

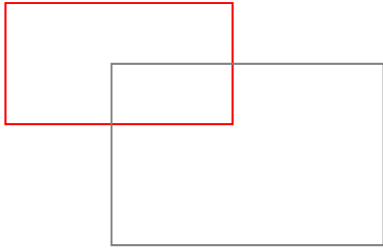
ITALIAN BUSINESS SUMMIT

International Abduction of Minors Reference Standards and Practical Aspects

Florence 29.05.2015

Interests of Minors and Judicial Protection

Att. Patrizia Giannini



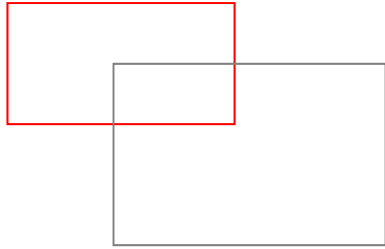
International Abduction of Minors

When are we faced with IA of a minor?

A. the child has been **taken abroad unlawfully** by the non-guardian parent who does not have exclusive authority, **taking the minor away from his place of habitual residence.**

B. the minor **is not returned to** his country of **habitual residence** by the non-guardian parent who does not have exclusive authority, in breach of custodial or visitation rights.

The abduction and detention abroad of a minor constitutes offenses under Art. 574 bis C.P.



International and European Law

Convention on the Civil Aspects of International Child Abduction (The Hague, October 25, 1980).

Provides an opportunity for the parent suffering the abduction to:

1. file for **return** of the child (e.g. when one parent takes or wrongfully keeps the child in another country), **or**
2. to **restore** the exercise of visitation rights.

Objective: protect minor against uprooting caused by removal or retention without returning him to the country of habitual residence.

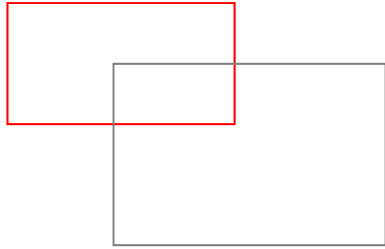
Other Conventions

(Luxembourg May 20, 1980) Convention on the recognition of decisions concerning custody of children and re-establishing custody.

Objective: protect child through the recognition of decisions concerning custody also in the country where the child has been taken.

United Nations Convention on the rights of the child, New York, 20 November 1989.

This Convention represents the most comprehensive protection and promotion of children's rights. Relationship with both parents.



European Convention of Strasbourg

(25 January 1996) on the exercise of the rights of the child.

Aims to promote **broad participation of the child** in family proceedings that concern him, recognizing his **right to always be heard**, to be represented in court by his own representative and to take on, in some cases, the role of a party in proceedings that affect him.

Additionally

Regulation Brussels II BIS - EC n. 2201/2003, 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

The Regulation establishes, in the field of child abduction, the enforceability of decisions issued by the courts of the country of habitual residence of the child.

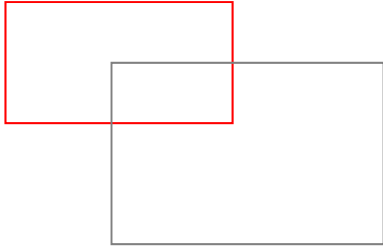
Also, it does not provide for any declaration of enforceability of decisions by Authorities of a Member State, on the rights of the child.

Brussels ***Ila*** Regulation

Unlike the Brussels II Regulation, applies to all decisions concerning parental responsibility

regardless of

legitimacy status of minors and the connection of the orders with the annulment, divorce and separation, in order to ensure equal treatment of all minors.



Central Authority

CA= The body that must implement the goals of the Conv.
Administrative Authority

Has NO decision-making power

Has power:

- to initiate,

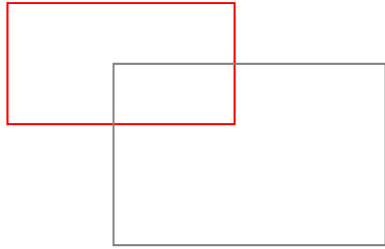
- to direct and

- information exchange

with different powers in the case of IA

- Active: from ITA v. foreign

- Passive: from foreign v. ITA



Central Authority

in *Active* IA:

CA accepts the demand for repatriation by the instant party (parent suffering the abduction) and all the necessary info provided by Hague Conv.

Article 8 and

forwards the application to the corresponding Court of the foreign CA where the child was taken, to allow the CT of that state to decide on repatriation.

CENTRAL AUTHORITY

In *Passive* IA

CA receives the request for repatriation from the corresponding CA of the foreign country from which the child was abducted, *gathers information*, locates the child and

forwards the application to the Prosecutor of the Republic at the Juvenile Court to make the application for the return of the child.

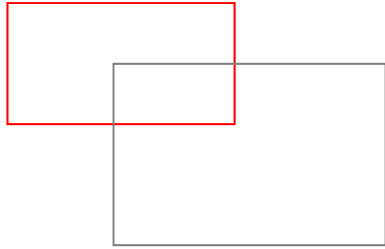
CA “DOs and DON’Ts”

CA ITA has no power of legal representation of the instant party, political choice of ITA law (different in England which has power of repr. party), CA has several tools, relies on Min Soc Serv, Public Admin Org’s, State Police etc.

CA Cooperates with other CAs to achieve the purpose of the convention.

CAs come together to:

- find new practices,
- develop new procedures,
- create a common language
- accelerate repatriation procedures that for the Hague should last 6 weeks (e.g. the East, South America) lasting even years, to the detriment of the minor.



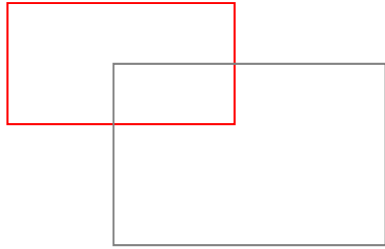
1980 Hague Conv.

Only for contracting countries (EU and non-)
Ratified with Law 64/94

Attn.: Islamic and Asiatic Countries
(Japan ratified Apr 2014)

The protection is limited to diplomatic activity.

The procedure under Hague Conv is a mixed nature,
as a party proc. between CA but then passes to the
CT for dec., repatriation and its enforceability.



Purpose of the Hague Conv.

**To ensure the immediate return
of the child removed or retained
and**

**to ensure that the rights of
custody and visitation under a
Contracting State are respected
in all countries.**

Pursuant to the Hague Conv

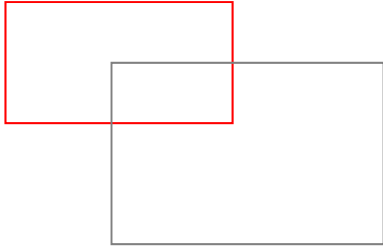
Custody rights:

the right of parents to decide on the place of habitual residence of the child.

Visitation rights:

includes the right of the parent to decide on the place of residence of the child different from the usual, for a limited time.

The parent who suffered the abduction may apply to the CA or appeal to the CT of the place where the child has been taken.



Hague Conv. Req'mnts

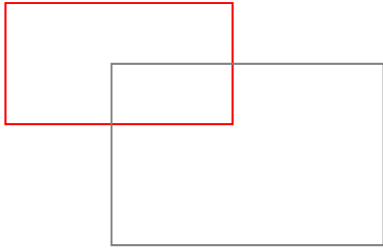
To apply the Hague Convention, you must meet the following

8 requirements:

1. Violated custodial rights must come from the law or from a CT order or agreement approved by the Court following the separation;
2. Custodial rts. must be effectively exercised by the parent suffering the abduction;
3. The minor must not be older than 16 yrs (Reg Brux II bis applies to all minors)
4. The parent who complains of abduction must not have given consent for the minor's removal;

and

5. It cannot be more than 1 yr since the abduction;
6. No moral or material damage to the minor should occur as a result of his restitution;
7. The minor cannot be opposed to the repatriation;
8. Restitution must not violate the Fundamental Principles of Human Rts Article 8.



Procedure in passive IA cases

Minor abroad in ITA, parent who suffered abduction brings the matter before the CA;

CA ITA receives request for repatriation by foreign CA, **locates the child** and provides for the mediation attempt with abducting parent;

international mediation is important, even if there is a repatriation provision;

CA sends the acts **to the juvenile Pros.** where the minor is located;

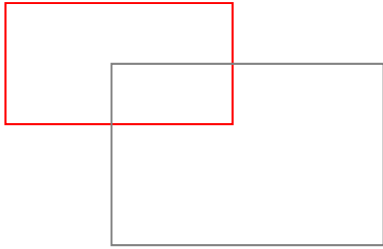
The Pros. asks for recourse fixing a hearing at the Urgent Chamber of the Juv. Ct. where the minor is found and the Ct fixes the hearing by decree;

Time from the appeal to the hearing *should* run no more than 6 weeks;

Procedure

Urgent, audience in chambers, possessory type, the Juv. Ct. should decide on the *status of fact*, and issue a decree of repatriation ONLY to be appealed to the Supreme Court;

The appeal to the S. Ct. does not suspend the enforcement of the decree.



3 critical points of Hague Conv.

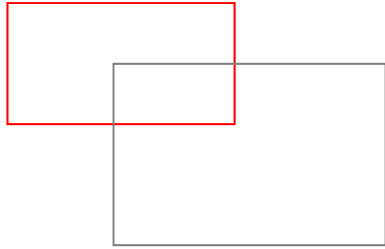
1. Habitual Residence: concept *of fact* and not juridical, which must develop from the trial papers / elements of preliminary investigation carried out in conventional procedure.

To apply Hague Conv. and reg Brux II bis, concept of **citizenship is not relevant**, only the habitual residence.

Cass. 3798/2008: *the place where the child, in virtue of a durable and stable residence, also is the center of his emotional ties, not only parental, arising from the daily life of relationship.*

--Difficult to determine with minors of tender years.

Cass. 16864/11 1984/12 1527/13



2. Minor's rt to be heard

2. In ITA law 64/94, minor must be heard *where necessary*; instead, the Conv.—first and foremost the NY Conv Rts of the Child, Strasbourg, our Supreme Court—rt to be heard as ESSENTIAL PROCEDURAL ACT in all proc. concerning minor and IA.

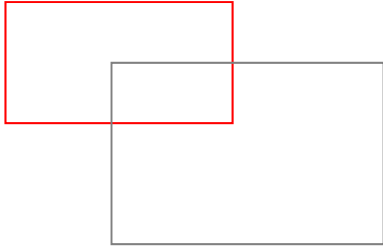
The minor **MUST** be willing to be heard, if not prejudicial to minor or for psycho-physical reasons, such as age or contrary to his interests.

Cardinal Principle of Brux II bis art. 11

On the one hand there is an obligation to listen,

but on the other hand, the CT retains discretion as to the results of the hearing.

When CT goes *against wishes of the child*, must justify very promptly.



3. Art. 13 of the Hague Conv.

Part A:

Despite the presence of IA, the CT must deny the order of repatriation because the parent suffering the abduction did not actually exercise his custodial rts.

Probs with shared custody: law is unambiguous: with shared custody, even if parent is non-resident, he can apply for repatriation.

Art. 13 of the Hague Conv.

Part B:

Also in cases of IA, the CT should not accept the request of repatriation when for the minor there is a well-founded risk of being exposed to physical or psychological harm or being placed in an intolerable situation.

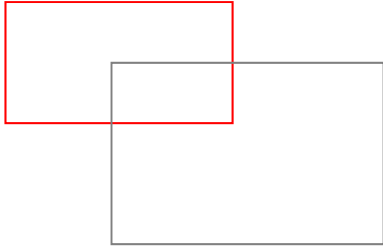
Streamlined Procedure??

In many cases, foreign CTs found themselves judging parent's capability in order to decide whether to repatriate;

in a streamlined conventional process, complex psych. exams are ordered where parents are in another state.

Certainly not a streamlined procedure! Abuse of the standard 13/B

Att.ne: Art 13 Part B has been weakened by Art.11
Brux II bis



Hague Conv. art 16

Facing a request for repatriation, the CT of the place where the minor was brought must suspend any assessment on the merits of custody.

What happens??

Example:

In a case of **active abduction**:

the minor is abducted to a foreign country (if European we have Brux IIa, but e.g. S. America the situation is complicated);

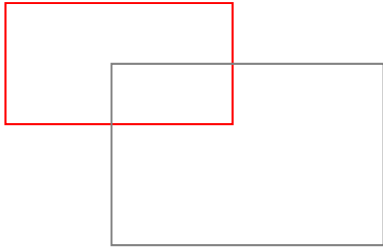
parent starting the abduction begins procedure in his country to determine custody rts. of the minor;

if the CT issues an order entrusting the child to the parent starting abduction would complicate the situation.

...which is why

Article 16 provides that the CA receiving the application of parent suffering the abduction urges the CA of the foreign state to

- require the CT to whom the case is eventually referred
- *not to decide on the merits of custody* until the proc. concerning Conv. are concluded.



Art. 29 Hague Conv.

Cases in which the parent who suffered the IA directly, **not through the CA**, tells the CT to submit the application for repatriation.

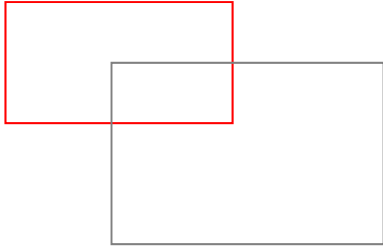
The Hague Conv. legitimizes the CT in the place where the minor was taken to decide on the question of repatriation.

The reg Brux II bis has introduced a **revolution in the field of IA**; it has given the final word to the CT of the usual place of residence before the IA occurred.

Regulation Brux II ***bis***, Art. 11 **integrates and replaces** Hague Conv., therefore the reg. has decided to confirm the reference to the Hague Conv.

BUT

has introduced a revolution giving the last word to the CT where the child was a resident.



Art. 11 Reg Brux II bis

The parent suffering the IA may, if he so considers, submit a claim to the CT on the basis of the Hague Conv.; the CT decides under Hague Conv., the child and the instant must be heard.

Critical Issues:

when the former CT refers to the Hague, or to the foreign, considers rejecting repatriation under Article 13 Part B, you must not do it if, in the country of the child's habitual res., measures have been taken to protect said child.

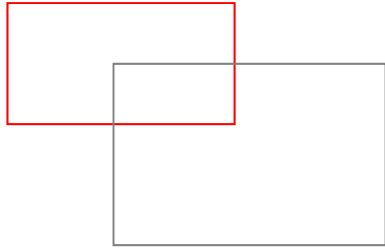
Example: Active IA

Minor in ITA is abducted to rumania/poland/croatia, here the CT applies 13 Part B:

- Parent starting the IA says she suffered violence, sometimes also the minor;
- you do exam which shows that parent suffering the IA could be violent;
- then the CT asks ITA, through the CA, what measures have been taken to protect the child in ITA;

Next,

- the CA addresses the CT of the place where the minor was a res.,
- but most times the CT, because the minor is not present on ITA territory, has not issued an order to protect the child
 - can issue it when child returns, but not when child is not here.
- The Foreign CT will not remand the child because 11 Brux II bis applies.



Ministry of Foreign Affairs

Jurisdiction of Ministry of Foreign Affairs (DGIT - Directorate General for Italians abroad)

***and* diplomatic-consular missions where Italian minor unlawfully taken abroad:**

a. Primary

if the State in which the child has been taken does **not adhere** to the Hague Convention of 1980 and/ or **is not the recipient** of Regulation (EC) No. 2201/2003.

In this case the **Ministry**

identifies the lines of action best suited for its solution;

provides information and assistance to the Italian citizen;

activates diplomatic-consular representations to bring about action on site

(Italian consular visit with the Italian minor, dialogue with local authorities, representation of the case);

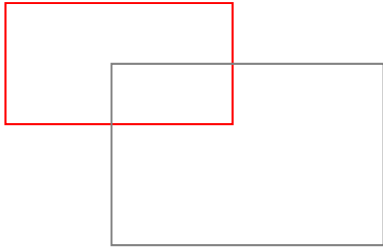
To support the action of the Ministry of Justice,

b. if the state in which the child has been taken **does adhere** to the Hague Convention of 1980 and/or is a recipient of Reg (EC) No. 2201/2003.

Here, the 1st juris. level is the Juv. Justice Dept of the Ministry of Justice, as the **Italian Central Authority**, responsible for running down the reported case to its counterpart foreign CA.

The CA, with which DGIT maintains constant cooperation, can be activated by the citizen to initiate:

- the **restitution process** of the minor;
- the **procedure** for the rights of the child taken away by the non-custodial parent.



How can a parent prevent the abduction of a minor child?

Above all, in cases of couples from different countries it is appropriate to:

learn about the provisions relating to custody and visitation rights in force in the State where the other parent belongs;

recognize, where possible, in the State where the other parent belongs, any provision for custody of the child in the parent's own favor;

if for some reason the minor is to travel abroad, **sign a commitment** from the other parent for his return to Italy on the date set;

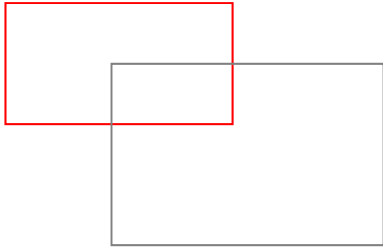
And...

ask a competent judge to issue specific order prohibiting expatriation of the minor;

verify that the travel ban is registered on the border control lists;

revoke the act of consent to ensure that the passport issued to the child becomes withdrawn;

ensure, in connection with the performance of visitation rights granted to the non-custodial parent, that said parent can not wrongfully restrain the child beyond the indicated period.



What can the parent who suffered the abduction do?

The parent can:

in agreement with the other parent, **apply to the Ombudsman of the European Parliament** in cases of international child abduction in order to initiate family mediation proceedings;

inform the Directorate General for Italians Abroad and Migration Policies (DGIT - Office IV at the Ministry of Foreign Affairs) in order to activate the competent diplomatic-consular representations;

apply to the Central Authority at the Ministry of Justice.

And...

file a timely complaint with the Police or Prosecutor's Office responsible for the territory where the child's habitual residence was;

resort to the Court responsible for the area where the child's habitual residence was, in order to obtain sole custody via urgent proceedings;

ask the Court of competent jurisdiction to suspend the parental rights of the parent who has committed the crime of abduction.