HOW TO RESCUE A STOLEN CHILD IN EUROPE

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I. The Hague Convention in Europe

1. A Now Fully European Scope

All European countries, including Turkey, are now signatories to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("Hague Convention.") The last hold-out was the Russian Federation, but on July 28, 2011, it too deposited its instrument of accession. The Hague Convention will enter into force there on October 1, 2011, a major milestone.

The Convention will not be effective as between the Russian Federation and other Hague signatories until they in turn accept its accession. As of the date of this writing, there are no such acceptances yet, but these will be reported on the status table of the HCCH website at http://www.hcch.net/index_en.php?act=conventions.status&cid=24#legend (follow the hyperlink in the "Type" column, which will be activated as acceptances are recorded.)

2. The Hague Convention Enforcement in Europe: An Uneven Record

The Hague Conference has posted recent (May 2011) statistical analyses of the outcomes of Hague Convention applications per receiving State, based on the latest available figures (2008.) Please refer you to these documents for detailed information on each country. *See* in particular *A Statistical Analysis Of Applications Made In 2008 Under The Hague Convention Of 25 October 1980 On The Civil Aspects Of International Child Abduction, Part I – Global* Report http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf and *A Statistical Analysis Of Applications Made In 2008 Under The Hague Convention Of 25 October 1980 On The Civil Aspects Of International Child Abduction, Part III –National Reports* http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf (detailed reports for Belgium, France, Germany, Poland, Spain, Turkey, the United Kingdom and various non-European countries, including the United States.) Both reports are also available in the *Work in Progress* section of the Hague Conference site: http://www.hcch.net/index_en.php?act=progress.listing&cat=7.

For the sake of this presentation, raw data from these documents have been extracted for the countries receiving the higher numbers of Hague applications in Europe (I included the United Kingdom, though it is the subject of a separate presentation, to give a frame of reference for other European Hague members.)

Incidentally the countries with the highest numbers of Hague cases present an interesting mix of "new" and "old" Europe, secular and religious traditions, and Christian and Muslim backgrounds.

T	Number of Incoming Cases	Central Authority Rejections	Judicial Denials	Total "Fail Rate"	Days to Resolution
h France	75	3%	16%	19%	278
e Germany	115	8%	19%	27%	163
Italy	46	4%	24%	28%	123
" Poland	67	6%	39%	45%	195
F Spain	63	0	23%	23%	265
a Turkey	63	8%	17%	25%	314
l UK	217	1%	7%	8%	91

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Rate" column here represents the sum of Central Authority rejections and judicial denials for each country. It is admittedly a subjective and imperfect means of measuring a country's performance of its Hague obligations. Yet including voluntary returns in success rate, or counting application withdrawals as either successes or failures, seems equally unsatisfactory.

Nothing compares to cold statistics when it comes to putting stereotypes to rest. Contrary to popular belief, it is not impossible to retrieve a stolen child from Germany, and cases there are processed fairly fast, though the chances of success are lesser than in France. Poland, on the other hand, does not appear Hague-friendly. If it were not for the glacial pace of its proceedings, Turkey would make a good showing. And who knew Italy was so expeditious?

=> Practice Pointer: When faced with a Hague case, forget stereotypes and check the receiving State's actual track record.

II. The Hague Convention and the European Union

1. The Contruction of Europe: From Free Trade Agreements To Political Union

The object here is a brief summary of the various treaties leading to the European Union under its current form:

- **1951: Treaty of Paris** establishing the European Coal and Steel Community (ECSC)
- **1957: Treaties of Rome** establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom)
- **1965: Merger Treaty** of Brussels providing for a single Commission and a single Council for the three European Communities then in existence
- **1987: Single European Act (SEA)** signed in Luxembourg and the Hague, providing for the adaptations required for the achievement of the Internal Market
- **1992: Treaty on European Union**, signed in Maastricht changing the name of the European Economic Community to simply the "European Community" and introducing new forms of co-operation between Member States, in particular in the areas of defense, justice and domestic law.
- **1997: Treaty of Nice**, reforming the European institutions after the Union's enlargement to 25 Member States.
- **2004: Proposed Constitutional Treaty**. This treaty was adopted by the heads of State and Government, but was defeated rather spectacularly when its ratification was put to direct popular votes in France and the Netherlands in 2005.
- **2007: Treaty of Lisbon.** This instrument, very close to the ill-fated Constitutional Treaty, is now in force and governs current European institutions and law. It was adopted without fanfare, without the benefit of popular votes in the Member States (and the attendant risks of failure at the polls.) The European Union now replaces the European Community. For the full text of the Treaty, see http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML.

  It should be noted that the Lisbon Treaty, which modestly presents itself as a series of amendments to preexistent Treaties, is in fact as far-reaching as its failed predecessor. The Treaty on European Union and its twin, the Treaty on the Functioning of the European Union, of equal value, constitute together the constitutional framework of the new European Union, and

establish its legal existence as an entity independent from its Member States.

2. Current State of the Union

The European Union comprises 27 Member States, encompasses a population of over 500 million and represents one fifth to one fourth of the world's economy, depending on the estimates. Member States are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. All European Union Member States are Hague Convention signatories.

3. Treaty-Making Powers of the European Union

The European Union itself has the power to enter to enter into treaties, independently from its Member States. It is a party to numerous bilateral agreements, in particular with the United States. *See* EU/US Agreement on Extradition (Official Journal L 181, 19 July 2003, p. 27) ; EU/US Agreement on Mutual Legal Assistance (Official Journal L 181, 19 July 2003, p. 34) ; EU/US Agreement on the Security of Classified Information (Official Journal L 115, 3 May 2007, p. 30) ; EU/US Agreement on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement) (Official Journal L 204, 4 August 2007, p. 18).

⇨ **Practice Pointer:** some of these EU/US agreements may be relevant to a Hague case, and it is reasonable to expect that more will be signed in the future. When researching a Hague case, do not overlook these. The link to the Official Journal of the European Union is http://eur-lex.europa.eu/JOIndex.do?ihmlang=en.

4. A (Very Brief) Overview of European Civil Law Outside Family Law

European law has yet to be codified, though the initial treaties have now been replaced by Council Regulations. Only a brief overview will be given here:

i. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation)

ii. Council Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation)

iii. Council Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation)

European law also addresses many other issues, such as, without limitation, service of process, taking of evidence abroad, maintenance obligations, bankruptcy.

5. European Family Law: Brussels II Bis

i. Background and Scope of Brussels II bis

The official title of Brussels II bis is *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*. The text of the Regulation can be found at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:HTML.

This Regulation is referred to indifferently as Brussels II a, Brussels II B, Brussels II *revised*, BIIb, Brussels II bis, or any variation on the above. The Brussels II bis denomination will be used here.

The original Brussels II Regulation limited itself to matters of divorce, legal separation and annulment. It was repealed in its entirety, and the provisions that were included into the new Regulation were renumbered. The ambit of the revised Regulation is far wider than that of its predecessor since it encompasses as well matters of "parental responsibility" (which includes parental child abduction.)

Brussels II bis applies to all European Union countries, except Denmark, which has opted out. The United Kingdom has opted in. The Regulation came into effect on March 1, 2005.

ii. Legal Effect of Brussels II bis

The Brussels II bis Regulation, like all European Union law, is directly applicable to Member States and their citizens without any need for domestication. Furthermore, it supersedes the law of Member States. This was established by European Court of Justice case law dating back to the 1960s.

In the case of Brussels II bis, the jurisdictional rules enacted by the Regulation are exclusive, and any jurisdictional rules of the Member States only apply "[w]here no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5" (Article 7, Residual Jurisdiction.) This means that the infamous Articles 14 and 15 of the French Civil Code, giving French courts automatic jurisdiction over all litigation, including family law matters, involving French citizens, are now deprived of any practical effect, though they remain on the books.

The rules enacted by Brussels II bis are in no way limited to conflicts of jurisdiction between courts of Member States. Competing claims of jurisdiction between a Court in the United States and a French court, for instance, will be resolved by the French court under Brussels II bis.

However, the Regulation may formulate a different rule depending on whether the conflict of jurisdiction is between the courts of two Member States. For instance, in divorce or custody matters, "the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established." (Article 19.) This automatic stay does not apply between a court of a Member State and a court of a third party State.

But Brussels II bis goes further still: it expressly supersedes the provisions of the 1980 Hague Convention as between Member States and enacts its own set of rules on the civil aspects of international child abduction.

iii. Specific Hague Convention Provisions In Brussels II Bis

The text of the Regulation is too long to be included here in full, but those of its provisions that are relevant to Hague Convention issues are reproduced in the attached Annex.

The Regulation differs from the Convention in that the court is required to hear the child's opinion on the question of his or

her return, and the use of the most expeditious procedures under national law is mandated, with a resolution reached in any case within six weeks.

The clear goal of the Regulation is to reduce the likeliness of non-return orders and limit the effectiveness of a successful Article 13(1)b) defense. For one thing, under Article 11(4) of the Regulation, a court in the receiving State may not refuse the return of a child on Article 13(1) *b)* grounds if it is established that adequate arrangements have been made to secure the protection of the child or after his or her return.

Furthermore, Articles 11(6), (7) and (8) provide a mechanism whereby the court of the requesting State retains jurisdiction over the child. Any judgment reached by that court is then automatically enforceable in the receiving State by way of the special procedure available under Article 42.

Thus the left behind parent who lost on Article 13(1)b) grounds is given a "second bite at the apple" before his or her home court. A subsequent order of the court of the child's habitual residence trumps the non-return order issued by the court of the receiving State.

For an application of these principles to the case of a child taken from Italy to Austria, see Povse v. Alpago, ECJ 1 July 2010, C-211/10 PPU.

Critics have argued that, in case of a non-return order issued by the receiving State, the parties are obligated to face the costs of parallel and competing procedures before the courts of two different countries, and that the left behind parent may remain without contact with his or her child for extended periods of time, sometimes years. Sadly, this is all too true, but is not the case even outside the ambit of Brussels II bis?

iv. Practical Enforcement of the Hague Provisions of Brussels II Bis

Again we will refer to the statistics compiled in May 2011 by the Hague Conference. See *Statistical Analysis Of Applications Made In 2008 Under The Hague Convention Of 25 October 1980 On The Civil Aspects Of International Child Abduction, Part II – Regional Report,* which includes a report on the application of

Brussels II bis.
http://www.hcch.net/upload/wop/abduct2011pd08be.pdf

From this document, it appears that 36% of the applications made worldwide under the Convention in 2008 involved the Regulation. For Brussels II bis States, the percentage of applications received from fellow Brussels II bis States rose to 71%. The Regulation is of considerable import in the adjudication of Hague cases.

What of its actual effect? Oddly enough, applications between Brussels II bis States are denied **more often than others** on Article 13(1)b) grounds. It seems that the Regulation has failed to reach its goal in this regard, and may even have been counter-productive.

However, the Regulation had a positive influence on the speed of the processing of Hague applications. The average number of days to reach an outcome between Brussels II bis States was 151 days, as opposed to 131 days where only the requested State was subject to the Regulation. And, as we all know, time is of the essence when rescuing a stolen child.

ANNEX

PROVISIONS OF BRUSSELS II BIS RELEVANT TO THE 1980 HAGUE CONVENTION

Article 10 Jurisdiction in cases of child abduction

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

(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.

Article 11 Return of the child

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter "the 1980 Hague Convention"), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

2. 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.

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 available 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.
4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.
5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.
6. 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.
7. 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.
8. 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.

Article 40 Scope
1. This Section shall apply to:
(a) rights of access;
and
(b) the return of a child entailed by a judgment given pursuant to Article 11(8).
2. The provisions of this Section shall not prevent a holder of parental responsibility from seeking recognition and enforcement of a judgment in accordance with the provisions in Sections 1 and 2 of this Chapter.

Article 41 Rights of access

1. The rights of access referred to in Article 40(1)(a) granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal.

2. The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if:

(a) where the judgment was given in default, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defense, or, the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally;

(b) all parties concerned were given an opportunity to be heard;

and

(c) 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.

The certificate shall be completed in the language of the judgment.

3. Where the rights of access involve a cross-border situation at the time of the delivery of the judgment, the certificate shall be issued ex officio when the judgment becomes enforceable, even if only provisionally. If the situation subsequently acquires a cross-border character, the certificate shall be issued at the request of one of the parties.

Article 42 Return of the child

1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. 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;

(b) the parties were given an opportunity to be heard; and

(c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.
The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).
The certificate shall be completed in the language of the judgment.

Article 55 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;
(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.