

European Family Law webinar  
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# CHILD ABDUCTION, including COOPERATION BETWEEN COURTS AND CENTRAL AUTHORITIES

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# CHRONOLOGY OF THE INSTRUMENTS CONCERNING PARENTAL RESPONSIBILITY

## Hague Convention 1980

*(came into force, depending on the ratification, starting from 1st December 1983)*

Abduction and rights of access



## Hague Convention 1996

*(came into force, depending on the ratification, starting from 1st January 2002)*

jurisdiction rules, applicable law, recognition and enforcement, cooperation



## Regulation Brussels II *bis* 2003 (2201/2003)

*(came into force March 1st 2005)*

jurisdiction rules, recognition and enforcement, cooperation

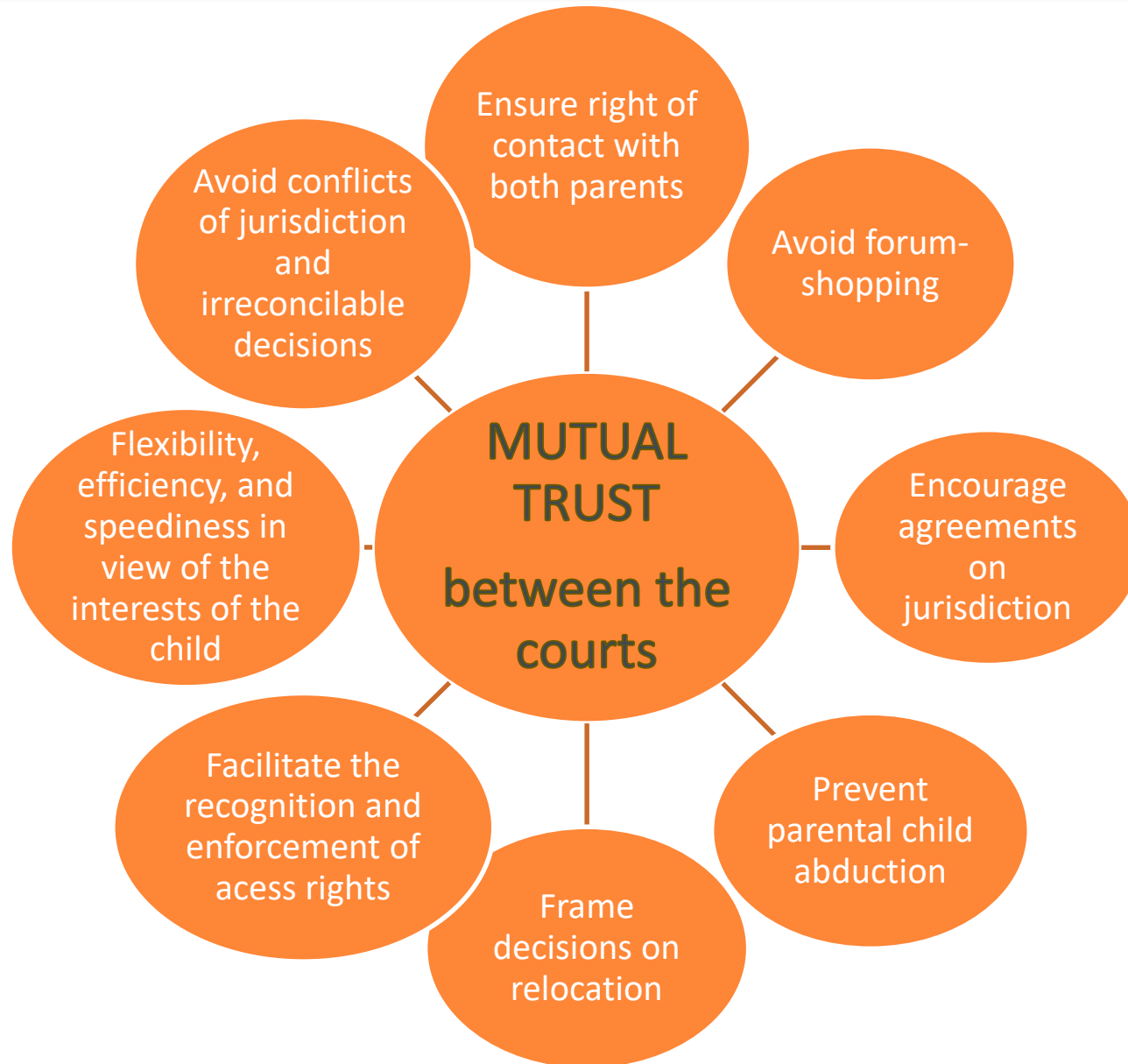


## Regulation Brussels II *ter* 2019 (nr. 2019/1111)

*(will become applicable on 1st August 2021)*

***Each instrument is inspired on the previous one:***  
**COMMON OBJECTIVES**

# Basic OBJECTIVES



# WHEN MORE JUDGES ARE CONCERNED

- I. LIS PENDENS AND DEPENDANT ACTIONS
- II. PROVISIONAL MEASURES
- III. TRANSFER OF THE CASE TO A COURT BETTER PLACED
- IV. WRONGFUL REMOVAL OR RETENTION (ABDUCTION)
- V. RECOGNITION AND ENFORCEMENT (DECLARATION OF EXEQUATUR)
- VI. PLACEMENT OF THE CHILD IN OTHER MS
- VII. TAKING EVIDENCE ABROAD



Co-operating judges

# FOCUS ON RULES IN CASE OF ABDUCTION



## Definition of the wrongful removal or retention

Art.3 HC 1980 // Art. 7,2 HC 1996 // Art. 2,11 Brussels IIbis

*Violation of « actually exercised » « rights of custody »*

### *« rights of custody »*

Definition: Art.5 HC 1980 // Art. 3b HC 1996 // Art. 2,9 Brussels IIbis

*The care and the determination of the place of residence*

To be examined in accordance with the law of the habitual residence of the child at the time of the removal or retention

= Rule on applicable law: art. 16 and 17 Convention of 1996

# FOCUS ON RULES IN CASE OF ABDUCTION

## BASIC RULE OF JURISDICTION:

Article 10 Brussels II bis// Article 7 Hague Convention 1996  
*combined with*  
Article 16 Hague Convention 1980

The acquisition of a new habitual residence **DOES NOT** operate the transfer of  
the jurisdiction

The courts of the  
previous habitual  
residence  
RETAIN THEIR  
JURISDICTION

The courts of the  
State where the  
child is present  
SHALL NOT DECIDE  
ON THE MERITS

# FOCUS ON RULES IN CASE OF ABDUCTION

RETURN PROCEEDING  
Hague Convention 25 october 1980

Left behind  
parent

Central  
authority  
of the State  
of habitual  
residence

Central  
Authority  
of the State  
where child  
is abducted

Seizure of a  
court  
« Hague  
Judge »

Decision on  
the return  
of the child

# FOCUS ON RULES IN CASE OF ABDUCTION

## RETURN PROCEEDING Hague Convention 25 october 1980

if proceedings are started **within** one year

### IN PRINCIPLE: RETURN ORDER (art. 12)

#### Exceptions (restrictive interpretation):

#### **Article 13, 1, a :**

No actual exercise of the custody rights at the time of the removal - consentment - subsequent acquiescement (// definition of abduction)

#### **Article 13, 1, b:**

Grave risk of exposure to a physical or psychological harm or intolerable situation

#### **Article 13,2 :** objection of the child (age and maturity)

#### **Article 20:** fundamental principles of the requested State (human rights)



# FOCUS ON RULES IN CASE OF ABDUCTION

RETURN PROCEEDING  
Hague Convention 25 october 1980

if proceedings are started **after** one year

**IN PRINCIPLE: RETURN ORDER**

**Exception:**  
**If child is settled (art. 12,2)**

# FOCUS ON RULES IN CASE OF ABDUCTION RETURN PROCEEDING

Hague Convention 1980  
*juncto* Brussel II *bis*

## Article 11 Brussel II *bis*

§2 child must be given the opportunity to be heard, unless age/maturity...

§3 act expeditiously, 6 weeks maximum

§4 refusal on the basis of art. 13, b): previously ask for adequate arrangements to secure the protection of the child

§5 no refusal without hearing the parent requesting the return

§ 6-8 « *second chance or overriding proceedings* » in State of origin  
certified decision art. 42: directly enforceable

# FOCUS ON RULES IN CASE OF ABDUCTION

## A. The courts of the previous habitual residence **RETAIN THEIR JURISDICTION**

### **A decision on the substance of the custody case:**

- Is automatically recognized in the State where the child is abducted
- If certified under Brussels II bis: is enforceable in the Member State where the child is abducted with a light *exequatur* proceeding (declaration of enforceability) (art. 39) or directly (art. 41: access rights)
- If the decision requires the return of the child and is certified under Brussels II bis (art. 42): is directly enforceable in the Member State where the child is abducted notwithstanding a non-return decision in that State
- Is enforceable in a third State under HC 1996 (art.26)

# FOCUS ON RULES IN CASE OF ABDUCTION

B. The courts of the State where the child is present SHALL NOT  
DECIDE ON THE MERITS

BUT

In urgent cases, provisional, including protective measures  
Art. 20 Brussels II *bis* // Art. 11 HC 1996



- Measures concerning persons or assets present in that state
- When the abducted child needs to be protected pending the proceedings or mediation
- Cease to apply when competent court has taken measures

This is not a ground for jurisdiction on the substance of the custody case

- Under Brussels II *bis*: measures **WITHOUT** extra-territorial effect
- Under art. 11 HC 1996: measures **WITH** extra-territorial effect
- Under Brussels II *ter*: measures **WITH** extra-territorial effect (*art. 35,2 juncto 2,1*)

# FOCUS ON RULES IN CASE OF ABDUCTION

*Abundant caselaw of the European Court of Human Rights :*

About Art. 8 ECHR

- Positive obligations of the States
- Co-operation, diligence for the enforcement
- speediness (6 weeks)
- Obligation for the courts to analyse carefully to encounter the serious allegations that could justify a non-return decision,
- Motivation and process of decision-making

Clarifications  
of decisions to  
be recognized  
or enforced

Procedural  
informations in  
case of LIS  
PENDENS

Transfer of  
Jurisdiction to  
court better  
placed

**DIRECT JUDICIAL  
COMMUNICATIONS OR  
THROUGH CENTRAL  
AUTHORITIES**

Child abduction:  
interweaving of  
return proceedings  
and proceedings on  
substance

Informations  
in case of  
provisional  
measures

Placement in  
another  
State

Taking of  
evidence





# Cooperation?

CENTRAL AUTHORITY

CA

CONTACTPOINT

NETWORKJUDGE

LIAISON

JUDICIAL COMMUNICATIONS

# THE TOOLS AND STRUCTURES OF COOPERATION AND SUPPORT TO JUDGES AND NATIONAL AUTHORITIES

HUMAN AND TECHNOLOGICAL

CENTRAL AUTHORITIES

JUDICIAL NETWORKS

WEB-BASED TOOLS





# THE CENTRAL AUTHORITIES

## Motor of the crossborder cooperation in child protection matters

Chapter II Hague Convention 1980  
Chapter V Hague Convention 1996  
Chapter IV Regulation Brussels *IIbis*

### 1. General functions

art. 54 Brussels *IIbis*  
art.30 Hague1996

Information about legislation, procedures, available services

# THE CENTRAL AUTHORITIES

## Motor of the crossborder cooperation

### 2. In specific matters

art.55-56 Brussels *IIbis*

art.31-36 Hague1996

Art. 7 Hague 1980

includes *inter alia*:

- Wrongful removal or retention, return proceedings, discover de whereabouts of a child (chapter II and III Hague 1980)
- Placement of a child in another Member State (art. 56 Br *IIbis*// art. 33 Hague 1996)
- Transfer of jurisdiction between courts (art. 15 Br *IIbis*// art. 8 et 9 Hague 1996)
- Crossborder mediation (art.31 b) Hague 1996)
- Recognition and enforcement of access rights and return orders (art. 55 b) Br *IIbis* //chapter IV Hague 1980)
- Facilitate communications between **courts, in particular for the application of art. 11, 6-7 and art. 15 Br *IIbis*** (art. 55 c) Bru *IIbis*)

# JUDICIAL COOPERATION

The European and international instruments **created a need** for

- Liaison between judges, direct judicial communications
- Assistance to judges, helpdesk, help in analysing a case

## First case of Direct Judicial Communications – DJC (1996)

*D. v. B.*, 17 May 1996, Superior Court of Quebec (first instance); Terrebonne, Family Division (Canada)

< [www.incadat.com](http://www.incadat.com) > Ref. HC/E/CA 369

*A Judge from Quebec contacts a Judge in California to ask:*

*1) Whether it is possible to withdraw criminal charges against the abducting mother with a view to avoid imprisonment upon return to the United States of America*

*2) Whether it is possible to guarantee a hearing without delay upon the return of the child to the United States of America*

# NETWORKING

Within the frame of the European Union:

## European Judicial Network in civil and commercial matters

Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters  
amended by  
the decision n° 568/2009/EC of the of the European parliament and of the council of 18 June 2009

### WHO?

- A) Contact points (if possible, at least one **judge**) = key elements
- B) Central authorities
- C) Liaison magistrates
- D) Any other **judicial authority** or administrative authority
- E) Professional associations representing other legal practitioners (lawyers, notaries, bailiffs)

# NETWORKING

## EJN

### European Judicial Network in civil and commercial matters

#### EUROPEAN JUDICIAL ATLAS: texts, forms, search tools

[https://e-justice.europa.eu/content\\_european\\_judicial\\_atlas\\_in\\_civil\\_matters-321-en.do](https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-321-en.do)

#### PUBLICATIONS

[https://e-justice.europa.eu/content\\_ejn\\_s\\_publications-287-en.do](https://e-justice.europa.eu/content_ejn_s_publications-287-en.do)

#### INFORMATION SHEETS ON NATIONAL LAW

[https://e-justice.europa.eu/content\\_information\\_on\\_national\\_law\\_information\\_sheets-439-en.do](https://e-justice.europa.eu/content_information_on_national_law_information_sheets-439-en.do)

# NETWORKING

In the frame of the Hague Conference on Private International Law (Permanent Bureau):

## IHNJ

### International Hague Network of Judges

*The idea was first proposed in 1998, in respect, at least initially, of issues relevant to the Hague abduction convention 1980.*

*Now, a wide range of both regional and international instruments are concerned,*

#### WHO?

Only sitting judges, with expertise in family law litigation

By now: 137 judges spread over 86 States are mentioned on the list:

Website Hague Conference:

<https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/ihnj/>

## NETWORKING

### International Hague Network of Judges

Judicial activism relating to the direct communications between judges, but also:

- **reluctances:** concerns about the proper legal basis, constitutional principles, internal procedural rules, independence of the judge...
- **Informal and flexible character** of the Hague Network of Judges

## NETWORKING

### International Hague Network of Judges Permanent Bureau of the HCCH

#### *The Judges' Newsletter*

To promote the mutual understanding and confidence between judges which is necessary for the effective operation of the international instruments

Exchange of information concerning judicial co-operation in matters of international child protection

To download:

<https://www.hcch.net/en/publications-and-studies/publications2/judges-newsletter>



# NETWORKING

## International Hague Network of Judges Permanent Bureau of the HCCH

*INCADAT*

Leading legal database on international child abduction law

<https://www.incadat.com/en>

# NETWORKING

INTRA Europe  
all the other civil  
and commercial  
matters

European Judicial  
Network in civil and  
commercial matters

INTRA  
Europe:  
family matters

International Hague  
Network of Judges

EXTRA Europe,  
family matters

# DIRECT JUDICIAL COMMUNICATIONS

## Guidelines General Principles Safeguards for Direct Judicial Communications

= SOFT LAW instrument

- Approved by the Special Commission on the practical operation of the Hague Conventions of 1980 and 1996, held in June 2011,
- Published in July 2012

<https://www.hcch.net/en/publications-and-studies/details4/?pid=6024&dtid=3>

# DIRECT JUDICIAL COMMUNICATIONS

Emerging Guidance  
regarding the  
development of the  
International Hague  
Network of Judges

Principles for General  
Judicial  
Communications

Principles for Direct  
Judicial Communications  
in specific cases including  
commonly accepted  
safeguards

# DIRECT JUDICIAL COMMUNICATIONS

## Which legal basis?

Art. 7, al.1 Hague Convention of 1980:

*« Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention »*

Art. 30 Hague Convention of 1996:

*« Central authorities shall cooperate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention »*

Art. 55 c) Regulation Brussels IIbis:

*The central authorities shall take all appropriate steps*

*« to: (...) c) facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15 »*

## Futur work to be done:

In the Permanent Bureau and in the Network, there is a reflexion about the opportunity and the feasibility of the elaboration of an international instrument giving a legal basis to judicial communications in the context of the International Hague Network of Judges.

# QUESTIONS & ANSWERS

Demo's on :

<https://e-justice.europa.eu/home.do>

<https://www.hcch.net/en/home>

# NETWORKING

## Within the frame of the European Union:

### European Judicial Network in civil and commercial matters

All information to be consulted on the PORTAL of the European Civil Justice:

<https://e-justice.europa.eu/home.do>

#### Some demo's

- **Under the tab: EUROPEAN JUDICIAL NETWORK:**
  - Find your CONTACT POINT: members' section
  - Informations on NATIONAL LAWS: fact sheets of each MS under the flags on the right
  - PUBLICATIONS (practical guides of different regulations)
- **Under the tab: EUROPEAN JUDICIAL ATLAS:**
  - For each regulation: legislation, dynamic forms, search tool to find a court in another MS, declarations of the MS
- **Under the tab: DYNAMIC FORMS** : forms/certificates to fill out on line

## Within the frame of the Hague Conference on IPL

All info to be consulted on the website  
of the Hague Conference on Private International :

<https://www.hcch.net/en/home>

### Demo's

- **The conventions:**

<https://www.hcch.net/en/instruments/conventions>

For each convention: the text, the status table, the central authorities, the publications (explanatory report, guides to good practices)

- **Specialised section « protection of children »**

<https://www.hcch.net/en/instruments/specialised-sections/child-protection>

convention 1996, practical handbook, status table

- **Specialised section « child abduction »:**

<https://www.hcch.net/fr/instruments/conventions/specialised-sections/child-abduction>

List of the members of the network, the explanatory report, travaux de la HCCH, Guides to Good Practice (amongst others the guide on the application of art. 13,1,b), INCADAT



# MYCONTACTS

## for my judicial co-operation

my STATE:

my CENTRAL AUTHORITY (address, telephone, e-mail, names)

<https://www.hcch.net/en/instruments/conventions/authorities1/?cid=24>

[https://e-justice.europa.eu/content\\_matrimonial\\_matters\\_and\\_matters\\_of\\_parental\\_responsibility-377-en.do](https://e-justice.europa.eu/content_matrimonial_matters_and_matters_of_parental_responsibility-377-en.do) (flags tabs)

my EJM CONTACT POINT: (name, address, telephone, e-mail)

[https://e-justice.europa.eu/content\\_judges\\_and\\_other\\_judicial\\_authorities-437-en.do](https://e-justice.europa.eu/content_judges_and_other_judicial_authorities-437-en.do)

my National Judge in the IHNJ: (name, address, telephone, e-mail)

<https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/ihnj>



Thank You!