

# **The Impact of the Brussels II Regulation on Hague Convention Proceedings in the European Union**

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## **Introduction**

With the 2003 enactment of the Brussels II *bis* Regulation<sup>1</sup> courts in countries of the European Union became bound by a separate and additional set of laws governing Hague return cases. Brussels II *bis* does not replace the 1980 Convention in EU countries, but it provides for additional rules applicable to Hague return cases for courts in EU countries. Besides adopting procedures for handling cases under the 1980 Convention, Brussels II *bis* covers a broad range of child-related family law issues, including conflict of law and exercise of jurisdiction. With the exception of Denmark, the Regulation is effective between all remaining EU member states. The Regulation entered into force on August 1, 2004, and became applicable March 1, 2005. All EU member states are signatory to the 1980 Hague Convention.

The adoption of Brussels II *bis* has no direct impact on U.S. courts handling Hague Convention proceedings involving an EU country. Analysis of the Regulation may, however, provide insight into its emphasis on certain issues.

## **Child's Objections to Return**

Article 13 of the Hague Convention provides that

the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

The Convention does not place an obligation on the trial court to inquire whether the child objects to return. The burden of proving the child's objection lies with the party opposing return. The court may choose to hear from the child and decide whether the child's opinion amounts to an objection to return and, if so, whether the court should consider that opinion.<sup>2</sup>

Brussels II *bis* reverses the burden of proof regarding the child's objections by requiring the court to inquire whether the child objects to return. When any of the defenses under Articles 12 or 13 are made in opposition to a return petition, the Regulation requires that the court give the child the opportunity to be heard unless

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1. 2003 O.J. (L 338) (hereinafter referred to as Brussels II *bis* ("*bis*" is loosely translated as "en-core").

2. *England v. England*, 234 F.3d 268, 272 (5th Cir. 2000).

doing so appears inappropriate in view of the child's age and maturity.<sup>3</sup> This requirement has resulted in cases where the views of a six-year-old have been entertained.<sup>4</sup> As a result, the enforceability of a judgment within the EU regarding access or return of a child depends upon the child being given the opportunity to be heard.<sup>5</sup>

A British appellate court observed that this provision of the Brussels Regulation should apply not only to cases involving EU countries but universally.<sup>6</sup> This opinion was based in part upon Article 12 of the United Nations Convention on the Rights of the Child,<sup>7</sup> which provides, *inter alia*, that "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

### **Expeditious Handling**

Article 11 of the Convention requires parties to "act expeditiously" in handling cases and sets a goal of six weeks for a court to reach a decision.<sup>8</sup> Article 11, paragraph 3 of the Brussels Regulation has adopted more stringent language mandating that decisions be made within six weeks, absent situations where "exceptional circumstances make this impossible."<sup>9</sup>

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3. Article 11(2) provides that "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."

4. *N. (M.) v. N. (R.)*, [2009] 1 I.R. 388 (H. Ct. 2008), [2008] I.E.H.C. 382 (Ir.) (Detailed assessment of the age at which the views of a child should be heard in the light of Article 11(2) of the Brussels Regulation. The court ordered that the views of a six-year-old child be considered.). *See also* Familiengericht [FGH] [Family Court], Sept. 18, 1998, 93 F 178/98 HK (Ger.) (view of six-year-old child provided to the court but not adopted).

5. "The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if: (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity." Article 41(2) regarding access orders. A nearly identical provision is set forth in Article 42(2) relating to orders of return.

6. *Re D (a Child) (Abduction: Custody Rights)*, [2006] UKHL 51, [2007] 1 A.C. 619, [2006] 3 WLR 989 ¶ 58 (appeal taken from Rom.); *see also* *Re M. (a Child) (Abduction: Child's Objections to Return)* [2007] EWCA (Civ.) 260, [2007] 2 FLR 72 (Eng.).

7. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). The United States and Somalia are the only United Nations members that have not ratified the UNCRC. *See* <https://treaties.un.org>.

8. "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." Article 11, paragraph 2.

9. "3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures availa-

In one appellate case arising in the United Kingdom, the court suggested that the six-week provision applied equally to both trial and appellate courts.

But the general point that I wish to make in relation to all these international family law cases, particularly those that are proceeding either under the Hague Abduction Convention or the Brussels II Revised Regulation, is that the Family Division judge in every case should specifically address the minimum necessary period for the filing of the notice of the application. Article 11(3) of the regulation requires the court, except where exceptional circumstances make this impossible, to issue its judgment no later than six weeks after the application is lodged. That provision clearly has most direct application to the process of trial. However, it is important that any appellate process should be completed in no less a period ....<sup>10</sup>

### **Grave Risk: Return Orders Based on 13(b) Findings**

Brussels II *bis* circumscribes application of the Hague Convention Article 13(b) grave risk defense by the adoption of two separate principles. First, if a 13(b) defense is sustained, the court may not refuse to order the child's return "if it is established that adequate arrangements have been made to secure the protection of the child after his or her return."<sup>11</sup> Second, even if a court refuses to return a child on grave risk grounds, the case may be reviewed by the courts of the child's habitual residence, and a contrary order may be entered compelling the child's return.

*Adequate arrangements for protecting the child on return.* Article 11(4) of Brussels II *bis* provides that the judge hearing a return application cannot refuse to order a return of the child on the basis of grave risk of harm if it is established that adequate steps have been taken to ensure the protection of the child following his or her return. This provision allows courts to consider the use of undertakings or any other mechanism that will ameliorate the risk of harm to the child upon return.<sup>12</sup>

It appears, however, that the existence of national laws that provide procedures for protecting children are insufficient by themselves to establish the existence of "adequate arrangements" that would allow for the the child's return despite the existence

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ble in national law. Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged."

10. *Klentzeris v. Klentzeris*, [2007] EWCA (Civ) 533, [2007] 2 FLR 996 (U.K.).

11. 2003 O.J. (L 338), Article 11, paragraph 4.

12. *F. v. M. (Abduction: Grave Risk of Harm)* [2008] 2 FLR 1263 (U.K.) (undertakings offered by father were sufficient to satisfy the requirements of paragraph 4 of Article 11).

of a grave risk defense. In one case arising in a French court,<sup>13</sup> the party requesting the child's return provided evidence that the laws of Hungary (the child's habitual residence) made the protection of children a priority. The French appeals court decided, however, that the mere existence of laws providing protection failed to demonstrate that more specific, concrete, and adequate provisions had been implemented to ensure the child's safety. The appellate court affirmed the trial court's refusal to order the child's return.

*Habitual residence court may order return despite initial order of sister state refusing return.* Brussels II *bis* provides that any party may request the court of the habitual residence to issue an order of return even though the court where the child is located has refused.<sup>14</sup> If the court of the habitual residence issues an order compelling the child's return, Article 42 of the Brussels Regulation provides for certification of the order, resulting in its becoming enforceable in any EU member country.

By way of illustration, consider that a child, habitually resident in Portugal, is wrongfully removed by his father to Spain. Upon filing of the mother's application for return in Spain, the Spanish court finds that return to Portugal would subject the child to a grave risk of harm—and thus refuses the mother's request for return of the child. Within three months, the parties may request the Portuguese court to make orders regarding custody, including one for the child's return. This order becomes

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13. Cour d'appel [CA] [regional court of appeal] Paris, Oct. 5, 2005, 1e ch., No de RG 2005/16526 (Fr.).

14. 2003 O.J. (L 338), Article 11, paragraphs 6–8:

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.

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.

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.

enforceable in Spain, and the Spanish courts lack the authority to issue further orders, except one enforcing the Portuguese order for the child's return.

If there are no custody proceedings pending in the child's habitual residence when the child is wrongfully removed or retained, the non-return order must be transmitted through the appropriate central authorities, giving the parents notice of the entry of the order. This notice commences the three-month period during which either party may institute proceedings in the courts of the child's habitual residence for the purpose of making custody orders.

In *Sofia Povse and Doris Povse v. Austria*,<sup>15</sup> the mother wrongfully removed a child from Italy to Austria. The father's application for return filed in Austrian courts was denied on the basis of an Article 13(b) defense. Upon the father's request, an Italian court reviewed the case pursuant to Article 11 and ordered the child returned to Italy despite the Austrian order denying the father's return petition. When Austria refused to abide by Italy's order compelling the child's return, the European Court of Justice upheld the father's right to the return order, and this ruling was affirmed by the European Court on Human rights.

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15. 3890 Eur. Ct. H.R. (2011) (Application No. 3890/11).