 (5)
The Modifications within the Brussels II a Regulation
Art. 11 (4)

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

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The Modifications within the Brussels II a Regulation
Art. 11 (6) and (7)

- new procedure foreseen in the exceptional case that the court of the requested Member States decides that the child is not returned
- procedure allows the court of the MS of the habitual residence of the child prior to the abduction to have the final say
- procedure regulates in detail what has to happen when a court decides that a child is not returned

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The Modifications within the Brussels II a Regulation
Art. 11 (6)

- court must transmit a copy of the order, all documents, esp. the protocol of the hearing to the Central Authority (CA) or the court of the MS where the child was habitually resident before the abduction (“state of origin”)
- the court of the state of origin shall receive all documents within one month of the date the non-return order was entered
  - European Judicial Atlas in Civil Matters
  - Central Authorities in every MS

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The Modifications within the Brussels II a Regulation
Art. 11 (7)

- unless there are not already custody proceedings pending in the “state of origin” the court of the “state of origin” must invite the parties to make submissions to the court according to national law within three months of notification so that question of custody of the child can be examined before the court of the “state of origin”

- if this timeframe elapses and no submission is lodged the court can close the file
The Modifications within the Brussels II a Regulation
Art. 11 (8)

- even if there is a judgment of non-return issued by the court of the “requested MS” pursuant to Art. 13 Hague Convention 1980 any subsequent judgment which requires the return of the child issued by a court of the “MS state of origin” is enforceable;

- Section 4 of Chapter III (Art. 21ff. – recognition and enforcement) Brussels II a applies to secure the safe return of the child

- underlines the “last say” of the courts of the state of habitual residence of the child

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The ECtHR and Child Abduction

- ECtHR is competent to review the procedure followed by the domestic authorities, and to ascertain whether the authorities, in applying and interpreting the provisions of the Hague Convention, have secured the guaranties of the ECHR, especially those of Art. 8 ECHR.

- Art 8 ECHR must be interpreted in harmony with the general principles of international law. In the context of child abduction this implies that particular account must be given to the provisions of the Hague Convention.

  Blaga v Romania, 54443/10, 1 July 2014 § 68, 72
  Golder v the United Kingdom, no 4451/70, 21 February 1975 § 29;
  Iosub Caras v Romania, no 7198/04, 27 July 2006 § 38,
  Shaw v Hungary, no 6457/09, 26 July 2011, § 72.
  Adžić v Croatia, no 22643/14, 12 March 2015 § 94
  Ignaccolo-Zenide v Romania, no 31679/96, 25 January 2015 § 95
  Karadžić v Croatia, no 35030/04, 15 December 2005 § 54

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presumed, the best interests of the child are better served by the restoration of the status quo ante by means the child’s immediate return to his or her country of habitual residence

(Hromadka and Hromadkova v Russia, no 22909/10, 11 December 2014, § 102, referring to X. v Latvia, X. v Latvia, no 27853/09, 26 November 2013, §§ 96-97 and 106-107)

the country where the child is to be returned to provides adequate safeguards and, if needed, that “tangible protection measures are put in place”

(Bлага v Romania, no 54443/10, 1 July 2014, § 71)

duty to act expeditiously to ensure the return of the child

(Adžić v Croatia, no 22643/14, 12 March 2015, § 95 and referring to e.g. Shaw v Hungary, no 6457/09, 26 July 2011 § 66)
wishes of the child even with a sufficient degree of maturity should not automatically be acceded to.

This means: the children’s wishes are noted but cannot amount to a veto right when deciding whether or not they should be returned.

Further circumstances might be taken into consideration before the courts exercise their discretion to refuse a return order. Among them the spirit of the Hague Convention according to which it is, by principle, in the best interest of the child to be returned.

If the courts have doubts regarding the well-being of the child, it should first determine whether and how sufficient safeguards are put into place for the return of the child to the country of his habitual residence.

(Blaga v Romaniano 54443/10, 1 July 3014, § 80-81)
The ECtHR and Child Abduction (4)

- *exceptions to the immediate return* of the child (Art. 12, 13, 20 Hague Convention) have to be *effectively examined*
  
  and

- *factors of evaluation* must be *evaluated in the light of Art 8 ECHR*.
  
  *(Blaga v. Romaniano 54443/10, 1 July 2014, § 69, referring to Neulinger and Shuruk v. Switzerland, no 41615/07, 6 July 2010, § 133)*

- *Art. 8 ECHR* imposes on the domestic authorities a particular *procedural obligation* in this respect. The domestic authorities (court) must
  
  a) *consider arguable allegations of a “grave risk”* for the child in the event of return
  
  and

  b) *make a ruling giving specific reasons in the light of the circumstances of the case.*

Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted, is necessary.

*(G.S. v Georgia, no 2361/13, 21 July 2015 §§ 45-48)*

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INTERRELATION BETWEEN THE BRUSSELS II A REGULATION AND THE 1980 CONVENTION

RULES AND PROCEDURE APPLICABLE IN A (NON) RETURN PROCEEDING

THANK YOU – let’s discuss!