



voorts
juridische diensten

Brussels IIa, child abduction and Brussels IIb

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Structure of presentation

Section 1: Jurisdiction

1. Difference between main proceedings and return order
2. Scope of instrument
3. Article 11 Brussels IIa
4. Proposals for amendment in Brussels IIb

Section 2: Recognition and enforcement

1. Which instrument? Brussels IIa, HCPC 1996, national rules?
2. Scope of Brussels IIa
3. Content of recognition rules
4. Proposals for amendment in Brussels IIb



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Section 1

International Jurisdiction



Poll Question 1

If a child is abducted from an EU country to another EU country, which instrument provides the ground to commence return proceedings?

- (a) Brussels IIa Regulation
- (b) Hague Child Abduction Convention 1980
- (c) ECHR
- (d) National law

II. Jurisdiction (1)

Concept of Habitual Residence

✓ Origin from Hague Conventions

- ✓ ECJ, 2 April 2009, C-523/07 (*A (Finnish case)*)
- ✓ CJEU, 22 December 2010, C-497/10 (*Mercredi*)
- ✓ CJEU 5 October 2010, C-400/10, (*J.McB v. LE*)

the **duration**, **regularity**, conditions and **reasons** for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration

II. Jurisdiction (3)

✓ Return order

✓ Where?

- ✓ In the State where the child **presently is**

✓ On what grounds?

- ✓ Hague Child Abduction Convention 1980
- ✓ Clear from concurrence provisions in Art. 60(e)/62(2) B IIa
- ✓ Brussels II-bis provides *additional rules* (art. 11 para. 1)
 - Hearing of the child and parent (para. 2 and para. 5)
 - Procedural terms (para. 3)
 - Restriction of exceptions art. 13(1)(b) (para. 4)
 - Transmission of case (para. 6)
 - Submissions (para. 7)
 - No declaration of enforceability (para. 8)

II. Jurisdiction (4)

- ✓ Ground for return order
 - ✓ **Child abducted from another EU State:**
 - ✓ HCAbC 1980, with additions of Brussels IIa
 - ✓ **Child abducted from HCAbC, but outside EU:**
 - ✓ HCAbC 1980
 - ✓ **Child abducted from non-HCAbC and outside EU**
 - ✓ Depends on legislation in each State
 - e.g. in NL/UK – analogous application

Poll Question 2

When is it possible to commence return proceedings in the state of the child's habitual residence?

- (a) Never
- (b) When the child has been removed within the EU
- (c) When the child has been removed to a state not party to the Hague Child Abduction Convention 1980
- (d) Always

II. Jurisdiction (5)

✓ Main proceedings

✓ Where?

- ✓ In the State where the child has his/her habitual residence

✓ On what grounds?

- ✓ Art. 16 HCAbC 1980: **not** in the State where the child is
- ✓ Art. 10 Brussels IIa: If abducted within EU
- ✓ Art. 7 HCPC 1996: If child taken to **another** state
 - Art. 60 sub e jo. 61 jo. 62 lid 2, Brussels II-bis

✓ Territorial jurisdiction? Adjournalment?

Poll Question 3

Does your jurisdiction suspend main proceedings awaiting the final result in the abduction case?

- (a) Yes, always
- (b) Under certain circumstances
- (c) No
- (d) Don't know

II. Jurisdiction (6)

- ✓ Article 10 Brussels IIa
 - ✓ Child abducted from MS A to MS B.
 - ✓ If situation satisfied, then MS B jurisdiction
 - ✓ If not satisfied, then MS A has jurisdiction

SITUATION 1

- ✓ The child has acquired habitual residence in Member State B and all those with rights of custody acquiesce in the abduction.

II. Jurisdiction (7)

✓ Article 10 Brussels II-bis

- ✓ Child abducted from MS A to MS B.

SITUATION 2

- ✓ The child has acquired HR in MS B AND
- ✓ Resided in MS B for more than 1 year since those with rights of custody learned or should have learned of the whereabouts of the child AND
- ✓ one of the following four criteria

II. Jurisdiction (8)

- 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;
- 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.

I. Jurisdiction (8)



- ✓ **Germany:** Main proceedings
 - ✓ On the basis of art. 10 Brussels IIa
- ✓ **Lithuania:** Request for return order
 - ✓ On the grounds art. 12 HCAbC & art. 11 Brussels IIa

II. Jurisdiction – Article 11(1)

Article 11(1) Brussels IIa

- ✓ Role of Brussel IIa
 - ✓ Ancillary to, and not replacement of
 - ✓ Role of art. 60(e) and 62 Brussels IIa?



II. Jurisdiction – Article 11(2)

Article 11(2) Brussels Ia: Hearing of the child

- ✓ Child **must** be given opportunity to be heard.
- ✓ Unless given age and maturity inappropriate
 - ✓ CoA The Hague 03.03.2010, *NIPR* 2010/286 (5.5 yr old not)
 - ✓ CoA England, *Re F (A child)* [2007] EWCA 468 (7 yr old yes)
- ✓ Questions: See also Practical Guide (p. 41)
 - ✓ At what age should the child be heard?
 - ✓ How should the child be heard?
 - ✓ By whom should the child be heard?
 - ✓ What weight should be given the opinion of the child?

II. Jurisdiction – Article 11(3)

Article 11(3) Brussels IIa: Speed of procedure

- ✓ “expeditiously”, but at any rate within 6 weeks
- ✓ Research from other jurisdictions

	Both B II-bis	One non B-II bis
Average (mean)	165	169
Minimum	2	2
Maximum	705	880

II. Jurisdiction – Article 11(3)

Time taken	Both States B II-bis	One state B-IIbis
Up to 6 weeks	15%	16%
6-12 weeks	24%	25%
12-18 weeks	13%	18%
18-24 weeks	10%	10%
24-30 weeks	8%	4%
30-36 weeks	6%	7%
36-42 weeks	6%	3%
42-48 weeks	4%	3%
48-54 weeks	3%	2%
More than 54 weeks	10%	12%

II. Jurisdiction – Article 11(4)

Article 11(4): Application of Article 13(1)(b)

- ✓ Return if adequate provisions after return
- ✓ Should be more than that a procedure, but that measures must have been taken
- ✓ If Art. 13(1)(b) is not successful, then do not need to go to Art. 11!

II. Jurisdiction – Article 11(5)/(6)

Article 11(5): Hearing of left-behind parent

- ✓ Cannot refuse to return child if the left-behind parent has not been provided an opportunity to be heard

Article 11(6): Transmission of decision

- ✓ Transmission of case to judge of HR of child
- ✓ Unclarity?

II. Jurisdiction – Article 11(7)/(8)

Article 11(7): Hearing of left-behind parent

- ✓ After transmission, parents given opportunity to present conclusions

Article 11(8): Overrule procedure

- ✓ If the subsequent judgment results in the result of the child, then this decision prevails over the non-return
 - ✓ See ECJ 11.07.2008, C-195/08 (*Rinau*)
 - ✓ See ECJ 01.07.2010, C-211/10 (*Povse*)

II. Jurisdiction – Article 11(8)

Article 11(8): Overrule procedure

- ✓ CJEU 01.07.2010, C-211/10 (*Povse*)
- ✓ Independent procedure, not dependent on custody case
- ✓ Has been said HCAbC case is now a “preliminary” hearing
- ✓ Link to 11(6) and 11(7) not stressed

- ✓ ECJ 11.07.2008, C-195/08 (*Rinau*)
- ✓ Article 11(8) contingent refusal on basis of HCAbC 1980
- ✓ Sufficient that *initially* refused
- ✓ Link to 11(6) and 11(7) stressed

II. Jurisdiction - overview



Decision: child does not need to be returned
Art. 13 HCAbC 1980, & 11(4) B IIa



Lithuanian judge transmits decision to
Art. 11(6) B IIa



German judge invites parents for conclusions
Art. 11(7) B IIa



If German judge determines that child does not have to return, then this **must** be respected by Lithuania
Art. 11(8) B IIa and art. 40/42 B-IIa

Poll Question 4

The overrule procedure currently contained in Brussels Ia should be maintained in the revised version of Brussels IIa?

- (a) Yes, and unchanged
- (b) Yes, but with amendments
- (c) No
- (d) No opinion

II. Jurisdiction – Revision

Changes suggested by Commission

- ✓ Divorce
- ✓ Parental Responsibility
- ✓ Child Abduction



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Section 2

Recognition and enforcement

IV. Recognition and enforcement (1)

I. Applicable regime

II. Three phases – Chapter III Brussels Ia

1. Recognition: Section 1 and 3
2. Enforceability
 - a. With declaration: Section 2 and 3
 - b. Without declaration: Section 4
3. Enforcement: Section 6

IV. Recognition and enforcement (2)

- ✓ Different applicable regimes
 - ✓ Brussels IIa
 - ✓ HCPC 1996
 - ✓ National rules
- ✓ Primarily dependent upon the jurisdiction of the decision

IV. Recognition and enforcement (3)

✓ Brussels II-bis

✓ *Geographical scope* (art. 21)

✓ Decisions from Member States (Croatia: 1 July '14)

✓ *Temporal scope* (art. 64 and 72)

✓ Decisions given after 1 March 2005

✓ *Substantive scope* (art. 1)

✓ Decisions within the substantive scope of regulation

– Definition of parental responsibility

– See art. 1(1)(b), 1(2) and 2 Brussels II-bis

IV. Recognition and enforcement (4)

✓ Substantive scope

✓ Decision – art. 21 and art. 2(4)

- ✓ A decision issued by a ‘court’
- ✓ ‘court’ may also be an administrative authority

✓ Parental responsibility – art. 2(7)

- ✓ By operation of law
- ✓ As the result of a decision
- ✓ By virtue of a valid agreement
- ✓ See also:
 - art. 2(9) [definition custody], art. 2(10)[definition contact]
 - art. 1(1)(b) [scope PR], art. 1(2) [examples of PR]

IV. Recognition and enforcement (5)

✓ Problems – Article 46:

- ✓ Signed contracts
- ✓ Authentic/notarial deeds



Only possible if enforceable in state where executed

✓ Problems – Article 20:

- ✓ Emergency provisions



See following sheet

✓ Special cases – Article 40

- ✓ Contact cases
- ✓ Return orders

Poll Question 5

If a court issues a judgment using Article 20, Brussels IIa as the ground for jurisdiction, can this decision be recognised in another EU Member State?

- (a) No, not all all
- (b) It depends on national law
- (c) Yes, but it must satisfy the rules of recognition in BIIa
- (d) Yes, always

IV. Recognition and enforcement (6)

✓ *Step 1: Automatic recognition*

✓ Both as main issues and incidental question

✓ Emergency provisions

✓ If competent on art. 20 Brussels Ia

– No recognition on grounds of Brussels Ia

– See CJEU 15.07.2010, C-256/09 (*Purrucker*)

✓ If competent on grounds of art. 8-15 Brussels Ia

– Recognition on grounds of Brussels Ia

✓ If competent on grounds of art. 11 HCPC 1996

– Recognition on grounds of HCPC 1996

IV. Recognition and enforcement (7)

✓ *Step 2: Enforceability*

✓ Two regimes

✓ With declaration – Section 2 and 3

✓ Without declaration – Section 4

– Contact (art. 40(1)(a) and 41)

– Return order on grounds of 11(8) (art. 40(1)(b) and 42)

✓ Petitioner has the choice (art. 40(2))

IV. Recognition and enforcement (8)

✓ *Step 2a: General procedure*

✓ Must obtain declaration of enforceability

- ✓ Very similar procedure to current Brussels I Regulation
 - *Jurisdiction?* art. 29(1) BIIbis
 - *Territorial?* HR child/person against whom (art. 29(2) BIIbis)
 - *Procedure?* art. 30(1) BIIbis
 - *Documentation?* See art. 37 en 39, Bijlage II (art. 30(3) BIIbis)
 - *Hearing?* *Ex parte* procedure (art. 31(1) BIIbis)

IV. Recognition and enforcement (9)

✓ *Step 2b: Contact orders*

✓ If default order, then must be served

✓ Certificate provided (art. 41(2)) – Annex III

- If cross-border – operation of law
- If not cross-border – upon request

✓ Consequences:

- Procedure for non-recognition not possible
- Suspension of enforceability not possible
- Testing on grounds of non-recognition not possible

IV. Recognition and enforcement (10)

✓ *Step 2c: Return order*

- ✓ Decision must be enforceable in state of origin
- ✓ Decision o.b.o. art. 11(8), Certificate Annex IV

✓ Only if:

- Child does not need to be returned
- On the ground of art. 13 HCAbC 1980
- Case has been transmitted on basis of art. 11(6)
- Conclusions requested on basis of art. 11(7)
- PR decision given on grounds of art. 11(8)

Poll Question 6

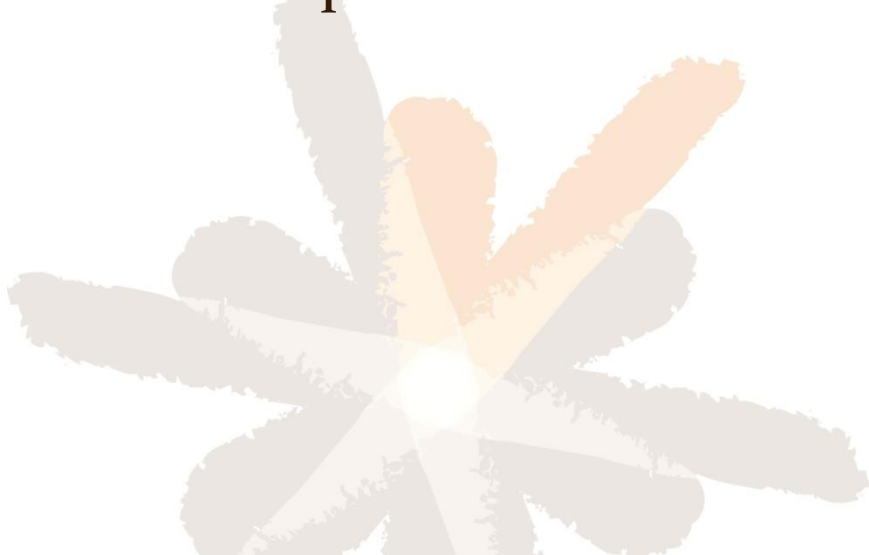
Alan (6 years old) has been abducted to Spain from the Netherlands. His father has legal parentage, but not parental responsibility. He has now lived for two weeks in Spain with his legal mother who has sole parental responsibility, without his father's consent. What would you advise?

- (a) Start return proceedings in Spain
- (b) Start return proceedings in the Netherlands
- (c) Start contact proceedings in the Netherlands
- (d) Start change of PR proceedings in the Netherlands
- (e) Start change of PR proceedings in Spain

IV. Recognition and enforcement (11)

✓ *Step 3: Enforcement*

- ✓ After declaration or certificate
- ✓ Equivalent to national decision



II. Recognition – Revision

Changes suggested by Commission

✓ Divorce

✓ Parental Responsibility

✓ Child Abduction

Contact details

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