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The key instrument providing for a worldwide regulation of international parental child abduction has long been the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. The Convention has been in force since 1983 and has proved a phenomenal success.\(^1\) Thanks to this treaty many thousands of children have been successfully returned to their habitual residence. The main object of the 1980 Convention is to secure the prompt return of children wrongfully removed from or retained in any Contracting State.\(^2\) The countries that are parties to the 1980 Convention have agreed that a child who is habitually resident in one Contracting State, and who has been removed to or retained in another Contracting State in violation of the left-behind parent’s rights of custody, shall be promptly returned to the country of his/her habitual residence. The Contracting States’ undertaking to re-establish the status quo changed by a one-sided decision of the abductor rests upon a conviction that, because of its close proximity to the child, the best suited court to take a decision on the merits of the case, that is, custody and access rights, is the competent court in the State of the child’s habitual residence prior to his/her removal or retention.\(^3\) There is a treaty obligation to return any abducted child below the age of 16\(^4\) if an application is made within one year from the date of the wrongful removal or retention,\(^5\) unless one of the exceptions to return provided for in Articles 12, 13 or 20 of the 1980 Convention applies.\(^6\)

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\(^1\) There are 86 Contracting States to the Convention as of September 2011.


\(^6\) According to Art 12 the court of the requested State need not return the child to the country of his/her habitual residence if a period of more than one year has elapsed from the date of the wrongful removal or retention and it is demonstrated that the child is settled in his/her new environment; Art 13 provides that the court need not return the child to the country of his/her habitual residence if at least one of the following preconditions is met: the left-behind parent was not actually exercising his/her custody rights at the time of the abduction; he/she had consented or subsequently acquiesced to the abduction; the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation and the child who has attained a sufficient age and degree of maturity objects to being returned; and finally, under Art 20 the seized court may refuse to return the child if the return would violate fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.
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Within the European Union, the operation of the 1980 Convention has been modified by certain provisions of the 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 (Brussels II bis Regulation). The Regulation entered into force on 1 March 2005 and applies to child abduction cases between the EU Member States except for Denmark. This regional instrument aims at creating even more ambitious rules on child abduction by imposing stricter obligations to assure the prompt return of a child. It reinforces the first principle of the 1980 Convention that the question of the custody of the child should be decided by the Member State of the habitual residence of the child.

Despite the ambitious goal of strengthening the deterrence of child abduction within the borders of the Union, the new child abduction regime did not receive a warm welcome by commentators. Quite the contrary, it provoked a storm of criticism as the value of parallel international instruments was questioned. Serious concerns were voiced at the ‘risk of disharmony between regulations emanating from Brussels and a convention negotiated at The Hague’. It was rightly argued that the 1980 Convention had been working well and that there was no legal need for a regional legislative intervention into the sphere of child abduction. As a result, the motivation behind the Union’s decision to move into the domain of child abduction was questioned and it was suggested that this choice was more of a political than a practical nature.

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7 Denmark has opted out from most Justice and Home Affairs matters and therefore does not participate in measures adopted by the Union in the area of visas, asylum, immigration and judicial co-operation in civil matters.


10 It is, however, not to suggest that there were no difficulties associated with the operation of the Convention. The most serious problem was an increasingly apparent tension between the Convention objective to secure the return of the child and the lack of safety of the returned child and/or the returning parent, especially in abductions committed against the background of domestic violence.

11 A particularly harsh criticism came from P McEleavy in McEleavy, ‘The New Child Abduction Regime’ (n 8) 6: ‘Experience of law making in the field of family law within the EU has shown that project initiation and development has often very little to do with pressing legal needs or indeed finding the most appropriate solution…. The reason, in large part, is that the EU is a forum where political considerations can prevail over legal reality.’
The question of desirability of separate intra-EU child abduction rules, and the underlying issue of motivation behind the Union’s involvement in the area, however, did not arise only retrospectively—after the adoption of the Brussels II bis Regulation. In fact, the issue marked the entire negotiation process, being at the heart of a schism that arose between the EU Members at the very early stage of the drafting procedure, and accompanied the entire negotiations. Much of the blame for the division was attributed to the reputed efforts of the pro-European Member States led by France to bring discredit on the Hague child abduction regime by pressing for a separate Brussels solution. Also, it was rightly argued that the proposed scheme was overly complicated and, as a result, very likely to lead to confusion for the parties, practitioners and judges. The pro-reformists, in contrast, sought to justify the indispensability of the new child abduction rules by claiming indications of an alleged misuse of the exceptions to return provided for by the 1980 Convention, particularly Article 13(1)(b). The conflict between the two camps inevitably affected the drafting procedure and ultimately had a negative impact on the quality of the relevant provisions of the Regulation.

This book starts with the premise that there was no real need for tightening the operation of the Convention return mechanism. It is based on a belief that the real problem with the operation of the Convention was not an overuse of the grave risk of harm defence as claimed by the drafters of the Regulation. Rather, the actual issue has been the lack of effective safeguards to secure the protection of the child and the abducting parent upon their return to the requesting State, especially in Article 13(1)(b) cases involving domestic violence. Consequently, the book questions the viability of the argument of the misuse of Article 13(1)(b), seeking to demonstrate that this rationale was erroneous and without any foundation in empirical reality. The book critically assesses the development of the Brussels II bis initiative and looks at how, despite the opposition of a substantial

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13 Commission (EC), ‘Mutual recognition of decisions on parental responsibility’ (Working Document) COM (2001) 166 final, 8, 27 March 2001. The argument of a misuse of Art 13(1)(b) was, however, presented only at a later stage of the negotiations. The early rationale, underlying among others the issue of child abduction, was an ambitious goal of the Union to better respond to the European citizen’s special needs by a deeper involvement into the international family law matters. See M Jänterä-Jareborg, ‘Unification of International Family Law in Europe—A Critical Perspective’ in K Boele-Woelki (ed), Perspectives for the Unification and Harmonisation of Family Law in Europe (Antwerp, Intersentia, 2003) 194–216, 194.
number of Member States, the Union managed to move into the domain of child abduction. The book further reproaches the Union for the lack of compliance with its law-making policy, aspiring to show that the child abduction provisions of the Brussels II bis Regulation were drafted in a rather unprofessional manner that fell short of the Union’s standards of good legislative drafting. The second part of the book is based on acceptance of the reality of the new intra-EU child abduction regime. Applying methods of empirical research, it examines how the Regulation operates in the area of child abduction and to what extent the instrument has fulfilled the expectations of its drafters. It also identifies areas that cause particular concern with respect to the practical operation of the child abduction provisions of the Regulation. The final part of the book to some extent departs from the overall critical attitude as it seeks to acknowledge those aspects of the Regulation that represent an added value in the area of child abduction.

Accordingly, the book addresses four interrelated objectives. First, it aims at critically evaluating the evolution of the new intra-EU child abduction regime, and examining to what extent the Union complied with its standards of good legislative drafting during the negotiations on the Brussels II bis Regulation. Second, it seeks to demonstrate that there was no real legal need for the involvement of the European Union in the area of child abduction, and tightening the Convention return mechanism. Third, it aspires to reveal how effectively the new return mechanism operates, and what are the points of concern in respect to the functioning of the new child abduction scheme. Finally, it investigates whether the Regulation has any added value in the area of child abduction.

I. Structure and Methodology

The book begins with the historical development of the Brussels II bis legislative initiative, focusing in particular on the evolution of the child abduction provisions of the new instrument. A detailed review of the key milestones on the road to the separate intra-EU child abduction regime (from the Tampere European Council Meeting in October 1999 to the adoption of the Brussels II bis Regulation in November 2003), is intermingled with critical observations on legislative practices employed by the European Commission throughout the negotiations on the Brussels II bis Regulation. The law-making policy of the European Union is then examined and the level of compliance with the Union’s principles of good legislative drafting throughout the negotiations on the new child abduction regime is assessed. The scrutinised principles are the principle of subsidiarity, the principle of proportionality, and the rule of mandatory consultation. Finally, a comprehensive study of resources relevant to the interpretation and the application of Article 13(1)(b) from the early 1990s until the adoption of the Brussels II bis Regulation is included.
The main body of the book is represented by an empirical survey of the practical operation of the child abduction provisions of the Brussels II bis Regulation. The survey takes the form of a statistical and analytical study, evaluating the effectiveness of the intra-EU child abduction regime. The analysis commences with information on the numbers of applications for return made within the researched period (1 July 2005 to 30 June 2006) under the Regulation; and information on the profile and the nationality of the abductor. It then turns to the outcome of the applications, the reason for judicial refusal and the timing of the cases. The rationale behind the choice of the researched period was that 2005/06 (being the first year of the operation of the Brussels II bis Regulation) had been the only year of the functioning of the separate intra-EU child abduction regime prior to the commencement of this research in November 2006. The findings of the survey are assessed by means of comparison with corresponding data obtained through the 2003 Statistical Analysis of Applications Made in 2003 under the Hague Abduction Convention. The 2003 statistical analysis was a research project conducted by the Centre of International Family Law Studies at Cardiff University Law School under the directorship of Professor Nigel Lowe. The author was involved in this project as a research assistant.

The statistical analysis is followed by an examination of areas that, as indicated by the results of the survey, appear to be of concern with respect to the practical operation of the child abduction provisions of the Brussels II bis Regulation.

With a view to acknowledging the Regulation’s contribution towards an increased understanding of the importance of the voice of the child, the final part of the book is devoted to the analysis of the obligation to hear a child in return proceedings, contained in Article 11(2). An examination of relevant recent legal developments in EU jurisdictions (England and Wales in particular) is followed by analysis of current approaches toward the defence of child’s objections in major non-EU jurisdictions: Australia, Canada and the United States. The focus on England and Wales, Australia, Canada and the United States is due to the fact that among the published case law, the jurisprudence of these countries predominates and is without doubt the most elaborate.

This book is based on the author’s doctoral thesis, which was presented for the degree of PhD at the University of Aberdeen in April 2010. The thesis was researched between November 2006 and February 2010. For the purposes of this book, the thesis was later updated to include relevant materials, including case law for the period until the beginning of November 2011. The thesis was funded by the University of Aberdeen Law School Studentship which covered fees as well as maintenance. Additionally, the author was awarded a contribution towards travel expenses from the CB Davidson Bequest Fund. In March 2007, the author carried

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out empirical research at the Child Abduction Unit in London (the Central Authority for England and Wales), whilst in April and May 2007 she visited and interviewed personnel at the Office for International Legal Protection of Children in Brno, Czech Republic (the Central Authority for the Czech Republic) and the Centre for International Legal Protection of Children and Youth in Bratislava, Slovakia (the Central Authority for the Slovak Republic).

The book has sought to include all relevant primary and secondary resources.