

Brussels II child abduction: Trumping orders

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Brussels II revised has dramatically improved the child abduction protections in the Hague convention. Details are set out elsewhere on the website.

One crucial element is that it has added an additional protection for the parent whose child has been abducted.

If there is an Order for non return from the Member State to which the child has been abducted on the basis of an Art 13 Hague Convention defence, the order must be sent to the Court or Central Authority of the country from which the child was taken. This has to be received within a month of the date of the non return order, [Art 11\(6\) Bil](#). Also sent should be a transcript of the hearings before the court and any reports or any other documents on which the judge has based his decision; it is the judge who made the non return order to decide which documents are relevant.

The receiving court or Central Authority then notifies the parties, obviously including the parent whose child has been abducted, and invites them to make submissions to the court within three months of the date of notification so that the court can examine the question of custody of the child, [Art 11\(7\) Bil](#). In the usual course of events, the parent would most likely then apply for a custody order, in effect a requirement for a return order.

A trumping order is not available if the non return is on the bases of any defence apart from [Art 13](#) Hague Convention

Notwithstanding the judgment of non return of another member state's court, the courts of the country from which the child has been abducted can then make a subsequent judgment requiring the return of the child and this shall be enforceable in order to secure the child's return, [Art 11\(8\) Bil](#). This subsequent judgment may include orders as to custody, residence but might include contact orders. The court should deal with it as if the abduction had not taken place and the child was before the court.

This [Art 11\(8\) Bil](#) decision to order the return of the child, in effect trumping the non return order of the court of the country to which the child had been abducted, is recognised and enforceable in all other EU member states without the need for a declaration of enforceability and without any possibility of opposing its recognition, [Art 42\(1\) Bil](#), provided certain criteria are met and certified namely ([Art 42\(2\)](#))

- all parties are given the opportunity to be heard
- the child is given an opportunity to be heard unless a hearing is considered inappropriate having regard to the age and maturity of the child
- the judgment takes into account the reasons for and evidence underlying the decision on the non return, the order being trumped; the respective judges are encouraged to communicate direct to establish proper understanding of the reasons behind the respective orders
- if any protective measures for the child after its return are put in place, these are communicated to the court which ordered the non return.

The form of the certificate is set out in [Annex IV](#) of Brussels II, is in the language of the judgment and completed by the judge who made the order. Hearing the child and the abducting parent, who will invariably still be in the other country, will often require videoconferencing, the taking of evidence through other member states and similar.

Trumping cases should be transferred up to the High Court: see the guidance of Singer J. in [HA v MB](#) 2007 Fam Law 1058, also see on trumping cases [Re A \(Custody order after Maltese non return order\)](#) 2007 1 FLR 1923

The book "Practical Guide to International family Law" (Jordans) by David Hodson and published July 2008 contains a flow chart of the procedure of these trumping orders.

If you would like any more information, please contact David Hodson or Ann Thomas of The International Family Law Group (www.iflg.uk.com)

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