

## **QUESTIONNAIRE ON THE ENFORCEMENT OF RETURN ORDERS UNDER THE 1980 HAGUE CONVENTION AND OF ACCESS / CONTACT ORDERS**

### **RESPONSE BY AUSTRIA**

#### **I. LEGAL BASES FOR THE ENFORCEMENT OF HAGUE RETURN ORDERS**

1. Please give details of any *specific* legislative provisions which exist in your State concerning the enforcement of return orders under the 1980 Hague Convention. Please specify the title of the instrument, its legal nature (law, decree, administrative regulation or rules of court etc.) and short description of content.

**Reply:** Art.5 para.4 of the Law of 9 June 1988 implementing the Convention enables the court to request the child welfare authority to assist in the enforcement of a return order. This assistance includes the temporary placement of a child in an institution after a physical taking away from the "abductor", if necessary.

2. Please give details of any *general* legislative provisions which exist in your State concerning the enforcement of court orders in the area of family law and govern the enforcement of return orders under the 1980 Hague Convention (either in the absence of specific provisions under question I.1 or in addition to any such specific provisions). Please specify the title of the instrument, its legal nature (law, decree, administrative regulation or rules of court etc.) and the content of the relevant provisions.

**Reply:** Art. 110 para.2 of the Act concerning non-contentious proceedings ("Außerstreitgesetz") permits the enforcement of return orders by "force" (physical handing over of a the child in addition to fines ordered against the person not respecting the return order (Art.79 of the Act just mentioned). These enforcement measures have to be ordered by the competent court

3. Please give details of any judicial decisions, practice directives or guides concerning the enforcement of court orders in the area of family law that govern the enforcement of return orders under the 1980 Hague Convention (either in the absence of specific provisions under question I.1 or in addition to any such specific provisions).

**Reply:** Courts usually order the physical handing over of a child by an enforcement officer of the court (bailiff) with the assistance of the child welfare authority and police.

4. Do you have any other comments relating to the law governing enforcement of Hague return orders, including any comments on the effectiveness of these rules?

**Reply:** No

#### **II. ENFORCEABILITY AND LEGAL REMEDIES**

1. a) Is a Hague return order subject to appeal or other forms of challenge? Please give details (number and character of legal remedies, possible time-limit for them, possible time-limit for appellate court or court of appeals to decide etc.).

**Reply:** Yes, in any case an appeal is possible. The period for lodging an appeal is 14 days. The other party has the possibility to reply within 14 days. Then the files are transmitted by the first instance court to the court of appeal. In practice courts of appeal give priority to child abduction cases but there is no legal rule. The court of appeal may allow a further appeal to the Supreme Court if there is an important legal question and no relevant case law of the

Supreme Court exists (so-called ordentlicher Revisionsrekurs). If the court of appeal does not allow such a further appeal the party concerned may lodge an extra-ordinary appeal (so-called außerordentlicher Revisionsrekurs) to the Supreme Court and it is up to the Supreme Court to allow the appeal or to reject it.

In exceptional cases the first instance court may order the immediate enforcement of the return order irrespective of an appeal (Art. 44 of the Act concerning non-contentious proceedings).

- b) Please specify whether any such challenge may only be made once, and which court or body has jurisdiction to hear the appeal.

**Reply:** If the court of appeal or the Supreme Court challenges the order of the first instance court and instructs the amendment of the proceedings a new order may be appealed again.

2. a) Please give details of any authorisation or other decision required for the actual enforcement of the Hague return order (e.g. registration for enforcement, declaration of enforceability, order of a specific enforcement measure or other).

**Reply:** If the return order is final and enforceable the judge of the first court has to order the concrete enforcement measures (e.g. fines or physical handing over of the child and the modalities)

- b) Which is the competent organ for these decisions?

**Reply:** see reply to lit.a

3. Does the Hague return order have to be final and no longer subject to ordinary appeal before any authorisation for enforcement or other measure specified under II.2 may be ordered?

**Reply:** Yes (with the exception of exceptional cases – see reply to II 1 lit.a)

4. a) Are any of the decisions specified under II.2.a) (authorisation to enforce or other decision) subject to appeal independent of any appeal against the merits of the return order? Please give details (number and character of legal remedies, possible time-limit to lodge them, possible time-limit for appellate court or court of appeals to decide etc.).

**Reply:** Yes, there is the possibility of an appeal but this may only be based on a change of circumstances after the return order has been made (see para.63 of the Sylvester judgment of the European Court on Human Rights).

- b) Please specify whether any such challenge may only be made once, whether it suspends the enforceability / enforcement of the order and which is the court or body to decide the appeal.

**Reply:** Court of appeal; the enforceability may be suspended.

5. If in your State both types of legal remedy as specified under II.1 and II.4 (i.e. against the order on the merits and against any decision taken at or required for the enforcement stage) exist, can they be lodged simultaneously? Is it the same court that deals with them if they are lodged (a) simultaneously, and (b) at different times?

**Reply:** At different times

6. Do you have any other comments relating to legal remedies and the enforcement of Hague return orders?

### **III. ENFORCEMENT PROCEDURE**

#### **A. The order to be enforced and the aims of enforcement**

1. If an application for return of a child under the 1980 Hague Convention is successful, what is normally ordered:
  - a) the surrender of the child to the applicant (if necessary, "for the purposes of returning the child to his / her State of habitual residence")
  - b) the return of the child to State X
  - c) other?

**Reply:** Usually in the form described in lit.a or lit.b

2. If such order has to be enforced, please specify which of the following is / are normally the aim of enforcing a return order:
  - a) to remove the child from the abductor or any other person
  - b) to hand the child over to the applicant or a person designated by him or her in the State where enforcement takes place
  - c) to ensure the child's return to his or her State of habitual residence
  - d) other.

**Reply:** Usually a combination of lit.a and lit.b

3. Whose responsibility is it to organise the repatriation of the child?

**Reply:** This is the task of the applicant

#### **B. Actors involved in enforcement**

1. Once a return order is made, is a specific request for enforcement necessary?

**Reply:** The court may act on its own motion or upon the request of the applicant

2. Please specify who initiates enforcement of the court's return order:
  - a) the applicant (in person or through his or her lawyer)
  - b) the Central Authority
  - c) the court
  - d) the enforcement organ itself
  - e) other.

**Reply:** Lit.a or lit.c

Where the law leaves choices or discretion, please give details concerning actual practice.

**Reply:** Because the applicant is represented by a local lawyer it is advisable that the lawyer requests enforcement measures in the first instance court.

3. a) Please give details of the persons, organs and institutions (e.g. enforcement organs, court, parties, psychologists, social workers, Central Authorities, other) involved in the enforcement of return orders under the 1980 Hague Convention
  - i) according to the law
  - ii) in practice.

**Reply:** There is a wide discretionary power of the judge to order the most adequate measures; usually the physical handing over is made by an enforcement officer of the court (bailiff) with the assistance of the child welfare authority (social worker) and police, in difficult cases a "task force" in the Superior Court of Appeal (Oberlandesgericht) exists which – together with the judge – develops "tailor-made" enforcement measures (including a child psychologist)

Please describe their respective roles and functions in enforcement, and whether their participation is mandatory. If this is not the case for some or all of the actors mentioned, please specify who decides about their respective participation and to what extent they are normally involved in Hague return cases (regularly or exceptionally and, in the latter case, depending on which conditions).

**Reply:** The presence of the applicant is not necessary but advisable if the child very young; as an interim measures the child may be placed in an institution before the applicant arrives to take over the child.

- b) In particular, are any social or psychological services available in order to prepare the child and / or the defendant for the return in order to de-escalate or even avoid enforcement by coercive measures?

**Reply:** Yes, both services are available.

- c) Please specify also whether presence of the applicant (or a person designated by him or her) is required and, if this is the case, at which stage of the enforcement proceedings and for what purpose.

**Reply:** See reply to 3 lit. a above.

4. a) Is there any supervision / control of the enforcement procedure by a court, the Central Authority or any other State authority? If a court is supervising / controlling the enforcement procedure, which court is it? The court that made the order or other (e.g. a specific enforcement court)?

**Reply:** The court which ordered the return.

- b) What if the court of first instance refused return, and the appellate court or court of appeals ordered return? Would the court of first instance, the appellate court or court of appeals which ordered return, or any other court be the court supervising / controlling enforcement in such a case?

**Reply:** It is always the court of first instance, despite of the fact that this court has refused to return the child.

### C. The enforcement procedure proper

1. Is there a timeline for enforcement?

**Reply:** No; but the earlier the better !

2. Is it normal to allow a period of time for voluntary compliance with a return order or to allow appropriate practical arrangements for the return of the child to be made?

**Reply:** No; but usually practical arrangements will be necessary

3. Are any measures available in order to prevent the abductor from taking the child into hiding after the return order is made and before it can be enforced? In the affirmative, please give details.

**Reply:** Quick actions will prevent the hiding; the "abductor" is not informed in advance that specific enforcement measures take place (no information in advance about the date of the handing over)

4. What happens if the child is taken into hiding after the order was made and before it can be enforced? Which actors would be involved (e.g. Central Authority, police, public prosecutor, other) and which measures can they take to locate the child? What is the effect of the hiding on a possible timeline for enforcement?

**Reply:** The court and/or the Central Authority would try with the assistance of police to locate the child.

5. When enforcement is initiated, what are the required steps (e.g. measures by the applicant, the court or any other supervisory authority, and the enforcement organs)?

**Reply:** The court may order the necessary steps on its own motion

6. Which coercive measures are available and under what conditions (e.g. pecuniary fines, physical force [against whom? the child? the defendant? others?], detention)? Which of these are normally used in practice?

**Reply:** Usually physical force, if necessary by fetching the child; pecuniary fines against the "abductor" may be ordered, too. Detention only in theory

7. a) Do they have to be ordered specifically (i.e. either "fine", "physical force", "detention")? If so, when and by whom?

**Reply:** Yes, by the court

- b) If problems occur during enforcement, may the enforcement organs unilaterally "upgrade" the intensity of coercive measures, or do they have to obtain authorisation from any particular higher authority (e.g. an enforcement court or other)? Please specify.

**Reply:** No; the enforcement officer has to follow the instructions given by the judge; if necessary, further instructions have to be requested by him (by a telephone call to the judge)

8. Please give details of any court orders which can be obtained in emergency situations. Can these orders be obtained after hours and *ex parte*?

**Reply:** Yes

#### **D. Costs**

1. Are costs incurred for the enforcement? If so, are they part of the costs of the court proceedings as a whole? How are they calculated? For which services are they charged?

**Reply:** No costs

2. Who has to pay the costs for enforcement? To whom? Is a reduction or exemption possible, e.g. under a Legal Aid Scheme? Under which conditions? In particular, is advance payment required in order for the enforcement organs to act? If legal aid was granted for the proceedings leading to the return order, would it cover the enforcement stage or would the application for legal aid have to be renewed?

**Reply:** No, free of charge for the applicant

3. Are the costs of the actual repatriation of the child (e.g. airfare for child and possible accompanying person) considered as part of the enforcement costs? Who has to pay for the repatriation? Is advance payment a condition for enforcement?

**Reply:** No; these costs have to be paid by the applicant.

4. Please specify how foreign applicants are provided with information about enforcement costs to be borne by them.

5. Please provide details regarding the enforcement organs' specific duties as they relate to the enforcement of Hague return orders concerning children.

**Reply:** none

6. Do you have any other comments relating to the enforcement procedure?

**Reply:** No

#### **IV. STATISTICAL INFORMATION**

**Reply:** See the last statistical data given by Austria

1. How many Hague return orders that you are aware of were made per year in your country in 2001, 2002 and 2003? How many of them had to be enforced in each of these years because the abductor did not comply voluntarily with the order? Please give the figures for each year separately.
2. How many Hague return proceedings were pending in your country that you are aware of for 2001, 2002 and 2003? Please give figures per year. In how many of these cases was a legal challenge made in order to avoid enforcement (by challenging either the order on the merits, the declaration of enforceability, a particular enforcement measure or other)? If possible, please specify the type of challenge (on the merits or against an enforcement measure).
3. How many of the legal challenges at the enforcement level (*i.e.* not on the merits) were ultimately successful (*i.e.* the order was not enforced)?
4. What is the average length of enforcement proceedings from the moment the order is made until the moment the child is (a) removed from the abductor and (b) repatriated?

#### **V. CO-OPERATION**

**Reply:** No specific agreements exist. No agencies involved in the enforcement

1. Please give details of any co-operative agreements existing between different agencies within your State, either formally or informally, with regard to the enforcement of Hague return orders. How did this co-operation develop?
2. Please give details of any co-operative agreements with other States, either formal or informal between different Central Authorities or agencies, or at the judicial level, with regard to the enforcement of Hague return orders. How did this co-operation develop?
3. Please provide details (including contact details, websites etc.) of all agencies in your State which have a role to play in the enforcement of Hague return orders.
4. Do you have any other comments relating to co-operation, including any comments on the effectiveness of co-operative agreements?

#### **VI. TRAINING AND EDUCATION FOR PROFESSIONALS**

1. Please give details of any training or education that is available in your State for professionals (including, judges, Central Authority personnel, lawyers, mediators, enforcement organs [*e.g.* bailiffs], police officers, and social workers) as a means of preparing them to enforce Hague return orders or decisions in family law matters in general.

**Reply:** Seminars for judges and lawyers take into account the Hague Convention 1980. Just recently, there was a seminar for practicing lawyers dealing with family law aspects including international child abductions (180 participants).

2. Who provides this training and education?

**Reply:** Ministry of Justice; Bar Associations

3. What form does this training take and how regularly does it occur? Does joint training of different professional groups which have to co-operate in the enforcement of Hague return orders (e.g. judges, bailiffs, police officers, social workers) also occur?

**Reply:** Special training for enforcement officers (Bailiffs) dealing with these matters (see the "task force" mentioned above)

4. Do you have any other comments relating to training and education of professionals, including any comments on the effectiveness of this training and education as a means of facilitating the enforcement of Hague return orders?

**Reply:** No

## **VII. OTHER INFORMATION**

1. Please give details of any web pages, and provide copies of any brochures, or information packs or similar materials which contain information or advice on the enforcement of Hague return orders in your State and which are available to parents, including applicants from abroad.

**Reply:** A practical guide including forms is being developed (on the web-site of the Ministry of Justice)

Who provides this information? When was it compiled? When was it last updated? How is the information made available and in which language(s)?

2. Do you have any other comments relating to information for parents, including any comments on whether such information is effective in assisting the left-behind parent in having his or her return order enforced?
3. Please provide any other information which may be relevant to the issue of the enforcement of Hague return orders.
4. Please provide details of any other bodies or authorities in your State who may have information useful to the research covered by this questionnaire.
5. Have you any general comments to make regarding the enforcement of Hague return orders?
6. Are there any changes envisaged in your legislation and / or practice? If this is the case, please give details in the answer to the respective question and indicate as of when such changes will take effect.

**Reply:** No

## **VIII. ORDERS GRANTING RIGHTS OF CONTACT / ACCESS / VISITATION**

For each reply, please indicate whether the same applies to the enforcement of contact orders. If this is not the case, please give details concerning the latter.

Where the contact order refers to a specific period of time (*e.g.* where the child is to spend "the first part of the 2004 summer holidays from 1 to 20 July 2004" with the applicant) and is not complied with, please explain also whether coercive measures can be applied only as long as the period mentioned in the order contact has not yet expired (*i.e.* in order to implement the order), or also afterwards (*i.e.* as a sort of punishment although contact during this particular period can no longer be implemented). Please indicate also whether the same rules apply to the enforcement of domestic and foreign contact orders. If this is not the case, please specify the differences.

**Reply:** No specific rules; access is decided according to national law (Art. 2 of the Hague Convention on the Protection of Minors 1961 and Brussels II bis Regulation). Pecuniary fines can be imposed even after the expiry of the access period.