



**L'EXÉCUTION DES DÉCISIONS FONDÉES SUR LA CONVENTION
DE LA HAYE DE 1980**

- UNE ÉTUDE EMPIRIQUE -

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Université de Cardiff*

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ENFORCEMENT OF ORDERS MADE UNDER THE 1980 CONVENTION

- AN EMPIRICAL STUDY-

**COMMISSIONED BY THE PERMANENT BUREAU AND SPONSORED BY THE
INTERNATIONAL CENTRE FOR MISSING AND EXPLOITED CHILDREN**

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à l'intention de la Cinquième réunion de la Commission spéciale
sur le fonctionnement de la Convention de La Haye du 25 octobre 1980
sur les aspects civils de l'enlèvement international d'enfants
(La Haye, 30 octobre – 9 novembre 2006)*

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on the Civil Aspects of International Child Abduction
(The Hague, 30 October – 9 November 2006)*

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EXECUTIVE SUMMARY

1. Introduction

The U.S.-based International Center for Missing & Exploited Children funded this research on the enforcement of the return and access orders made under the 1980 Hague Convention on the Civil Aspects on International Child Abduction of 1980. This report draws from specifically commissioned reports on enforcement in the following 9 jurisdictions (Australia, England & Wales, France, Germany, the Netherlands, Romania, Slovakia, Sweden and United States) as well as from previous investigations into the procedures and systems in 6 of those Contracting States (Australia, England & Wales, France, Germany, the Netherlands and United States). We also have regard to the selected countries' responses to the Questionnaire on the Enforcement of Return Orders under the 1980 Hague Convention and of Access/Contact Orders issued by the Permanent Bureau of the Hague Conference.

The State Parties to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the 1980 Convention) meet together periodically in a Special Commission organized by the Permanent Bureau of the Hague Conference on Private International Law to review, and make recommendations on practice under the Convention.

At the Special Commission concerning the 1980 Convention held at The Hague from 27 September to 1 October 2002 the following recommendation was made:

"The Permanent Bureau should continue to gather information on the practice of the enforcement of return orders in different Contracting States. The Permanent Bureau should prepare a report on this subject with a view to the development of a guide to Good Practice"

Good Practice Guides have already been published on Central Authority Practice and Implementing Measures and on Preventive Measures (available at www.hcch.net).

As a result of this recommendation, the Permanent Bureau entered into a joint initiative with Professor Nigel Lowe of Cardiff University and the International Centre for Missing and Exploited Children. The role of Professor Lowe and the Cardiff Team has been to undertake empirical research as to how the enforcement of Hague Convention return (and access) orders works in practice in a number of Contracting States. The research has also focused on identifying areas of good practice in the context of enforcement.¹ In co-ordination with the empirical research, the Permanent Bureau has also undertaken research on the procedural law on enforcement in Contracting States generally. It is intended that the two enquiries will lay the foundations for a Good Practice Guide on Enforcement.

2. Summary of Common Problems Encountered

- The child and respondent go into hiding.
- The child is removed to another country.
- The child objects to being returned and refuses to travel/co-operate.
- The use of appeal system/legal system to delay enforcement.

¹ In this respect this Report concentrates on the enforcement of return orders. For the enforcement of access orders see Lowe N and Horosova K *Good Practice Report on Access* (NCMEC 2006).

- The respondent engages in obstructive behaviour to delay/avoid enforcement (e.g. the respondent refuses to reveal travel plans, changes travel plans, claims moving difficulties, refuses to sign visa applications).
- Enforcement of the return order is delayed because the parent cannot re-enter country of habitual residence (e.g. for immigration reasons or because of a criminal warrant).
- Enforcement is delayed due to non-compliance with conditions/undertakings contained in the return order, or a need to secure a mirror order in the requesting State (e.g. the applicant fails to pay money upfront or to comply with conditions; neither party can afford airfares; neither party can afford accommodation; the applicant is unable or unwilling to overturn a criminal warrant; lengthy process to secure mirror orders).
- Enforcement is delayed due to the impact of concurrent domestic custody proceedings in the requested State/requesting State.
- Enforcement is delayed due to the health/welfare of returning child.
- Enforcement delayed due to the health of the respondent (e.g. illness, pregnancy).
- Enforcement is delayed because the parents cannot fund travel arrangements (also relevant to conditions/undertakings).
- Enforcement is delayed because the applicant parent did not seek the enforcement of the return order.
- Enforcement is delayed because the applicant parent changed his/her mind about pursuing the enforcement of the return order.
- Court orders do not specify how the child's handover/return is to be effected nor within what time frame.
- Enforcement is delayed because of the pressure of public/media.
- Enforcement is delayed because the appellate court did not rule on the case for a long time without stating any reason (related to lack of awareness and knowledge of judges hearing Convention applications).

1. METHODOLOGY AND SCOPE

In consultation with the Permanent Bureau, it was decided that the empirical research would be conducted in the following Contracting States which comprise a combination of civil and common law jurisdictions:

- Australia
- England and Wales
- France
- Germany
- The Netherlands
- Romania
- Sweden
- United States; and
- Slovakia was later added to the list, advantage being taken of the appointment of Katarina Horosova as a researcher for the project and who had experience of working with the Slovak Central Authority.

The aim of the research project has been to conduct systematic empirical research on each of the above jurisdictions with a view to producing detailed descriptions of how return and access orders under the 1980 Convention are enforced in each jurisdiction. *For the purposes of this project 'enforcement' has*

been taken to mean enforcement in the context of a judicial order for return or access having been made by a court either at first instance or on appeal. On this basis the issue of appeal falls within the scope but the reluctance to make a return order in the first place, for example, because of the requested court fears for the child's safety if returned to the requesting State, falls outside the scope of this Report.

The research has been practitioner-focused with the methodology tailored to best suit each jurisdiction. The research methodology has included the use of interviews and questionnaires which although being based on standardized questions, has been adapted to suit each jurisdiction (and the time made available by practitioners for interviews). A broad range of bodies and persons have been interviewed within each jurisdiction including lawyers, central authority staff, police, public prosecutors, non-governmental organisations etc. The research has largely been confined to a consideration of contemporaneous applications and retrospective applications from 2001, 2002 and 2003 and 2004 where enforcement was an issue or a problem. However, the scope of the research has included applications that commenced prior to 2001 if they highlight particular enforcement problems relevant to that jurisdiction. As one aim of the empirical research has been to assist in the identification and formulation of good practice, any changes in practice, including preventive measures, which have been introduced historically to resolve enforcement problems, have also been explored.

To assist in the research project, for the majority of the jurisdictions, foreign consultants were engaged who were familiar with the system of international family law in that jurisdiction to work in collaboration with the Cardiff team.

2. BACKGROUND TO THE ISSUES

2.1. The 1980 Convention

The 1980 Convention does not have any express provisions dealing with enforcement of orders made under the Convention. However, the need for prompt enforcement of return orders is supported by the objects of the Convention and by the various provisions of the Convention that require Contracting States to secure the prompt return of children and act expeditiously, namely:

- Article 1 stipulates that the objects of the Convention are "to secure the prompt return of children wrongfully removed to or retained in any Contracting State".
- Article 2 stipulates that "Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available".
- Article 11 stipulates that "the judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children"

2.2. Interaction between 1980 and Human Rights Conventions

The need for Contracting States effectively and promptly to enforce access and return orders has been reinforced by a number of recent decisions of the European Court of Human Rights (ECHR) that have ordered Contracting States to pay damages and costs and expenses to applicants.

In the context of the enforcement of access and return orders made pursuant to the 1980 Convention, the European Court of Human Rights has considered a number of cases where an applicant has alleged that a particular State has violated their rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Human Rights Convention). In particular, the Court has considered whether the State's failure or disproportionate delay in enforcing a judgment of a national court in a case that concerns the right to respect for family life would amount to a violation of Article 8², on the basis of the interference with the individual's right to respect for family life.

*Ignaccolo-Zenide – v – Romania*³ was the first time a complaint regarding the 1980 Convention had been before the European Court of Human Rights and was the first case addressing the failure by a Council of Europe State to enforce a national court order for return forthwith under the Convention.⁴ Although a number of applications concerning the Hague Convention had previously been made to the European Commission of Human Rights they had all been declared inadmissible. In this particular matter, the Court criticised the failure of the Romanian State to take the necessary steps to enforce the order, the tardy efforts to facilitate contact, the lack of psychological counselling given to the children and the failure to give the mother proper notice of all the proceedings in relation to the child. It found by six votes to one that there had been a violation of Article 8 and ordered payment of penalties by Romania to the applicant mother. After this decision, the Romanian government undertook an extensive review of its legislative framework and administrative procedures for dealing with 1980 Convention applications and introduced new laws.

Ignaccolo-Zenide –v- Romania is no longer an isolated decision and a number of other States have been criticised by the European Court of Human Rights. Other more recent decisions include: *Maire – v- Portugal*⁵, *Sylvester –v-Austria*⁶ and *Karadzic –v- Croatia*⁷.

Furthermore, in an interesting contrast, an abducting parent from a non-European State (Australia) submitted a communication to the United Nations Human Rights Committee⁸ claiming that herself and her two children were a victim of violation by Australia of various articles of the International Covenant on Civil and Political Rights because of the proposed forcible removal (return) of one child pursuant to the 1980 Convention and that the application of the 1980 Convention amounts to a violation of the child's rights under the Convention. In this particular case, however, the communication was declared inadmissible.

3. ENFORCEMENT OF RETURN ORDERS

The system for the enforcement of return orders is different in all nine jurisdictions although the practice and procedure evident in Australia, England & Wales and USA is generally comparative. Research into the experience of these countries indicates that enforcement issues have arisen in only a small number of

² For interesting articles examining Article 8 cases in detail see N. Mole *The Hague Convention and Article 8 of the European Convention on Human Rights* [2000] IFL 121 and A. Schulz *The 1980 Hague Child Abduction Convention and the European Convention on Human Rights* in (2002) 12 *Transnational Law and Contemporary Problems*, 335-392.

³ (App No 31679/96) (2001) 31 EHRR 7.

⁴ Mole, *op. cit.* n 2 at p.124.

⁵ (App No 48206/99), [2004] 2 FLR 653.

⁶ (App No 36812/97 and 40104/98), [2003] 2 FLR 210.

⁷ (App No 35030/04), [2006] 1 FCR 36.

⁸ Australia Communication no (CCPR/C/81/0901/1999), [2004] UNHRC 48.

cases each year. The research has also found that the measures available in each jurisdiction have usually been effective in dealing with the enforcement problem, whereby the return order is successfully enforced, although delays may occur. It is also interesting to note that despite the existence of a range of coercive enforcement measures, the majority of jurisdictions have rarely needed to utilise the strongest of these enforcement measures (such as contempt of court procedures, imprisonment or police assisted enforcement).

In considering how enforcement works in practice, any enquiry cannot be limited to the enforcement measures taken once a return or access order has been made, one cannot entirely exclude earlier stages of the process since actions taken earlier in the process can reduce the risk of enforcement issues arising in the first place.

Points of good practice have been identified in respect of each jurisdiction. Many of the points of good practice identified below are not limited to the enforcement process, but rather the entire application process and some have been considered in detail in the existing guides to good practice published by the Permanent Bureau. Nevertheless, they bear repetition in any guide on enforcement.

3.1. Summary of the individual country reports on enforcement

3.1.1. Australia

Australia is a common law jurisdiction. The main statute governing family law is the *Family Law Act 1975 (Cth)*. By authority given under section 111B of the *Family Law Act*, Australia has implemented the Convention into domestic law through regulations known as the *Family Law (Child Abduction Convention) Regulations 1986* (the Regulations). The Regulations are not in identical terms to the Convention. The Regulations effectively redraft the Convention, and as such, can be amended to take account of judicial decisions. Section 111B enables the Regulations to make such provisions as are necessary or convenient to enable Australia to perform its obligations, or obtain any advantage or benefit, under the Convention for Australia. Section 111B was last amended by the *Family Law Amendment Act 2000* and recent amendments were made to the Regulations by the *Family Law Amendment Regulations 2004*.

In Australia, the Commonwealth Central Authority receives and checks all incoming applications under the Convention. In addition, a Central Authority (State Central Authority) has been appointed in each of the 6 States and the 2 mainland Territories. State Central Authorities have all the duties, may exercise all the powers, and may perform all the functions of the Commonwealth Central Authority.⁹ The Central Authority (rather than the individual) is the applicant seeking orders for the return of a child, or to secure access. The left behind parent is technically not a party to proceedings brought by the Central Authority. Amendments introduced in 2004 enable individuals to make applications on their own behalf, without the assistance of the Central Authority, for the return of a child pursuant to the Regulations.¹⁰ Australia has not made a reservation under Article 26 of the Convention and therefore all legal costs for applications (return

⁹ These roles and responsibilities are set out in regulations 5, 8 and 9 of the Family Law (Child Abduction Convention) Regulations 1986.

¹⁰ Amendments introduced through the Family Law Amendment Regulations 2004 enable individuals to apply for orders for the return of a child to overcome the effects of the decision of the Full Court of the Family Court in "A" (by her next friend) (unreported decision of Finn, May and Carmody JJ, 20 July 2004) which ruled that an individual could not apply to a court under the Regulations. Since the amendments were introduced, there have been only two cases where applicants have not sought the assistance of the Central Authority.

and access) are borne by the Commonwealth Central Authority if the individual applies through the Central Authority and allows the Central Authority to conduct the legal proceedings.¹¹ Commonly, in-house lawyers within the State Central Authorities (or counsel from Crown Law etc appointed by the State Central Authority) undertake the litigation and represent the applicant in court proceedings (acting on instructions from the Commonwealth Central Authority).

Judicial System for Hearing Convention Applications

Jurisdiction to deal with family law matters (and therefore Convention matters) is vested in both Federal and State Courts. The relevant Federal courts are the Family Court of Australia¹² and, since 1 July 2000, the Federal Magistrates Court. Within the State systems, the various courts of summary jurisdiction and also the Family Court of Western Australia have jurisdiction to hear Convention applications. However, in practice applications are not made before the courts of summary jurisdiction. Furthermore, in practice applications are not made before the Federal Magistrates Court so jurisdiction is effectively restricted to the Family Court of Australia. In the Family Court of Australia, a Judicial Registrar or a Judge¹³ can hear Hague cases. There are currently 6 Judicial Registrars who are empowered to hear Convention cases. Judicial Registrars exercise the delegated power of the Judge and their decisions are subject to a rehearing if either party wishes to have the decision reviewed. Generally, in Convention applications, jurisdiction is exercised by judges.

Applications are dealt with expeditiously with the Regulations requiring the court to prioritise return applications.¹⁴ Cases are prioritised to the extent allowed by court lists and due process requirements. The application will normally be filed in the court and interim *ex parte* orders obtained (orders to prevent the child being removed from the jurisdiction etc) within one or two days of the application being received by the State Central Authority.

Concentrated Jurisdiction and Expedited Access to the Legal System

In practice, jurisdiction within Australia is restricted to the Family Court of Australia and the Family Court of Western Australia. In the context of enforcement, the same court also deals with any applications for any further orders to assist in the enforcement of the return order.

The Regulations provide for the court to prioritise Convention applications generally and this is supported by case management directions issued by the Family Court that ensure abduction matters are listed expeditiously. The Family Court of Australia also provides an out of hours court service for urgent matters.

Appeals

Appeals from a Judicial Registrar are to a single judge of the Family Court of Australia. Appeals from a Judge of the Family Court of Australia/Family Court of Western Australia are heard by the Full Court of Family Court of Australia.

¹¹ Legal costs will not be borne by the Central Authority if an individual applies for the return of the child rather than the Central Authority. However, only the responsible Central Authority, and not an individual, can make an access application under the Regulations. Individuals can undertake private domestic proceedings to secure access.

¹² The Family Court of Australia has original jurisdiction throughout Australia – except for Western Australia where jurisdiction is vested in the Family Court of Western Australia.

¹³ Currently there are 42 Judges, including the Chief Justice, appointed to the Family Court of Australia. There are 5 Judges appointed for the Family Court of Western Australia.

¹⁴ See Regulation 15(2) and Regulation 15(4). For a detailed analysis of the speed in which applications are disposed see (reference to Statistical Report for Australia).

Including the Chief Justice there are seven judges in the Appeal Division. Appeals from the Full Court are heard by the High Court of Australia which is the highest court in the land. To appeal to that court, special leave from the High Court is required, or a certificate from the Family Court of Australia that the matter involves an important question of law or of public interest. To date, there has only been one certificate granted by the Family Court in respect of a Hague matter and special leave to appeal has only been granted twice by the High Court. An appeal is not a hearing *de novo*, and new evidence cannot be introduced without leave of the court, except where the appeal is from a Judicial Registrar to a single Judge of the Family Court. The appellate court can only interfere with the lower court decision if the appellant can demonstrate that the order that is the subject of the appeal was the result of some legal, factual or discretionary error. The High Court can substitute a new decision or remit the matter to the lower court for a reconsideration.

Expedited Procedures for Appeal Cases and 'Gatekeeper' System

Using the legal system of appeals can be one mechanism by which a respondent parent may seek to delay return pursuant to a return order and accordingly hamper enforcement efforts. In practice, the system endeavours to expedite appeal procedures. An appeal may be heard as early as one week after the appeal has been filed but is usually heard within one or two months. Conversely further appeal to the High Court tends to take much more time and can 'dramatically cool down the hot pursuit nature of the Convention.'¹⁵

Australia seeks to reduce the impact appeals may have on enforcement by ensuring they are dealt with swiftly and by having a 'gatekeeper' system in the fact that leave to appeal is required for further appeal to the High Court, limited grounds for appeal apply and a stay on the return order is required. Although normally granted, the Family Court of Australia has refused to grant a stay on the return order in some cases pending appeal¹⁶ which has rendered the appeal process nugatory in that the order has been enforced and the child returned to the foreign country.

Enforcement

Effective Preventive Measures

In Australia, available preventive measures used are as follows:

- Order made for the child's name to be included on the Airport watch list which prevents the child leaving Australia¹⁷;
- Passports and all relevant travel documents surrendered to the court;
- Passports are usually only handed back to the returning parent and child at the departure lounge;
- Central Authority staff or Australian Federal Police to escort respondent and child to the airport;

¹⁵ Lowe, Armstrong and Mathias, "Country Report: Australia", (NCMEC, 2002).

¹⁶ *Saffari & Director-General, Department of Families [2002] FamCA 1085.*

¹⁷ This order is routinely made in all Convention occurs and is very effective. The order will provide that the child is not to be removed from the jurisdiction of Australia and direct the Australian Federal Police to add the child's details to the Airport watch list. This list operates at all international points of arrival and departure in Australia (including sea ports) and if a child presents at one of these places the Australian Federal Police will restrain the child from leaving.

- Return order will specify detailed return arrangements, including where available, that the return be by direct flight. In cases where there is a concern the respondent and child may disappear because of a stopover the return order may specify that the applicant parent or an escort accompany the respondent and child on the return flight;
- Return order may specify who will pay the cost of the return travel (order can be made for the respondent to pay costs pursuant to regulation 30);
- An injunction may be made restraining the movement of the parent/child to reside at a particular address;
- Reporting condition included in the order (where they have to report daily to police);
- Respondent to provide a bond, forfeited if the child does not return as ordered;
- Where there are welfare concerns for the child, or a risk that the respondent will abscond with the child, the court can make an order removing the child and place them in the care of another person or institution pending the child's return¹⁸;
- Use of private investigator to observe respondent and child's movements prior to return;
- Order providing for the child to attend counselling to assist them to come to terms with the return order and therefore alleviate risk of enforcement issues;
- Inclusion of other conditions within return orders to alleviate fears the respondent parent has regarding the return and therefore reduce the risk of enforcement problems arising. This will also ensure the safe return of the child. However, there have been a number of cases where the applicant parent's failure to comply with conditions has led to enforcement being delayed, or the return not being enforced at all. There is also a move to the making of mirror orders where the jurisdiction enables this to occur.

Effective Enforcement Measures

As already noted, the Regulations enable the Central Authority to seek a broad range of orders to ensure that the prompt enforcement of the return order is carried out in accordance with Convention requirements. This is further supported by Regulation 20(1) which deals specifically with the responsibilities of a Central Authority following the making of a return as follows:

(1) If the responsible Central Authority applies to the court for an order for the return of the child, and the order is made, the responsible Central Authority must cause such arrangements as are necessary to be made to give effect to the order.

This enables the Central Authority to carry out a range of measures to give effect to the return order, without the need for any cooperation from the respondent parent or further court action. Regulation 20(2) further reinforces the requirement for the child to be returned promptly. It provides that, if within 7 days after the order is made, the Central Authority has not been notified that the order has been stayed, the child must be returned in accordance with the order.

The enforcement measures that can be used on, or after, the making of a return order are as follows:

- warrant directed to the police to find, recover and deliver the child;

¹⁸ This is specifically provided for under Regulation 14(1)(d).

- return order made with detailed conditions specifying the mode and details of the return, including preventive measures, to ensure return order can be enforced;
- return order including a provision directing the responsible Central Authority to make the necessary arrangements to effect the return of the child;
- order made to place the child with an appropriate person or body pending return, and
- sanctions (including imprisonment) for failure to comply with an order of the court/contempt of court.

Effective Communication and Cooperation between all Agencies and Bodies Involved in the Enforcement Process

There is a need for effective co-operation, communication and liaison between the various government and non-government agencies involved in the enforcement process. In particular, this includes the Central Authorities, the Australian Federal Police, immigration/visa authorities, judiciary and the airlines. The effective communication and cooperation between the Commonwealth Central Authority and the responsible State and Territory Central Authority who may be undertaking the enforcement procedure(s) is particularly worth noting.

Effective Location Powers

The relevant authorities have a broad range of powers at their disposal to locate a child who is the subject of Convention proceedings. Furthermore, the responsible Central Authority, the court and the police take a proactive approach to locating missing children. In addition to specifically authorising the issue of a warrant for the police to locate and recover the child, the Regulations enable the court to make any other orders they see fit to give effect to the Convention. This is supplemented by the disclosure agreements the Commonwealth Central Authority has in place whereby they can undertake some immediate searches upon the initial receipt of the application without the need for court orders. The following measures are available to locate a child:

- Disclosure of address information by the Department of Immigration and Multicultural Affairs;
- Disclosure of address information by Centrelink;
- Disclosure of address information by Australia Post;
- Warrant issued for the Australian Federal Police to find and recover the child (they can then enter and search premises etc as well as utilising police powers to undertake a range of searches not available to the Central Authority);
- Location order¹⁹ or a subpoena²⁰ issued for a person or authority to provide the court with any information they have regarding child's whereabouts (eg relatives, banks, telephone companies, schools, motor vehicle registry etc);
- Commonwealth Information Order²¹ - directed to various Departments or Commonwealth instrumentalities for the provision of information they hold in their records about the child;
- Subpoena for persons (such as relatives of friends) to attend court and give evidence on the respondent and child's whereabouts;
- Publication Order²² (which allows for the publication of the child's details in the media), and

¹⁹ See *Family Law Act* ss 67J, 67K, 67M and 67P.

²⁰ See Order 28, *Family Law Rules*.

²¹ See *Family Law Act* ss 67J, 67K, 67N and 67P.

²² See *Family Law Act* s121.

- Use of private investigators in exceptional cases (for example private investigators may be used to observe relatives of the missing child and respondent or to do other observation).

Small Pool of Experts Involved in Abduction Work

Due to jurisdiction being restricted in practice in Australia to the Family Court, a limited number of judges (and an additional 6 Judicial Registrars) hear Convention matters all of whom have expertise in family law matters.

As repeat players in litigation both the Commonwealth Central Authority and the State Central Authorities have built up a lot of expertise in these matters. Where applicable, the responsible Central Authority also briefs a small pool of counsel to conduct the litigation. Many of those briefed have been acting in Convention matters for the responsible Central Authority for many years.

3.1.2. England and Wales

England and Wales is a common law system, however, the majority of child law is governed by statute. The Family Law Act 1986 deals with jurisdiction, recognition and enforcement of orders within the whole of the United Kingdom, and in the context of international child abduction – the jurisdiction of the courts in respect of children in an international context. However, in this regard it is also important to consider the impact of the Council Regulation (EC) No 2201/2003 of 27 November 2003 (the revised Brussels Regulation). In England and Wales the main domestic statute affecting child law is the Children Act 1989.

The 1980 Convention is implemented in England and Wales (and for the United Kingdom) through the Child Abduction and Custody Act 1985 ('the 1985 Act').

Judicial System for Hearing Convention Applications

Pursuant to section 4 of the 1985 Act all Convention cases are heard at first instance by the Family Division of the High Court (which is the highest court of original jurisdiction in family cases). The same Court also deals with any applications for further orders to assist in the enforcement of the return order. Solicitors can apply on a daily basis to the Applications Judge of the High Court for urgent interim orders/directions when needed and there is a 24 hour, 365 days per year, Duty Judge available for urgent matters.

Jurisdiction is concentrated - there are only 18 full-time Judges empowered to hear Convention cases at first instance and 35 Lords Justices of Appeal, 4 of whom specialise in family law. Appeals are heard by 3 Judges, one of whom will be a specialist family judge. All hearings take place in London.

Concentrated jurisdiction, the high level of the court, the significant number of Convention cases heard in England and Wales, and the use of panel solicitors allows for the development of expertise among judges, barristers and solicitors.

Appeals

Appeals in relation to return applications are from the Family Division of the High Court (court of first instance) are to the Court of Appeal, and appeals from the Court of Appeal are to the House of Lords. From 1 January 1999, permission/leave to appeal is required. Leave may be granted either by the High Court Judge, or more usually, by the Court of Appeal itself. An appeal will be only be granted where the judge has misdirected himself in law or failed to give

sufficient weight to a particular aspect of the case. Applications for leave to appeal and the appeal itself are expedited and the court will strive to hear the appeal within six weeks from permission being granted.²³

Appealing can be one mechanism by which a respondent parent may seek to delay return pursuant to a return order and accordingly hamper enforcement efforts. The jurisdiction of England and Wales effectively reduces the impact appeals may have on enforcement by ensuring that:

- (a) they are dealt with swiftly;
- (b) having a 'gatekeeper' system in that leave to appeal is required, and
- (c) there are only limited grounds for appeal.

Furthermore, the respondent must apply for a stay on enforcement of the return order if an appeal is pending.

Aside from the factors mentioned above, two other factors may also contribute to the small number of appeals²⁴:

1. There is no automatic extension of public funding for an appeal. The question has to be put to the Legal Services Commission (supported by a submission by barrister/solicitor) which will apply a 'merits' test before granting an extension of legal aid; and
2. The high standard of legal advice given to the parties on the generally limited prospects of success for pursuing an appeal.

Enforcement

Effective Preventive Measures

In the context of enforcement, the existence of effective preventive measures reduces the risk that the abducting parent will abscond or flee with the child and therefore hamper enforcement of any return order made. Available preventive measures used are as follows:

- Passport Order²⁵/Location Order routinely obtained at the first ex parte hearing. This also means that the travel documents are seized either before, or at the same time, that the party is notified of the Convention proceedings;
- Passports and all relevant travel documents seized pursuant to the order above and held by Tipstaff until further directions of the court;
- Injunctions preventing respondent from applying for travel documents (including a passport) for the child (may need to liaise with United Kingdom Passport Agency as well as any applicable foreign embassy/consulate);
- Passports are usually only made available to the returning parent and child at the departure lounge and the agent remains outside to ensure they do not leave the airport
- Return order will specify return arrangements, including usually, that the return be by direct flight (which is arranged by applicant's lawyer);
- Children are placed on the Port Alert System (see outline below);

²³ Per Thorpe LJ in *Re C. (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 FLR 478,488.

²⁴ According to the 2003 Statistical Survey of Applications made under the 1980 Hague Abduction Convention, drawn up by Lowe N, Atkinson E, Horosova K and Patterson S, only 3 of the 99 Hague applications that went to court were appealed. The global average of appeals was 22%.

²⁵ A passport order is similar to a location order except no direction included for the Tipstaff to locate the child, has the same restraints against removing child from England and Wales etc.

- An injunction may be made against the respondent preventing the removal of the child from England & Wales (and their current residential address). This injunction is also included in any location/passport order made and continued by further directions of the court at the first inter partes hearing;
- In rare cases where there is a fear of re-abduction, or other unusual circumstances arise, the child can be placed into the care of local welfare authority, or in the care of applicant, pending a final resolution of Hague application.²⁶
- A collection order can be made that enables the Tipstaff to remove the child and deliver them to the care of the applicant or accommodated by the local care authority.
- In one exceptional case²⁷ the use of an electronic tagging device (at the respondent's own suggestion) was used where the parent had been in hiding for a period of four years prior to being located for the purposes of the return application being determined.
- Use of undertakings within return orders may alleviate fears of abducting parent and can consequently reduce the risk of enforcement problems as well as ensure the safe return of the child. Undertakings are commonly used in England and Wales. Common undertakings include:
 - providing for the provision of maintenance or housing;
 - upfront payment of money (for maintenance, rent, moving costs etc);
 - arrangements for interim residency of the child pending the custody proceedings in the country of habitual residence;
 - agreement to withdraw, or not institute, criminal proceedings against the returning parent;
 - agreement to not molest, harass or approach returning parent or other protection type measures;
 - registration of the undertakings and terms of the return order in a court in the requesting State (i.e. secure a mirror order).

The effectiveness of undertakings and their enforceability outside England & Wales is a relevant issue to be considered given their extensive use.²⁸ If a move is made to the increased use of 'mirror orders' or 'safe harbour orders', this will have the impact of delaying enforcement further unless more streamlined processes are implemented for the registration of such orders in requesting States.

Effective Enforcement Measures

There are a broad range of factors that contribute to the effective enforcement of return orders made under the 1980 Convention. The enforcement measures that can be used after the making of a return order are as follows:

- Location and disclosure of information orders (see above)
- Collection order backed by a 'bench warrant'
- Orders for enforcement
- Contempt of court proceedings

²⁶ See *Re C. (Abduction: Interim Directions: Accommodation by Local Authority)*[2003] EWHC 3065 (Fam) , [2004] 1 FLR 653.

²⁷ *Re C*, above.

²⁸ Furthermore, an investigation by the leading English non-governmental organisation, Reunite, looking into the outcomes for children returned following an abduction (a report by the Reunite research unit, September 2003), raises a number of concerns about the use of undertakings, particularly from its key finding that, in the sample studied, 66.6% of the undertakings made were not complied with (even if the undertakings are 'mirrored' by a court order) which can leave the returning parent and child in a very vulnerable position.

Solicitors have indicated that where the returning parent fails to show up for their flight the applicant's lawyer will immediately apply to the High Court Applications Judge for a collection order which includes a bench warrant. In particularly urgent matters, the solicitor can also secure a bench warrant/collection order from the 24 hour Duty Judge.

A collection order is made under the inherent jurisdiction, as the recovery powers pursuant to section 34 of the *Family Law Act 1986* do not apply to proceedings under the 1980 Convention. In the context of enforcement, the collection order will also include a bench warrant which enables the Tipstaff to arrest and detain the respondent and to bring that person before the court as soon as practicable as the respondent has contravened the order of the court for the return of the child.

Pursuant to the orders made by the court, the Tipstaff will collect the respondent and child and deliver them a particular location (in this case the High Court) for further directions or fresh orders as to the enforcement of the return order. For example, the child may be placed in the care of the local authority whilst the applicant travels to collect the child, or the child may return with an escort where such a measure is necessary. The decision of the Court of Appeal in *Re C (A Child)* (unreported), CA, establishes that the court continues to have control over the return of the child until the implementation of the order. This control includes the ability to review the order for return (per Arden LJ in *TB v JB (Abduction: Grave Risk of Harm)*).²⁹

Solicitors have indicated that the use of the collection order/bench warrant procedure has ensured that if a problem arises, the return order can be effectively and promptly enforced. However, such mechanisms as a collection order may not be appropriate (and difficult to implement) if an older child is strongly objecting to the enforcement of a return order.

In addition to the power to arrest and bringing someone before the court, in rare cases the solicitor may file a notice, or the court on its own motion, might find a respondent/relative in contempt of court and fine or imprison them for a period of time unless or until they disclose information regarding the child and/or respondent's location. Contempt proceedings have, however, rarely been utilised, as the ability to collect and remove the child has secured enforcement of the return order. The practitioners interviewed for this research could only identify one case in the past five years where a relative was imprisoned for being in contempt of court through failing to disclose the respondent's whereabouts. Nevertheless, by informing parties of the existence of contempt laws, the practitioners can be persuasive in ensuring a respondent complies with the return order, or persuasive in persuading family members to disclose a child's whereabouts.

Effective Communication and Co-operation between All Agencies and Bodies Involved in the Enforcement Process

A suggested element of good practice is the need for effective co-operation, communication and liaison between the government and non-government agencies involved in the enforcement process in England and Wales including: immigration/visa authorities; court staff; police; tipstaff; solicitors; airlines; embassies; local welfare agencies and the Central Authority. Solicitors have confirmed that good working relationships exist with all these bodies.

²⁹ [2001] 2 FLR 515 at 542, See Lowe, N; Overall M and Nicholls M *International Movement of Children Law Practice and Procedure*, (Family Law 2004) 21-99, n 261.

Effective communication and cooperation is not just limited to internal cooperation within England & Wales but can be required on an external basis also (often between Central Authorities in the requesting & requested States and with foreign authorities for immigration or visa purposes).

Effective Location Powers (prior to, and after return order made)

Pursuant to section 5 of the *Child Abduction and Custody Act 1985*, and the inherent jurisdiction of the High Court with respect to children, the High Court can make a range of interim orders/directions to locate a child. Accordingly, where a child's location is not known, an urgent application can be to the High Court Applications Judge (on an ex parte basis) for a range of orders in order to locating a missing child:

- Location Order;
- Collection Order;
- Orders for the disclosure of information to assist in locating a child (such as address information from telephone companies and government departments³⁰ such as Inland Revenue, Vehicle Licensing Agency, Department of Work and Pensions etc);
- Order for persons (such as the relatives or friends) to attend court and disclose any information they have as to the child's possible whereabouts;
- Publicity Order (to allow for publication of the child's details in the media);
- Interpol (use of international police assistance to locate a missing child, normally used where a warrant for the respondent parent has been issued)
- Use of private investigators in exceptional cases (can be used without the need for a court order).
- Contempt of Court powers to enforce orders.

Use of Counselling /Mediation

Whilst practitioners interviewed have indicated that children and family court reporters (formerly known as court welfare officers) do provide some level of assistance in enforcement matters, particularly in those cases where a child is opposing the enforcement of the order. However, aside from the valuable work undertaken by Reunite, there is no systematic approach to the provision of counselling to assist a respondent (or child) to come to terms with the return decision. Nevertheless, in 1999 Reunite commenced a 3 year mediation pilot project in parental abduction matters under the 1980 Convention.

It is also worth noting that where the respondent has agreed to return voluntarily after court proceedings have been initiated, the terms of the 'voluntary return' may be reinforced by formally entering into consent orders, therefore giving a legally enforceable basis for the voluntary return agreement.

Child's Objections /Children Opposing Return

Based on the interviews and research conducted in England & Wales, the majority of cases where enforcement measures have not been effective in securing the return of a child have involved children who (sometimes violently) object to being returned in accordance with the return order. Upon appeal (in some cases

³⁰ The formal arrangements whereby government departments will disclose addresses are set out in a Practice Direction – *Practice Direction (Disclosure of Addresses)*[1989] 1 WLR 219, as amended by *Practice Direction* [1995] 2 FLR 813.

instituted by separate representatives intervening on behalf of the children) the children are found to have objected in the relevant sense and the return order has been overturned. In some of these cases, upon hearing of the strength of the children's objections, the left-behind parent has declined enforcement and the return order has eventually been set aside.³¹ Whilst these cases are rare and unusual, as far as good practice goes, some consideration of the procedure by which these children are heard, the extent of expert advice provided, and the type and nature of the reports provided to the court is invited. The impact of the revised Brussels II Regulation on the need for the court to hear children's views also has to be considered. Secondly, the extent to which a system exists for providing counselling and information to children to assist them in coming to terms with the effect and requirements of the return order should also be considered as well as the role of the Children and Family Court Reporter in these cases. Whilst there is clearly a system in place for those children's views and wishes to be heard in the UK (at the very least oral evidence or a written report by CAFCASS is provided), a good balance needs to be secured between having these matters resolved as speedily as possible and ensuring that adequate expert information on a child's wishes and objections be provided to the court.

The appointment of a separate representative for those children in certain circumstances is one way by which the court is seeking to deal with these issues; however, this action usually occurs after enforcement of the return order has failed.

3.1.3. France

France was one of the three original ratifying States bringing the 1980 Hague Convention on the Civil Aspects of International Child Abduction into force in December 1983. Once ratified, international Conventions are directly applicable in France, upon the publication of a decree of ratification in the Official Journal (*Journal Officiel*). A decree of 29 November 1983 (*Décret 83-1021 du 29 Novembre 1983*)³², published the Hague Convention and prescribed for its entry into force on 1 December 1983.

The System for Hearing Convention Applications – the Public Prosecutor

In France, a key role in the Convention proceedings is played by public prosecutors. The public prosecutor locates the child, hears the parties concerned, acts as a mediator between them and supports the return application before the court at every stage of the proceeding (including the enforcement stage). The main advantage of the involvement of public prosecutors in Hague abduction cases is that they are generally very familiar with the Convention procedure.

After the receipt of the return application the Central Authority transmits the case to principal public prosecutor who in turn transmits the application to the public prosecutor concerned. This procedure, however, has been criticized for its time-consuming character. Indeed, the compulsory involvement of several authorities before the actual return proceedings can be initiated causes unwelcome delays in dealing with the return application. Furthermore, a change of residence of the child within France may require change of public prosecutor what means further delay in the proceedings.

The public prosecutor is responsible for locating the child in France. For this purpose he has the right to request the assistance of police and gendarmie. It is

³¹ See e.g. *Re HB (Abduction: Children's Objections)* [1998] 1 FLR 422.

³² *Journal Officiel*, 1 December 1983, p. 3466.

to be noted that in big cities, a co-operation of police specialized in protection of minors is available. For example, in Paris, 3 groups comprising 10 investigators each work on child abduction cases. These investigators are highly specialized in family law matters. The police specialized in the protection of minors is empowered to obtain personal data from various registries (e.g. local authorities registries, social security files, etc.). In some cases, an important role in searching for the whereabouts of the child has been played by private investigators hired by applicants.

Once the child is located the public prosecutor tries to achieve a voluntary return of the child or seeks other amicable resolution of the case. If the negotiations fail, the public prosecutor refers the case to a court. It must, however, be emphasized that though the public prosecutor is present at the court, he does not act as a legal representative of the applicant. His role is merely to support the return application before the court in the name of respect for the interests of society. In child abduction matters the representation by a private lawyer is not mandatory and the parties can therefore act on their own. In such cases, there are no fees involved in the court proceedings. Nevertheless, if the parent decides to hire a private lawyer, the fees involved may be high. Therefore, the French Central Authority can ask the public prosecutor to make a referral to the Legal Aid Office to have a French lawyer appointed to assist or represent the applicant. However, when the lawyer is officially appointed and is paid only by legal aid, the parent may not always be very well represented. The abduction cases are time-consuming. They demand many hours of work and require a good knowledge of private international law and the Hague Convention system. However, the remuneration for these cases is very low.

In addition to the fees for the legal representation, there are high costs for the document translations involved in the proceedings. These costs have to be fully met by the applicant.

Judicial System for Hearing Convention Applications

In 2004, elements of the concentrated jurisdiction for hearing Convention applications were introduced in France. Only one regional court per court of appeal has jurisdiction over the Convention cases. Some of the persons interviewed consider this specialisation to be sufficient. They agree that a further concentration of jurisdiction within the French court system would be difficult; there would be less material and geographical proximity of the judge to the parties. Others would like to see further concentration, i.e. that only a few courts be given jurisdiction over the Convention cases for the French territory as a whole.

Hague Convention cases are dealt with and decided by specialized family law judges. The specialisation of the family law judge appears to be a positive point in the eyes of all those interviewed.

When ordering the return of the child, some judges limit their decisions to ordering, in accordance with the Hague Convention, "the prompt return of the child to its country of habitual residence". The terms of this return are not stipulated. In this context, it has been found useful to spell out exactly what is expected by each party and the time within which the specified actions should be taken. For example, the order should contain details of the time and location of the surrender of the child to the applicant and, if there is a risk of non-compliance with the return order, to decide also on a possible penalty for the breach of the return order. It appears that there are fewer appeals against such return orders compared with the orders not containing terms of enforcement and/or penalties for possible non-compliance.

There is a notable lack of routine preventive measures in the French legal system which would allow the judges to prevent failure of potential enforcement measures (e.g. judges do not have right to order the removal of passports).

Immediate Enforceability of Return Orders

Applicant, respondent and the public prosecutor have the right to lodge an appeal against the first instance decision within the period of 15 days from the notification of the first instance decision to the Court of Appeal. However, if the first instance decision is accompanied by an order declaring the decision immediately enforceable, lodging an appeal does not prevent the enforcement of the return order. It should be emphasized that in accordance with the aim of the Convention to secure a prompt return of the child to the country of his/her habitual residence, in practice all decisions of the family law judge are accompanied by an order declaring them immediately enforceable. The order declaring immediate enforceability can be appealed by the party seeking to obtain a stay of immediate enforcement. Such an appeal is, however, not possible if the interested party has also appealed against the decision of the family law judge. The president of the Court of Appeal can decide to stay the order for immediate enforcement until the Court of Appeal decides on the merits of the matter (i.e. return of the child) and in practice he often does.

Since January 1, 2005, a new Article 1074-1 of the New Code of Civil Procedure (resulting from the Decree of October 29, 2004) has come into force, which provides that "measures concerning the exercise of parental authority [...] are immediately enforceable ipso jure". Return orders are therefore part of the doctrine to which this Article applies and therefore benefit ipso jure from immediate enforceability. They can be enforced despite the absence of a special note in the initial court decision and despite the fact that an appeal has been lodged against it.

Appeals

At the appellate level, the parties must appoint a counsel³³ who will take steps on their behalf before the court. However, if the parties have chosen a lawyer to assist and/or represent them before the family law judge, he has also the right to intervene into the appellate proceedings. The private lawyer can, in fact, prepare the case and argue it before the court. The public prosecutor's office is represented by the principal public prosecutor or by one of his substitutes. This representative also acts as a State counsel if the appeal is lodged by the public prosecutor.

Once the parties are notified of the decision of the appellate court, they have the right to lodge a final appeal to the Court of Cassation. The appeal must be lodged within 2 months from the notification. The Court of Cassation, however, only deals with questions of law.

Enforcement

It is the public prosecutor who in consultation with the French Central Authority decides on how the enforcement of the return order will be carried out. Therefore, even if immediate enforcement has been ordered, it does not mean that the child's actual return will be immediate. The public prosecutor first contacts the parents in order to negotiate voluntary compliance with the order. If it is not

³³ An 'appointed advisor' representing the parties during the proceedings before the court of appeal.

possible to agree on a voluntary return, there are several methods of enforcement available:

- The applicant comes to get his/her child in France (the most common situation in practice);
- The respondent returns the child to his/her country of habitual residence;
- The child is entrusted to a third party (for example, a family member) who is responsible for bringing the child back to his/her country of habitual residence (not very common).

There is a lack of effective enforcement measures. It is not possible for the court to find the respondent who does not comply with the return order in contempt and then impose a penalty of imprisonment. Other enforcement measures such as placement of the child in care whilst the applicant travels to collect the child or whilst the return proceedings are pending are available in France but rarely used in practice.

Costs of the Return of the Child

Applicant and respondent themselves are responsible for the costs of the return of the child. However, when France is the requesting State, the social worker at the French Central Authority can help a parent who habitually resides in France and who has limited resources to obtain financial aid. The social worker can help the parent to obtain a loan or an airfare from the airline company. However, the latter seldom occurs.

Use of Mediation throughout Convention Processes

In France, there is a well-developed system of mediation. There are three bodies involved in providing mediation services in course of return proceedings. First, it is the responsibility of the public prosecutor to seek an amicable resolution of issues. In most cases, public prosecutor asks the specialized police service to visit the abductor and discuss the application prior to court proceedings being initiated. The public prosecutor attempts mediation also at the later stage of the proceedings. After an appeal being lodged against the return order, he mediates between the parents the conditions for the return of the child. Secondly, mediation is possible through the help of lawyers specializing in international children cases. As specialists, they work in accordance with the Hague Convention, respecting its the spirit and the need for the protection of the interests of the child. Finally, a separate body, MAMIF (Mission of International Mediation Assistance for Families) was set up in 2001 by the Ministry of Justice.³⁴ It can help the parents at any stage of the proceedings, particularly where problems with enforcement occur, to engage in dialogue and seek negotiated solutions. The judges of MAMIF are assisted by social workers. MAMIF is a public body; this means that the mediators are not paid by the parties. However, the Mission judges frequently have recourse to co-mediation, *i.e.* the intervention of a third party whose action is usually justified by language problems. Mediation is a long procedure and one cannot expect everything from this alternative method for settling disputes. The results obtained by MAMIF vary: sometimes, efforts for dialogue may prove totally vain; in other cases a verbal agreement may be reached; and in the best of cases, a draft agreement may be written (it must then be approved by a court).

³⁴ In 1999, a Franco-German commission of parliamentary mediation, made up of 3 members of the French Parliament and 3 members of the German Parliament, was set up. Its purpose was to solve by negotiation existing Franco-German problems related to family law. Encouraged by the success of this commission, the French Ministry of Justice decided to establish MAMIF.

Mediation helps the parent to understand the decision and thus to be better able to comply with it voluntarily. In France, mediation is available even after a return order has been made.

Criminalization of Abduction

International parental child abduction constitutes a criminal offence under the French criminal law.³⁵ The victim parent can make a complaint to the police, the gendarmerie or to the public prosecutor. When the public prosecutor's office receives a complaint for failure to adhere to child custody arrangements or for abduction, he may initiate a judicial investigation; an investigating judge may then be appointed, with the power to deliver a warrant to arrest or warrant for a suspect in a case where it is difficult to locate the child's whereabouts. Within the scope of a preliminary investigation, the public prosecutor's office retains the power of discretionary prosecution and may decide to take no further action (particularly if criminal proceedings are a factor in the return of the parent and the child). But once an investigating judge has been appointed and the judicial investigation has commenced, the public prosecutor can merely propose that the investigating judge discharge the accused. The withdrawal of the complaint has no effect on criminal proceedings.

Practical Problems in Enforcing Decisions

The Refusal to Handover the Child Voluntarily by the Abducting Parent

This situation occurs quite frequently, but the reasons for refusal vary widely. A return order cannot be negotiated: once it has been given, it must be enforced. Nevertheless, it would appear that dialogue between the parents is always important, regardless of the stage in the procedure; it makes it possible to de-dramatise the situation. Mediation helps the parent to better understand the decision and therefore to accept it more readily.

Locating the Child

As previously mentioned, the public prosecutor plays a key role in locating the whereabouts of a child who that has been wrongfully removed or retained. He intervenes in this regard at the beginning of the return procedure, but also when the decision ordering the return of the child has been delivered. Indeed, in some unusual cases the respondent parent removes or tries to remove the child again after the return order is made.

As soon as the French Central Authority has transmitted the case file to the principal public prosecutor's office with jurisdiction, which refers the case to the public prosecutor, the latter must determine the whereabouts of the child. To do so, he calls upon the service of the police or the gendarmerie or, in large cities, the police department specialising in the protection of minors.

The police department specialising in the protection of minors quickly locates the child, using various sources of information (the place where the child attends

³⁵ Article 227-5 of the *Criminal Code*: "the act of wrongfully refusing to return a minor child to the person who has the right to demand its return is punishable by one year of imprisonment and a fine of 15,000 euros". Article 227-7: "the act of removing a minor child by a legitimate natural or adoptive parent from the hands of those who exercise parental authority or to whom such authority has been entrusted or with whom the child habitually resides is punishable by one year of imprisonment and a fine of 15,000 euros". Article 227-9: "the acts defined by Articles 227-5 and 227-7 are punishable by 3 years of imprisonment and a fine of 45,000: 1. If the minor child is retained more than five days without those who have the right to claim its return knowing its whereabouts; 2. If the minor child is wrongfully retained outside French territory".

school, the known address of a family member provided by the Central Authority, social security organisations, etc. The search is carried out using every means). Once the whereabouts of the child have been established, the police department specialising in the protection of minors quickly conducts a hearing of the child and of the respondent parent.

The police services also carry out a more all-encompassing investigation of the child's environment. They check on the child's material conditions of existence (the financial situation of the parent, the reasons for leaving, the school attended by the child, etc.), as well as the family group's situation in France: the history of the family is recounted. An effort is made to assess the risk of flight by the parent with the child, for it appears that the possibility of flight is reduced if the family is well established with social and economic roots. The investigation aims at trying to project into the future.

The Removal of the Child Abroad

As we have seen, there are no provisions in French law that allow the withdrawal of the parents' passports. Sometimes, the public prosecutor can persuade them to hand over their passports voluntarily. But, in practice, it is relatively easy for a parent determined to cross a border to do so, especially when it means circulating within the European Union.

Cost of the Return of the Child

Case files relating to international child abduction generally concern families who are financially relatively well off, and this is especially true when the initiative for the procedure is taken by a lawyer. The costs of the procedure are high and may, in some cases, be an obstacle to the return of the child. Persons with insufficient resources may obtain financial aid in order to be able to assert their rights in court.

The Refusal of the Child to Return to its Country of Habitual Residence

Measures to enforce the decision to return the child are harder to implement for older children. It is therefore important to hear the child beforehand to know the child's attitude and whether or not it is opposed to the return. It is necessary to explain the situation to the child when it is old enough to understand and if it refuses the return (in practice, this is particularly true for children 14 years of age or older).

The Existence of Criminal Measures or Measures Related with the Entry and Stay of Foreigners

As we have seen, criminal proceedings may be initiated by the French authorities against a parent who retains or removes his/her child. Furthermore, criminal action may be taken in the country of habitual residence against the parent who has abducted the child or who is wrongfully retaining the child. The parent may sometimes risk imprisonment if he/she returns to the country that has adopted the sanctions. The risk of criminal conviction may, on the other hand, be an impediment to the return of the child, or at least delay it.

The same is true when the country of the child's habitual residence has adopted measures to prohibit the parent who has violated the right of custody to come back and remain on its territory. Measures relating to the parent's entry and stay or prohibition from the territory are all obstacles to voluntarily handing over the child, to voluntary fulfilment of the decision ordering the child's return.

Other Problems

A variety of other problems may arise. They may be linked to clumsiness on the part of the police in charge of recovering the child and insufficiently informing those involved in the return. In May 2004, a case of international child abduction received widespread media attention: the police had intervened at the child's kindergarten during school hours when other parents of schoolchildren were present. Their intervention, which was described as "forceful", shocked public opinion. A committee to support the mother was organised. The return of the child could not take place until six months later, after the child had been placed in a foster family by the children's judge.

Associations sometimes encourage the parents to alert the media in order to impede the child's return. They know little about the context of the Hague Convention (the public knows even less about it), and the situation only worsens.

3.1.4. Germany

In Germany, the 1980 Hague Convention on the Civil Aspects of International Child Abduction was adopted by the Act of 1 Dec 1990³⁶. Since March 2005 the implementation of the Hague Convention and the Revised Brussels II Regulation into German procedural law is governed by the *Internationales Familienrechtsverfahrensgesetz* (hereinafter: IntFamRVG).³⁷

Proactive Involvement of the Central Authority

The duties of the German Central Authority are performed by the *Generalbundesanwaltschaft beim Bundesgerichtshof* (attorney-general at the Federal Supreme Court of Justice). The Central Authority personnel are highly qualified in the Convention cases and play an important role in an efficient and expeditious processing of Hague applications.

One of the main tasks of the Central Authority is to locate the abducted child within the German territory. For this, the Central Authority can employ the help of police forces and other state authorities. It is empowered to obtain personal data from the *Kraftfahrt-Bundesamt* (Federal Bureau of Motor Vehicles and Drivers) or the domestic authorities for social affairs. The former enables the Central Authority to retrieve information regarding all individuals who own cars with German number plates; the latter opens the registries of nearly all authorities dealing with social matters, be it the health, social security, nursing care or accident insurance agencies, the employment centres, the welfare or the youth welfare authorities. The Central Authority is also entitled to submit tracing requests to the *Bundeskriminalamt* (Federal Criminal Police Office) which can initiate a tracing notation in the central registry, alerting all relevant national authorities including the border police. All this enables the Central Authority to find any person legally having his or her residence within Germany as there is legal duty to register such residence.

Another important duty of the Central Authority is initiating court proceedings on behalf of the applicant (Section 6 (2) IntFamRVG). To this end, the Central Authority can appear personally before the domestic courts or act through mandated counsel. In practice, though, the Central Authority generally initiates the court proceedings; it submits the application for return or access orders, for interim measures or for legal aid, and then delegates the case to local counsel for further proceedings. Only in exceptional (i.e. complicated) cases the officers of the Central Authority will argue directly before the courts or present briefs on

³⁶ BGBl 1991 II 329.

³⁷ BGBI 2005 I 162.

certain legal issues. However, the Central Authority continues to monitor the activities of the counsel mandated particularly by receiving and analyzing regular reports on the state of affairs.

Counsel

The participation of counsel appointed on behalf of the applicant is of crucial importance in Hague Convention proceedings. After the Central Authority has undertaken the initial steps, the counsel is *spiritus rector* of the further proceedings: he attends hearings, submits pleadings, negotiates amicable solutions, keeps in touch with the applicant and the respondent or his/her representative, etc. The counsel is always a *Rechtsanwalt* (qualified attorney). Moreover, most counsel in Hague Convention matters are specifically qualified as *Fachanwälte für Familienrecht* (attorneys for family law, approved by the bar association) and have a profound knowledge in family law matters. Additionally, often the counsel involved in Hague Convention matters is well experienced in abduction cases. The specialization of the counsel stems mainly from the fact that competition in Hague Convention cases among attorneys is comparatively low because these cases demand a high personal commitment and are not very profitable. Therefore, apparently only a small number of practitioners in Germany is willing to do. Thus, the Central Authority allocates the incoming cases among a relatively small group of approximately 20 counsel, spread all over Germany. Mostly these counsel are based at one of the locally competent family courts.

The fees for counsel in legal aid cases depend on the value of the claim. In Hague Convention matters the courts normally fix that value at a sum between EUR 2,500 and 5,000³⁸. Given the fact that Hague Convention matters are quite time consuming, counsel might not even be able to cover their own costs. It is therefore likely that some counsel will try to spend as little time as possible on legal aid cases in Hague Convention matters and this may be reflected in the quality of the legal service provided.

Youth Welfare Authorities

The youth welfare authorities are obliged to support the Central Authority and the courts in taking all measures necessary to enforce the Hague Convention. However, frequently concern was expressed regarding the role of the youth welfare authorities within in Hague Convention proceedings. The main reason is that officers of the youth welfare authorities are often not familiar with the aims of the Convention. This lack of familiarity with the aims of the Convention is not surprising given the fact that unlike the courts there is no parallel concentration of competence in the youth welfare authorities.

Judicial System for Hearing Convention Applications

The key role in processing the Hague Convention applications is taken by the *Familiengerichte* (family courts). The family courts have been established as a division of the *Amtsgerichte* (lower local courts) and are competent to hear family matters as a court of the first instance.³⁹ A *Familiengericht* consists of a single judge.⁴⁰ Since 2000 jurisdiction for hearing the Hague Convention cases has been concentrated in only those *Familiengerichte* in whose district an *Oberlandesgericht* (regional courts of appeal) has its seat. Consequently only 22 *Familiengerichte* have first instance jurisdiction for hearing the Hague Convention cases. Moreover, Section 12 (3) of the IntFamRVG allows the *Bundesländer*

³⁸ See also W Vomberg 'Das Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung - Ein Buch mit sieben Siegeln?' FPR 2000, 3, 6.

³⁹ Section 23 b *Gerichtsverfassungsgesetz* (hereinafter: GVG), BGBl 1975 I 1077.

⁴⁰ Section 22 GVG.

(federal states) to further concentrate the local jurisdiction for Hague Convention matters to the *Familiengericht* of only one *Oberlandesgericht* within their territory if that *Bundesland* has more than one *Oberlandesgericht*.

Local jurisdiction is vested in the *Familiengerichte* in whose district the child stays at the moment when a return or access application was submitted to the Central Authority. Alternatively, (e.g. if no application was submitted to the Central Authority), the *Familiengericht* in whose district need for care exists will be vested with the local jurisdiction. For Hague Convention matters this will usually be determined by where the child is staying at the moment of filing the court application.

The confining of jurisdiction to a limited number of *Familiengerichte* is considered to be the main factor for the effective processing the Hague Convention applications. This has led to judges and local counsel specializing in Hague Convention matters. Additionally, and perhaps most importantly, in many cases the persons involved know each other from earlier cases which was held to facilitate expeditious proceedings.

Undertakings

Undertakings in Hague Convention matters, in principle, are possible according to German procedural law⁴¹, although they are not explicitly provided for in the relevant legislation and their legal nature is therefore uncertain. However, it appears that two kinds of undertakings can be identified in German law⁴²: the first refers to an interim order of the court; this 'undertaking' order creates an obligation for one of the parties that needs to be fulfilled *before* the return or access order will be made. The other type of undertaking is an agreement by the parties to fulfil a condition after the return or access order has been made; the agreement needs to be contained in the court order to be enforceable.

Appeals

An appeal can only be lodged against the decision of the *Familiengericht* within a period of two weeks. The only and final appellate courts in Hague Convention matters are the *Oberlandesgerichte* (regional courts of appeal).

The return order of the *Familiengericht* becomes final after two weeks if there is no appeal. Only the respondent, the child (if it is older than 14) and the competent youth welfare authority are entitled to appeal against a return order of the *Familiengericht*. The return order enters into force if it has become final. The entering into force of the order is required for any enforcement measure unless specifically ordered by the *Oberlandesgericht*. The IntFamRVG does not envisage the *Familiengericht* being able to order the immediate enforcement of the return order. However, the *Oberlandesgericht* must, after appeal, order the immediate enforceability of the return order of the *Familiengericht*, if the appeal is obviously ill-founded, or if, after consideration of all due interests of the parties involved, the return of the child even before an appellate decision appears reconcilable with the child's best interests. The aim of this rule is to reduce the cases where appeals are lodged just to delay enforcement of the first instance return order.

It may be observed that return orders of the *Familiengerichte* enter into force at a fairly late point in time – after two weeks if no appeal was lodged to the

⁴¹ E Carl 'Möglichkeiten der Verringerung von Konflikten in HKÜ-Verfahren' FPR 2001, 211, 212 et seq; G Mäsch, "'Grenzüberschreitende' Undertakings und das Haager Kindesentführungsabkommen aus deutscher Sicht' FamRZ 2002, 1069, 1077 et seq; Niethammer-Jürgens 308.

⁴² G Mäsch, "'Grenzüberschreitende' Undertakings und das Haager Kindesentführungsabkommen aus deutscher Sicht' FamRZ 2002, 1077.

Oberlandesgericht. The successful applicant will therefore have to wait at least for two weeks before he or she can actually enforce the return order.

Enforcement

The enforcement of orders made under the Hague Convention is regulated in Section 44 of the *Internationales Familienrechtsverfahrensgesetz* (hereinafter: IntFamRVG).⁴³

Possible Enforcement Measures

Return and access orders under the Hague Convention can be enforced in a three ways:

If the respondent does not comply with the court order the court can rule, as a first step, the payment of a *Ordnungsgeld* (fine) up to 25.000 Euros or *Ordnungshaft* (imprisonment) of the respondent.

Apart from *Ordnungsgeld* and *Ordnungshaft* the court can additionally or alternatively order the use of coercive force to enforce its order. However, coercive force against the child can only be used to enforce return orders (i.e. not access orders). The bailiff as the primary enforcement body is authorized to claim assistance by the police force. If the bailiff cannot locate child the court can order any person which is bound to return the child to give an affidavit on the child's whereabouts. Prior threat of coercive force by the court is not a condition

Competence for Ordering Enforcement Measures

All three possible enforcement measures have to be ordered by the court and have – at least legally – to be separated from the return order. *The competent court to decide on specific enforcement measures is the court whose decision renders the return or access order enforceable.* If no appeal against the order of the *Familiengericht* has been lodged the *Familiengericht* has jurisdiction to order enforcement measures once its return or access order has entered into force. Often, however, one party appeals to the *Oberlandesgericht*; in this case it is for the *Oberlandesgericht* alone to decide on the enforcement measures. This is a new rule in the German law. In the past, it was widely debated whether the *Oberlandesgericht* could order enforcement measures once an appeal against the order of the *Familiengericht* was lodged. There was some authority that the *Oberlandesgericht* was not able to do so and the applicant had to apply for enforcement measures to the *Familiengericht* first, even if the order to be enforced was an order rendered, or at least affirmed, by the *Oberlandesgericht*⁴⁴. In the past, this could cause enormous delay. If the respondent appealed against the enforcement order of the *Familiengericht*, the *Oberlandesgericht* was again asked to decide on enforcement measures⁴⁵ and so had to decide on the issue anyhow.

Ex Officio Enforcement of Return Orders

⁴³ BGBI 2005 I 162.

⁴⁴ See OLG Stuttgart 22 Oct 2001 IPRax 2003, 249; notably, *ibid* 252; W Zimmermann in Keidel et al (eds) *Kommentar zum FGG* (15th edn CH Beck Munich 2003) § 33 FGG para 47; Peetz 235; cf, however, also OLG Dresden 21 Jan 2002, FamRZ 2002, 1136, 1139 where without further reasoning the *Oberlandesgericht* itself ordered enforcement measures.

⁴⁵ Roth 231; Niethammer-Jürgens 308.

Normally it is up to the parties to enforce court orders in their favour or to apply for enforcement measures.⁴⁶ However, Section 44 (6) of the IntFamRVG obliges the court to enforce return order ex officio unless the applicant asks the court not to enforce the order. Concern was expressed by counsel and judges as to this provision, namely, first, the enforcement of court orders is normally up to counsel who represent the winning party. They have the experience on how to enforce a specific case. Judges lack that experience. Secondly, the driving force in Hague Convention procedures are counsel's personal dedication and experience; but they play no role in the enforcement process, as it is the judge alone who is in charge. Thirdly and most importantly, Section 44 (6) IntFamRVG is likely to overburden judges in practical terms. Proper enforcement might not be warranted anymore. Fourthly and finally, it is so far unclear what steps the applicant can take if the court does not comply with its duty to enforce its orders.

Preventive Measures

To prevent failure of potential enforcement measures and also to ensure expeditious proceedings, the courts have a discretion to take, upon request or ex officio, interim measures (Section 15 of the IntFamRVG). Notably, the court can order all measures which appear necessary to secure the current place of the abducted child's stay, e.g., by prohibiting the respondent to change the whereabouts of the child, by imposing duties to appear regularly at a police office, by prescribing to deposit passports or by ruling a border ban.

Overall, the possibility of taking preventive measures is an important tool to strengthen the effectiveness of the Hague Convention enforcement system and to secure enforcement of later court orders. However, some interim measures, though they are potentially available and effective, might cause harm to the child, and are therefore generally not applied for by the applicant. Thus, for example, the placement of a child in a foster family for the time of proceedings can be quite a traumatic for the child, especially if he or she does not speak the language of the forum state. Applicants are therefore reluctant to make such applications.

Mediation

In Germany, generally, the mediation is not considered an effective part of the enforcement of return orders. It is held that that most parties are not prepared to enter into mediation. Instead, in the context of child abduction cases, coercive measures are considered as the most effective enforcement measure.

Some Concluding Observations

Voluntary Adherence

All persons interviewed confirmed that in most cases enforcement measures are not necessary. Although many losing respondents appeal they normally comply with the court order once it becomes final. Furthermore, even at the enforcement stage, the courts continue to try to achieve an amicable solution once the court order has become final and enforceable. Furthermore, the courts often summon the children for the hearing as well; if the court orders the return of the child, enforcement can then take place immediately in the court room.

Coercive Force as an Enforcement Measure Generally Successful

⁴⁶ Cf OLG Dresden 22 Mar 2002, FamRZ 2003, 468.

Most interviewees reported that enforcement measures, notably the use of coercive force, are generally successful. If the bailiff appears together with police force, most respondents comply with the court order. Moreover, some enforcement difficulties which occurred in the past in connection with the old Section 33 FGG have now been sorted out by the new Section 44 IntFamRVG.

Lack of Expertise on the Side of the Respondent's Counsel

Many practitioners complained that their counterparts acting for the respondent often lack expertise regarding Hague Convention matters. They then delayed proceedings by raising points which are of no relevance to the court's decision at all, most frequently arguments regarding the best interests and welfare of the child. Furthermore, counsel for the respondent were often not familiar with the special procedural rules for Hague Convention cases now embedded in the IntFamRVG. This caused additional delay because appeals were lodged which were without legal foundation.

Role of the Youth Welfare Authorities

Frequently concern was expressed regarding the role of the youth welfare authorities within in Hague Convention proceedings. Their officers are often not familiar with the aims of the Hague Convention.

Absconding by Return in Adherence of a Return Order

Paradoxically, a problem appears to arise in cases where the respondent complies with the wording of the return order and voluntarily returns to the country where the child was abducted from – however, without giving notice to the applicant. After his or her return the respondent and the child can then abscond again because the applicant does not know about their (temporary) return.

No Effective Enforcement of Access Orders

Most counsel who have dealt with access cases under the Hague Convention have emphasized that access applications are almost useless because there is no realistic possibility to enforce them. If the respondent does not voluntarily allow access to the child it is nearly impossible for the court to effectively enforce its order.⁴⁷ Notably, pursuant to Section 44 (3) IntFamRVG coercive force against the child is not admissible to enforce access orders. Many applicants cannot afford to travel repeatedly time to Germany if attempts to enforce access order fail. Hence, access orders are considered to have mere moral force.

However, the enforcement situation for access orders may have improved because of the new Section 44 IntFamRVG which allows the ordering of *Ordnungsmittel* rather than only *Zwangsmittel*. If the respondent does not comply with the access order this behaviour can ex post be sanctioned with a fine or imprisonment even if the order cannot be enforced anymore.

Low Fees in Legal Aid Cases

Almost all counsel complained that the fees they were able to earn in legal aid cases are far too low. The fees for counsel in Germany depend on the value of the claim. In Hague Convention matters the courts normally fix that value at a sum

⁴⁷ Cf G Hohloch and C Mauch 'Die Vollstreckung umgangsrechtlicher Entscheidungen vor dem Hintergrund europäischer Rechtsvereinheitlichung und des HKÜ'FPR 2001, 195, 196.

between EUR 2.500 and 5.000.⁴⁸ The maximum fees resulting from that value thus amount to approx. EUR 1.100. Therefore, counsel in custody matters often conclude a fee agreement which is not admissible in legal aid cases. As Hague Convention matters are quite time consuming for counsel, this means that they might not even be able to cover their own costs. It is likely that counsel will try to spend as little time as possible on legal aid cases in Hague Convention matters. This could mean that the Hague Convention therefore is less effective than it could be; as already stressed, counsel and their personal dedication are to a large extent the driving force in Hague Convention procedures.

Media Pressure

In some interviews it became apparent that counsel are often exposed to intensive media pressure. In rural areas especially where the respondent is rooted in the local society it is sometimes difficult for counsel representing the applicant to pursue the case. Press and media often report rather negatively about Hague Convention proceedings, ignoring the purpose of the Hague Convention. They often assert that the children involved are the object of international relation and allege that their best interests are violated. Against that background there is evidence that in some cases counsel preferred not to attend enforcement attempts of the bailiff and the police in order not to appear in public as the attorney of the applicant and thereby, possibly, to damage their reputation as family lawyers on which future assignments from that community depend. Such media pressure could perhaps be decreased by better information policy and public relations, in other words by better media management of the authorities involved.

3.1.5. The Netherlands

In the Netherlands, the 1980 Hague Convention on the Civil Aspects of International Child Abduction is implemented by the *1990 Implementation Act (Uitvoeringswet)*.⁴⁹

Proactive Involvement of the Central Authority

The duties of the Dutch Central Authority are performed by a division of the Ministry of Justice (*Directie Justitieel Jeugdbeleid*). The Central Authority personnel is highly experienced in child abduction cases and has developed a consistent practice for handling Convention applications.

One of the main duties of the Central Authority is to locate the abducted child within the Dutch territory. In most cases there is an address or a telephone number available. The Central Authority has the right to inquire whether the child is registered with the relevant municipality. The municipality officer is obliged to provide this information.⁵⁰ Where there is no address indicated, the Central Authority will write to the head of public prosecutors of the district where the

⁴⁸ See also W Vomberg 'Das Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung - Ein Buch mit sieben Siegeln?' FPR 2000, 3, 6.

⁴⁹ Wet van 2 mei 1990 tot uitvoering van het op 20 mei 1980 te Luxemburg tot stand gekomen Europees Verdrag betreffende de erkenning en de tenuitvoerlegging van beslissingen inzake het gezag over kinderen en betreffende het herstel van het gezag over kinderen, uitvoering van het op 25 oktober 1980 te 's-Gravenhage tot stand gekomen Verdrag inzake de burgerrechtelijke aspecten van internationale ontvoering van kinderen alsmede algemene bepalingen met betrekking tot verzoeken tot teruggeleiding van ontvoerde kinderen over de Nederlandse grens en de uitvoering daarvan, *Stb.* 1990, 202.

⁵⁰ In the Netherlands everyone is required to register a change of residence within five days in the register of their municipality. However, the non-registration is only a minor offence.

child probably resides to look for the child or to the head of the public prosecutors in the Hague if that place is unknown. These requests have to be dealt with as a matter of priority. Police officers trying to locate are, so far as is reasonable, allowed to enter every place. In (at least) one case, a prosecutor asked the court for wire-taps at the grandparent's home to locate the child.⁵¹

Another important task of the Central Authority is to seek an amicable resolution of the case. If there is an agreement between the parents, the Central Authority may confirm this in a letter to the respondent. This stage, at which the Central Authority acts as an "intermediary" between the parents, can take a few weeks. If necessary, mediators can be involved.

Judicial System for Hearing Convention Applications

There is no system of concentrated jurisdiction for hearing the Convention cases in the Netherlands. This means that 19 District Courts as the courts of first instance, 5 Courts of Appeal and one Supreme Court have jurisdiction to hear Convention applications.

If the child's return is ordered, the District Court usually determines a timeline wherein the child must be returned. If not, the Central Authority determines a reasonable period, depending on the circumstances of the specific case, to comply with the court order. During that period the child and the parents can get prepared for the return of the child. Although the court might specify certain conditions for return, the concept of undertakings/mirror orders is not recognised in Dutch law.⁵² Nevertheless, there have been at least two decisions where a court ordered return under certain conditions.

Appeals

Return orders of District Courts are immediately enforceable, even if an appeal is lodged.

No authorisation or other decision is required for the enforcement of the return order. In addition, in international child abduction cases Dutch law has reduced the period within which the appeal can be lodged. No less importantly, Convention applications have priority over other cases.

Notice of appeal to the Court of Appeal (*Gerechtshof*) has to be given within two weeks after the decision of the District Court. A further appeal 'appeal in cassation' on a point of law lies to the Supreme Court (*Hoge Raad*) and must be lodged within four weeks after the decision of the Court of Appeal. Nevertheless, despite the expedited time frames in the legislation, in practice some delays have occurred in obtaining a decision from the Supreme Court.

Enforcement

The length of the enforcement proceedings depends on the timeline determined by the court in the decision. If there is no timeline, depending on the circumstances of the case, the average length of enforcement is between 2-3 weeks. During this period, the respondent is given the opportunity to comply with the return order voluntarily.

⁵¹ The Honourable Justice Frans van der Reijt in *The Judges' Newsletter*, Spring 2004, volume 7, p. 40.

⁵² But there is some discussion on this point. Some experts are of the opinion that children must not be returned if the respondent is not eligible for legal aid in cases of access and custody in the country of habitual residence and that a condition in this regard must be included in the return order.

Police Assisted Enforcement

If the respondent is not willing to return (together with) the child, the Central Authority will ask the applicant to collect the child. Police assisted enforcement is available should the applicant/police need to collect the child from the respondent who is unwilling to handover the child or escort them to the airport. Sometimes a member of the Child Protection Board accompanies the police.

Preventive Measures

To prevent failure of potential enforcement measures (e.g. where there is concern that the respondent may go into hiding or leave the country with the child), the court can, on its own motion, or upon request, prior to, or after a return order is issued, direct that the child be taken into provisional guardianship (*voorlopige voogdij*) or to order the child to be removed and placed into temporary care (*ondertoezichtstelling met uithuisplaatsing*). However, these measures are rarely utilised. Unlike some other countries, the respondent does not normally have to hand over his/her passport nor that of the child, nor other travel documents.

Coercive Measures

If the respondent fails to comply with the order the court may order the respondent to pay a *dwangsom*, which is a punitive sum payable to the applicant on a daily basis until the order is complied with. Another possibility is for the respondent to be committed to prison for a maximum of one year for failure to comply with a judicial order (*lijfswang*).⁵³ But of course, the imposition of fines or detentions may not in themselves bring the child back to the applicant and will not be in the best interests of the child in most cases. It is possible to appeal against these enforcement measures, but in most cases the court orders are immediately enforceable, even if appeal is lodged.

Some Problems Encountered in Practice

Child Moved to Another Country

In at least one case, after a return order was made, the respondent did not let the child return to the State of habitual residence, but moved the child to another country.

Child and Respondent Go into Hiding

There are a few cases in which return orders could not be enforced or enforcement was delayed, because the respondent and child had gone into hiding.

Sickness of the Child

There was at least one instance where the child could not immediately return because of illness.

Appeals

⁵³ It is also possible to take these measures on request of the Central Authority together with the return order, but usually the court orders a *dwangsom* or *lijfswang* in an interim injunction proceeding after the abductor fails to comply with the order for return.

Although, even if appeal has been lodged, return orders can be immediately enforced, in some cases appeal causes delay of enforcement. In quite a few cases, the children did not return before the hearing of the case in appeal.

Overall, however, enforcement does not appear to be an issue in many cases (less than three cases per year). The law appears to give sufficient powers to the Central Authority, and to other authorities such as the police, to ensure that return orders can be effectively and promptly enforced where necessary.

3.1.6. Romania

Once ratified, international Conventions are directly applicable in Romania, constituting a part of Romanian domestic law. Consequently, there is no need to implement the Conventions into the domestic legislation by a separate act of implementation.

On September 15, 2004 Romania passed the *Law No. 369/2004 on the Application of the Convention on Civil Aspects of International Child Abduction*.⁵⁴ The main reason for the new law was that there had been serious problems with the practical operation of the Convention in Romania. In particular, there was no uniform interpretation of the Convention by the Romanian courts which in turn led to inconsistent practices in dealing with applications and to extremely long periods for handling the applications and any problems with enforcement of return orders. However, despite the fact that the new law has been passed to address many of the general concerns with the Romanian system, this law is yet to be implemented in practice. In particular, the specialised court with concentrated jurisdiction has not been formed and the duties of the Central Authority are yet to be passed by Regulation.

The Central Authority

The duties of the Romanian Central Authority are performed by the Directorate for International Law, Judicial Co-operation and Foreign Legal Affairs-Department for International Legal Assistance in Civil, Commercial and Family Law at the Ministry of Justice. It is intended that a Regulation providing for a detailed description of the status and responsibilities of the Central Authority will be approved by the Minister of Justice in the near future. At the time of the research, the draft Regulation was under preparation and it is understood that it has now been enacted.

The Central Authority is first concerned to locate the abducted child within Romanian territory. To do so, the Central Authority co-operates with the Ministry of Administration and Interior. The Central Authority is empowered to employ the assistance of police forces and *gendarmerie*. It is also entitled to submit tracing requests to the local council and other authorities.

Once the child is located, the Central Authority initiates mediation between the parties and tries to achieve a voluntary return of the child or other amicable resolution of the case. However, due to unwillingness of the parties to negotiate, mediation usually fails. In such cases the Central Authority informs the Legal Directorate of the Department for International Legal Assistance in Civil, Commercial and Family Law about the case and requests the Legal Directorate to initiate return proceedings before the competent court. In court proceedings the applicant is represented by a legal counsel working at the Legal Directorate of the Ministry of Justice. This practice is at variance with the stated procedure. Under

⁵⁴ Promulgated by *Decree No. 697/2004* of the President of Romania.

the new law the Central Authority is required to be present/applicant and actively involved in the court proceedings.

Judicial System for Hearing Convention Applications

In 2004, a concentrated jurisdiction for hearing Convention cases was provided for in Romania. The law 369/2004 prospectively established that a specialist part of the Bucharest Tribunal (Bucharest Court for Minors and Family) should deal with Convention cases. However, this specialized court has not yet been formed. In addition, none of the courts approached in connection with the research had any knowledge of any 1980 Convention cases despite 14 pending cases reported by the Central Authority and the existence of the ECHR judgment.⁵⁵

The court has the right to take measures which appear to be desirable to protect the child and to prevent the respondent going into hiding or absconding (e.g. ordering the removal of passports, or to pay a financial bond, etc.). In the return order, the court can impose a civil fine up to 25 million lei for the possible non-compliance with the order.

Enforcement

The new legislative framework in Romania, which is particularly relevant to enforcement, requires the Central Authority to have a pro-active role in all aspects of Convention applications and the duties of the Central Authority will also be set out by Regulation.

In cases where the return order is not complied with voluntarily within the established time-frame, the Central Authority can apply for a writ of execution which the court transmits to the tax authorities for enforcement. If, after payment of the fine, the child is still not returned, further enforcement measures (i.e. collection/removal of the child) can be applied for in the courts including the payment of a daily fine by the respondent until the child returns. If applied for, the collection/removal of the child, a writ of execution can be issued by the court authorising the applicant (or through his representative) to take the child with the assistance of the police.

Practical Aspects of the 1980 Hague Convention

Ignaccolo – Zenide v Romania

On January 22, 1996, Mrs. Ignaccolo-Zenide lodged a complaint before the European Court of Human Rights that in breach of Article 8 of the Convention that guarantees the right to the respect for family life, the Romanian authorities did not take appropriate measures for the execution of the court orders that had settled the issue of minors' entrusting and established the children's abode with her.

The applicant complained, in particular, of the half-hearted attempts made to execute the order of December 14, 1994, which she described as "*pretences*", and pointed out that nothing had been done to find her daughters who had been hidden by their father each time before the bailiff arrived. She criticized the Romanian authorities for their total inactivity between December 1995 and January 1997.

⁵⁵ See above-case *Ignaccolo-Zenide – v – Romania* (App No 31679/96), (2001) 31 EHRR 7.

In their memorial, the Government maintained that they had discharged their positive obligations owed by them under Article 8 of the Convention and that there had consequently been no violation of that provision.

The Government maintained that the authorities in question had taken adequate and effective steps to have the order of December 14, 1994 executed, for example, by arranging for the bailiff to be assisted by police officers and by summoning the children's father to the Ministry of Justice. The Government pointed out that the failure to execute the above-mentioned order was due firstly to non-compliance by the father, for whose behavior the Government could not be held responsible and secondly, the children's refusal to go and live with the applicant, again a matter for which the Government could not be blamed.

Notwithstanding the Government's submissions, in the Court's view, *"the national authorities had neglected to make the efforts that could normally be expected of them to ensure that the applicant's rights were respected, thereby infringing her right to respect for her family life, as guaranteed by Article 8 of the Convention."*

Other Problems

1. There are doubts as to which court is competent to determine the issue of regulating the legal status of child involved in international abduction where the custody of the child is a secondary count vis-à-vis the main count of the dissolution of a marriage (in the event where the court had overruled the divorce request, but the child was located on the territory of a different state from the one where the competent court to rule on the marriage was)?
2. It is unclear where there is a distinction between "child" and "minor", taking into account that the Convention covers children involved in international abduction.
3. It is unclear as to who is the competent guardian authority to conduct a social investigation in this matter.

3.1.7. Slovakia

The Slovak Republic ratified the 1980 Hague Convention on October 24, 2000. The Convention entered into force on February 1, 2001.⁵⁶ There was no need to adopt an 'act of transformation' to implement the Convention as it is in most common law jurisdictions. In Slovakia, the incorporation of international treaties into the domestic law is based on the monist approach under which certain treaties may become directly applicable domestically and do not rely on subsequent national legislation to give them the force of law once they have been ratified.

Proactive Involvement of the Central Authority

The duties of the Slovak Central Authority are performed by the Centre for the International Legal Protection of Children and Youth (*Centrum pre medzinarodno-pravnu ochranu deti a mladeze*). The lawyers working at the Central Authority are highly specialized in Hague Convention matters. They have developed a considerable expertise and are pro-active with their involvement in abduction matters.

The Central Authority is first concerned to locate the child and the respondent. In most cases the applicant provides a full address of where the child resides in Slovakia. Nevertheless, if the whereabouts of the child is only generally indicated

⁵⁶ The adoption of the Convention was announced by the Notification of the Ministry of Foreign Affairs of the Slovak Republic No. 119/2001 Coll.

– e.g. by a district, a town or a village where the child might be found, the Central Authority employs the help of other authorities such as a local authority or a municipality and the search is conducted through these intermediaries.

If no indication at all is given, the Central Authority exercises its right to obtain data from the Central Registry of the Population. This right enables the Central Authority to submit tracing requests to the Registry in order to retrieve information regarding the whereabouts of the child and the respondent if they legally have their residence (temporary or permanent) within the territory of the Slovak Republic as there is legal duty to register such residence. Requests for co-operation with the local authorities, municipalities and the Central Registry of the Population are dealt with as a matter of priority.

Before January 1, 2006 there had been no obligation on the police to co-operate in locating the child and the respondent. However, since January 1, 2006 parental abduction has been criminalized⁵⁷ and the Central Authority anticipates finding support from the police in cases where the child cannot be located by other means.

Secondly, the Central Authority plays a key role in mediation between the parties involved. For this purpose the Central Authority requests a local authority of the district where the child resides to contact the respondent and to arrange a meeting of the respondent and a representative of the Central Authority. If the respondent is willing to attend the meeting, it is held at the office of the local authority as soon as possible. The aim of this meeting is to secure the child's voluntary return. If the respondent does not react to the summons or is reluctant to meet with the representative of the Central Authority, the Central Authority sends him/her a recorded mail requesting the voluntary return of the child within a period of 10 days.

If the attempt to secure the voluntary return of the child fails and no other amicable resolution is reached, the Central Authority, as the legal representative of the applicant, forwards the case to the competent court.

Judicial System for Hearing Convention Applications

There is no system of concentrated jurisdiction for hearing the Convention applications in Slovakia. This means that all 45 District Courts as the courts of the first instance, 8 Regional courts as the courts of appeal and one Supreme Court have jurisdiction to hear Convention applications. The lack of concentration of jurisdiction in a limited number of courts is the main obstacle to facilitating speedy disposal of Hague Convention proceedings. Judges are usually not familiar with the Hague Convention system. Consequently, the courts are unable to follow the principle of expedient procedure enunciated in the Convention.

Undertakings

Undertakings in Hague Convention matters are theoretically possible, although they are not explicitly regulated by the Slovak law. The legal nature of undertakings in Slovakia is therefore uncertain.

Appeals

⁵⁷ On January 1, 2006 a new Penal Code (Act No. 300/2005 Coll.) which recognized parental child abduction as a separate form of kidnapping came into effect. According to paragraph 210 of the Code, parental abduction is punishable by an imprisonment of 6 months up to 5 years.

Paragraph 204(1) of the Code of Civil Procedure allows an appeal against the first instance decision within a period of 15 days from the service of the decision to the parties. The return order therefore becomes final after 15 days if there is no appeal. If the appeal has been filed, the enforcement of the decision is stayed until the appeal decision has been handed down.

Enforcement

Return orders are not immediately enforceable. The successful applicant has to wait for at least 15 days before he/she can actually enforce his/her return order. If the respondent has lodged an appeal, the 'waiting period' for the enforcement of the order is significantly protracted as there are no expedited time-frames for appellate proceedings. Moreover, there are no expedited time-frames for the enforcement proceedings in the existing legislation.

The decision to return does not contain any details of the actual surrender of the child to the applicant nor specifies what to do if the respondent does not comply with the return order voluntarily. Given the relatively small number of Hague Convention cases which have ended in the return of the child being ordered by a Slovak court, the Central Authority has neither established a practice of how to secure the child's actual return if the respondent is unwilling to return the child voluntarily after the return order has been issued. The law, however, does not allow any coercive measures to be taken against the respondent without the return order being made enforceable by a competent Slovak court and the coercive measures to secure the return of the child being specified by the court.

In case the respondent does not comply with the return order within 3 days, the applicant wishing to have the decision to return made enforceable, must file a petition for the enforcement of the decision with the competent court.

Voluntary Adherence

Before an order of enforcement can be issued, the presiding judge must call upon the respondent to comply with the order. In this call he must also notify the respondent of the consequences resulting from the failure to observe the conditions stipulated in the court decision.

At the same time, the judge, as a rule, requests the municipality or a local child welfare authority to negotiate with the respondent in order to persuade him/her to comply with the return order voluntarily.

Coercive Measures

If the call by the presiding judge remains fruitless, the judge has a right to arrange the physical removal of the child from the respondent and the handover of the child to the applicant. It is left to the discretion of the judge to decide on the details of the actual surrender of the child. Depending on the circumstances of the case the judge may request the assistance of the municipality and/or government authorities such as the Central Authority, the local child care authority or the police to facilitate the actual removal and handover of the child to the applicant.

Preventive Measures

Although preventive measures such as collection of the child's and respondent's passport or removal of the child from the physical custody of the respondent are an important tool to strengthen the effectiveness of the Hague Convention enforcement system, there are no such measures expressly provided for in the

relevant provisions of the Slovak legal system. Nevertheless, the 'right of discretion' of the court allows measures which might act as deterrent to be included in the return order or the order of enforcement. Applicants are, however, reluctant to make applications for some of these measures as these steps might cause a psychological harm to the child (for example, a removal of the child from the physical custody of the respondent and his/her temporary placement in a foster family for the time of proceedings).

Lack of the Effective Enforcement of Access Orders

The effective enforcement of an access order depends to large extent on the willingness of the respondent to co-operate. Indeed, if the respondent does not voluntarily allow the applicant to exercise his/her access rights, there is no realistic possibility to enforce the order as unlike return orders, access orders may have to be enforced repeatedly and over a long period of time. In addition, the applicant may not be in a position to afford to travel repeatedly if attempts to enforce access order fail. Hence, it appears that generally, sanctions available for not complying with the access order do not bring a sufficient pressure on the respondent to guarantee the effective exercise of the applicant's access rights.

Final Observations

Despite some obvious weaknesses in the legal system in Slovakia, there has only been one incoming return case where a serious enforcement problem occurred.

In this case the respondent mother wrongfully removed 3 children (boys aged 7, 5, and 3 years) from Germany to Slovakia in June 2004. On behalf of the applicant father the Central Authority initiated the return proceedings in the competent court. The first instance court ordered the mother to return the children to the country of their habitual residence (Germany). The mother appealed but the appeal court upheld the first instance decision. Despite the final return order the mother refused to return the children arguing that the oldest child (aged 7) had started his first year of a primary education in Slovakia and it would not be in his best interests to interrupt the studies before the end of the school year. She also argued that the separation of the two younger boys from their elder brother would be contrary to their best interests.

The Central Authority lodged an application for the enforcement of the return order at the competent court. Although there was a concern that given the length of the children's residence in Slovakia (20 months) the return order may not have been enforced, it was finally enforced in February 2006.

However, given the fact that Slovakia ratified the Hague Convention only in 2000 and the Central Authority therefore has not handled a large number of Convention applications, it is difficult to draw a meaningful conclusion. Nevertheless, generally it appears that the operation of the Convention could be enhanced by improving the legal framework for child abduction matters. The crucial issues which should be addressed are: concentrated jurisdiction for hearing child abduction cases, expedited decision-making mechanisms, restricted and/or expedited appeal proceedings, immediate enforceability of return orders or expedited enforcement proceedings and provisions on preventive/interim measures.

A key element of the efficiency of the operation of the Convention in Slovakia is the work of the Central Authority. The lawyers at the Central Authority are highly-skilled in Hague Convention matters, co-operative and dedicated to their mission.

3.1.8. Sweden

In Sweden, the 1980 Hague Convention on the Civil Aspects of International Child Abduction is implemented by the *1989 Act on Recognition and Enforcement of Foreign Decisions on Custody and Related Matters and on Return of Children* (Swedish Code of Statutes SFS 1989:14) (hereinafter: the 1989 Act).

Judicial System for Hearing Convention Applications

Since 1 July 2006 jurisdiction to hear Convention applications has been restricted within the Swedish system.⁵⁸ The applications are heard by the Stockholm District Court at the first instance and by the Svea Court of Appeal in Stockholm at second instance.

There is a requirement within the 1989 Act for return applications to be dealt with expeditiously. If a decision has not been granted within 6 weeks from the date of application, the court is obliged to explain the reasons for the delay upon the request of the applicant.

Appeals

Using the legal system of appeals can be one mechanism by which a respondent parent may seek to delay return pursuant to a return order and accordingly hamper enforcement efforts. This is particularly relevant in Sweden where a return order may be made enforceable without hindrance of legal force. In practice, most respondents apply, and are granted, a stay of action.

Appeals must be filed within three weeks from the date the appellant was notified of the decision. Appeals from the first instance decision are common⁵⁹, but the courts have learnt how to deal with appeals and the whole process is dealt with expeditiously. It is also possible to appeal a decision for enforcement or seek a stay on the execution (stay of action) of a return order. However, the courts continue to treat such applications expeditiously, therefore in practice, only minor delays occur.

Enforcement

The enforcement of return orders is regulated by Sections 18 - 23 of the 1989 Act. According to Section 18 the court deciding a return application may combine a return order with a fine if it is likely that the child will not be returned without delay. Alternatively, the return order may be combined with an order for police assistance and/or an order for mediation. In practice, the primary method of enforcement used is police assisted enforcement ordered by the court.

In summary, the enforcement measures that can be used after the making of a return order are as follows:

- Penalty fee
- Order for police assisted enforcement
- Mediation (including mediation combined with an enforcement order)
- Immediate care – removal of the child

Penalty Fee

⁵⁸ Amendment to the 1989 Act (SFS 2006:462).

⁵⁹ According to the 2003 statistical survey, op. cit. at n. 25, 29% of applications going to court were appealed. The global average was 22%.

This measure can be ordered at the time the return order is made by combining the judgement with a penalty fee, or at subsequent enforcement proceedings. It is essentially a fine for non-compliance with the order so it acts as an incentive to comply voluntarily. The reliance on penalty fees is problematic for a number of reasons. Often the respondent will not have the financial means to pay it upon enforcement – or alternatively the amount provided is too low to act as a deterrent. Furthermore, an order combined with a penalty fee cannot be enforced once the date and time for enforcement has passed. Instead, the applicant has to go back to court in order to get the penalty fee enforced and get another enforcement order. This is a new procedure where the respondent may make objections and even the decision to enforce the penalty fee can be appealed. The court can also continue to make a penalty fee order at each enforcement proceeding.

Given the problems related with the penalty fee, this enforcement measure will only be ordered where it is thought that it will achieve enforcement. Accordingly, the commonly preferred procedure is police assisted enforcement.

Order for Police Assisted Enforcement

Police assisted enforcement is considered a drastic measure and the relevant legislation provides that it must always be executed in the most lenient way possible. The police must be accompanied, wherever possible, by someone who may serve as support for the child, such as a doctor and a child psychologist. The police attend the premises in plainclothes. If a mediator is also attending they will go ahead and talk to the respondent first. The applicant parent may also be present to receive the child.

An order for police assisted enforcement gives the police a discretion as to when and if they will execute the order. The police will normally contact the respondent and give them the opportunity to return voluntarily in the first instance. The police will also check to ensure there is no order staying the enforcement. If the respondent still refuses to return, the police are prohibited by law from enforcing the decision without prior notice to the respondent – hence they must announce their arrival. Announcing their arrival gives the respondent time to prepare the child but in some cases also results in the respondent absconding with the child or simply not being at home when required. In certain circumstances, for example, where there is perceived to be a grave risk to the child, the police may be able to attend without prior notice. If the respondent is not present at the first visit, the police can attend the house or child's school etc a second time without announcing their arrival prior to enforcement occurring.

As part of the police assisted enforcement process, the police may accompany a respondent and child to the airport to ensure they board their flight.

Mediation Combined with an Enforcement Order

In addition to mediation ordered to facilitate a voluntary agreement to return, the court may order mediation in combination with a penalty fee or police assisted enforcement. This may assist the respondent to come to terms with the requirement to return the child and may aid compliance with the return order on a voluntary basis.

Immediate Care – Removal of Child

The 1989 Act also provides for two additional measures whereby the child can be removed from the respondent. These are rarely utilised in Sweden. Under Section 19 the court can order, at any time during proceedings that the child be taken into immediate care if there is a risk that the child will be removed from Sweden or that enforcement will be obstructed. Police are responsible for implementing this order at their discretion. The court may also order that the child be taken into care in combination with a return order.

Section 20 provides the police with a similar right to take the child into care in a case where court proceedings have not yet been initiated, or where there is no time to await a court decision under Section 19. Such action must be immediately reported to the court for a hearing to take place. Again, this measure is rarely utilised and some police may not even be aware that this special provision operates outside the normal domestic care provisions.

Effective Location Powers

There are normally no issues in locating a child within Sweden, as all persons have to be registered on the population register. Both the Swedish Central Authority and police are able to conduct searches through the school system. However, where the Swedish Central Authority is unable to locate a child in the first instance the case is then referred to the police for them to locate the child. The police can also use Interpol if there is an existing international arrest warrant in place. Additionally, the solicitor to whom the case has been referred to might also conduct searches or hire a private detective.

Use of Mediation throughout Convention Processes

In accordance with Section 15 of the 1989 Act the court may commission a member of the social services board or the social services to mediate to accomplish a voluntary return. Such a commission may only be given if the court finds it likely that this will lead to a voluntary return and that the mediation process will not lead to unnecessary delays in the case.

The court can order mediation at any time during proceedings, including mediation combined with an enforcement order. The act of mediation itself during the proceedings, provided by trained family mediators, may resolve some issues between the parties and make the respondent more likely to return the child voluntarily, or comply with the return order. For example, conditions on return may be negotiated (by the mediator or the lawyers) and they can then be reflected in the agreement of the parties in the minutes of the order (but these are not enforceable as such).

In ordering mediation to occur in combination with the enforcement order, the mediator may also be able to assist the respondent to deal with the terms of the return order and make the child available to return. For example, in police assisted enforcement the mediator may enter the house to speak to the respondent parent prior to the police coming in to enforce the order.

Summary of Enforcement Issues

The Swedish system is generally effective in securing the prompt enforcement of return and access orders and in practice the system works well. All the practitioners interviewed indicated that they encountered few major enforcement problems in practice, although access applications were generally more difficult to enforce. In the context of return orders, there were difficulties in the part in getting the courts to make orders for police assisted enforcement rather than

imposing penalty fees but this position has now changed with police assisted enforcement being the norm. This is in part due to the specific law reforms introduced by Sweden in 1993 to address problems with enforcement in light of criticisms that penalty fees were not an effective enforcement measure.

Practitioners also indicated that over the past few years, the police (who in practice are responsible for the enforcement of return orders in Sweden) have also improved their procedures in relation to their willingness to act promptly and to undertake police assisted enforcement. However, it remains difficult to utilise the stronger enforcement measures available such as obtaining an order from the court for the child to be removed and placed in care, as either a preventive measure, or for the specific purpose of enforcement. Enforcement remains difficult in those rare cases where the parent absconds due to a lack of clear, transparent and effective location powers.

One general issue which partially relates to enforcement is the inability of the Swedish court to impose conditions within return orders. This has proved problematic as often the Swedish courts have been reluctant to order children to return where they are not satisfied as to the welfare of the child and parent upon return. In relation to outgoing applications, it has also been noted that foreign courts may decline to enforce (or make) a return order as the Swedish authorities cannot make mirror orders reflecting the conditions imposed on the return by the foreign court.

In the context of access matters, continued reliance on penalty fees as the main enforcement mechanism made enforcement difficult if the respondent was not willing to comply with the orders. It was difficult to secure orders for other types of enforcement in light of the restrictions in the law as to when police assisted enforcement could be ordered. Accordingly, the court was reluctant to make orders

3.1.9. The United States of America

The 1980 Hague Abduction Convention is only the fourth Hague Convention and the first family law Convention to which the United States of America has become a party. The Convention came into force on 1 July 1988 following implementation of the International Child Abduction Remedies Act 1988 (ICARA). Under USA law an international treaty is entitled to recognition as the "supreme law of the land". Consequently, the Hague Convention takes precedence over any conflicting Federal or State laws other than the Constitution.

In the USA the National Centre for Missing and Exploited Children (NCMEC) handles incoming Hague cases on behalf of the Office of Children's Issues under a tri-party agreement with the Department of State, as the U.S. Central Authority.

Effective Location Powers (prior to and after return order made)

NCMEC assists in discovering the whereabouts of wrongfully removed or retained children in the United States⁶⁰ and has a mandate to locate missing children.⁶¹ NCMEC works with law enforcement authorities (FBI, State and local authorities,

⁶⁰ Subcommittee on International Child Abduction of the Federal Agency Task Force on Missing and Exploited Children and the Policy Group on International Parental Kidnapping, "A Report to the Attorney General on International Parental Kidnapping", April 1999, p. 38.

⁶¹ Ibid.

US Marshals) to locate children, and has available many other tools for locating missing children, namely:⁶²

- The Federal Bureau of Investigation (FBI), at the request of a foreign police agency, may attempt to locate a child abducted to the USA in violation of the criminal laws of the requesting State.
- Personnel from the Federal Inspection Service, i.e. the Customs and Federal Inspection Services Personnel at U.S. Ports of Entry: U.S. Customs Service and Immigration and Naturalization Service (INS) may identify respondents and abducted children at U.S. borders and international airports.
- U.S. law enforcement personnel may, in any capacity (e.g. State, local, FBI, and FIS) and anywhere (e.g. at ports of entry or elsewhere in the country) use the National Crime Information Centre (NCIC) to cross-check information against NCIC files.
- Local, State or Federal law enforcement officers may request change-of-address information through the request change-of-address information through the U.S. Postal Inspection Service. The Postal Service has also a photo distribution programme to fax flyers of abducted children to post officers nationwide for display and for dissemination by mail carriers.
- The Defence Department Legal Assistance Officers and Worldwide Military Locator Services can, if the respondent is a member of the armed services or other family member accompanying is a service member, help to find the child by providing information on the service member's most recent duty assignment and location.
- Address information on respondents and abducted children may be available from The Federal Parent Locator Service (FPLS). This source of address information is particularly useful if the respondent has no previous employment history in the USA. However, a Social Security number is needed to do a search.⁶³
- The State Missing Children's Clearinghouses will assist in locating children when information suggests that a child may be in that State. Many clearinghouses are part of statewide law enforcement agencies and as such can co-ordinate with law enforcement investigations.⁶⁴
- Non-Profit Missing Children's Organisations are usually small local groups of victimised parents and other concerned individuals dedicated to the issues of missing and exploited children. They vary widely in the services they provide including helping a parent to organize the search and recovery process.⁶⁵
- Though most abducted children are successfully located through the efforts of professional law enforcement, the applicant has a right to hire a private investigator. Useful advice may be provided by Missing Children's Organisations that employ private investigators as consultants.⁶⁶
- Foreign police usually send messages through INTERPOL to alert U.S. authorities about the abduction if they believe that the respondent may travel to the USA. INTERPOL-U.S. National Central Bureau (USNCB) may work with NCMEC and/or local authorities to locate children abducted to the USA.⁶⁷

Judicial System for Hearing Convention Applications

⁶² Hague Conference on Private International Law, "Questionnaire on the Enforcement of Return Orders under the 1980 Hague Convention and of Access/Contact Orders : Response by the USA", p. 6
URL http://www.hcch.net/upload/abd_return_us.pdf

On Web March 2006.

⁶³ Op. cit. n 61, pp. 38-39.

⁶⁴ National Centre for Missing and Exploited Children, "Family Abduction: Prevention and Response", p. 60.

URL http://www.missingkids.com/en_US/publications/NC75.pdf

On Web March 2006.

⁶⁵ Ibid, p. 61.

⁶⁶ Ibid, p. 74.

⁶⁷ Op. cit. n 61, p. 39.

There is no system of concentrated jurisdiction for hearing the Convention applications in the USA. Both Federal courts and courts of the individual States have original jurisdiction to hear Convention cases. This means that potentially in excess of 30.000 judges have jurisdiction to hear a Convention case.⁶⁸

Processing of Applications

Among many different approaches to the processing of Hague applications, two in particular may be identified:

1. Position in Texas

The respondent is served with notice of the return hearing at 7.30 am on the date of the court hearing by Federal Marshals. They, with the child, are brought to the court for a substantive hearing on the return application. The practitioners interviewed have indicated that if the respondent seeks an adjournment to secure legal advice, they will make an application for the child to be placed in the care of the applicant until the final hearing. If a return order is made, the child will usually return that same day with the applicant.

2. Position in Illinois or California

In these States, the respondent is given advance notice of the final hearing date (usually within one-two weeks of the applications being filed). However, a range of *ex parte* orders may be obtained to secure the position of the child pending the return date.

The U.S. Central Authority will contact courts handling Hague Convention matters after six weeks to inquire as to the status of the matter. In general, delay in trial courts is not a widespread problem.⁶⁹

Return orders vary widely. Some spell out exactly what is expected from each party and the time within which the specified actions should be taken, whereas others state only in general terms that the child be returned to the requesting State.

Undertakings or pre-conditions on return involving actions to be taken in the requesting State are rarely issued.

Appeals

Orders for return are immediately enforceable, unless otherwise specified in the order or stayed pending appeal. Court rules vary with regard to whether stays are mandatory or discretionary.

Recognising that the Convention contemplates an expeditious decision, some courts will waive time limits given in which to file appellate briefs. Others have used expedited procedures to determine the appeal.

Many State courts have two levels of appeal from a trial court determination: an intermediate court of appeal and a final level of appeal. In the Federal court system, appeals from district court (court of first instance) decisions are made to Federal circuit Courts of Appeal. An appeal of a decision made by the Federal

⁶⁸ See Lowe N, Armstrong S and Mathias A, *Country Reports: United States* (NCMEC 2002) at 2.2.

⁶⁹ Though as against other Contracting States, Hague applications are disposed of relatively slowly. See the analysis of the USA in Part II of the 2003 Statistical Survey, op. cit. at n. 25.

Circuit Court or the final State court of appeal may be made to the U.S. Supreme Court. Only one appeal of a return order is permitted at each court level.

Enforcement

As a general matter, orders for return are immediately enforceable according to its terms. No extra enforcement authorisation or decision is necessary. Enforcement of the return order is initiated by the applicant generally through his/her attorney unless the applicant is acting in his/her own behalf. Enforcement of orders are supervised by the court issuing the order and assisted by law enforcement officers (i.e. Federal Marshals for Federal Court orders and State and local law enforcement agencies for State Court orders).

There is no specific timeline for enforcement of return orders other than any specific provisions included in the order itself. In this context, some attorneys interviewed stated that it was important to make certain that the order for return was as specific as possible. Orders that lack specificity may not be easily enforceable. As a rule, the respondent is expected to comply immediately with the terms of the order. Indeed, according to the practitioners interviewed, it seems that in the majority of cases, the practice adopted is for the child to return with the applicant (who is present at the hearing) on the same day that the return order is made. Even when circumstances of the case warrant some delay prior to the return occurring, the practice is to grant very short delays (usually between 1-30 days). Nevertheless, a court may allow a period of time for voluntary compliance with the return order or to allow practical arrangement for the return of the child to be made. If the respondent does not comply voluntarily with the order, the applicant may seek the assistance of law enforcement and/or petition the court for additional measures, such as contempt of court orders.⁷⁰

Enforcement Measures

Once a return order has been made, the courts seem willing to utilize a broad range of effective enforcement measures to secure the child's return and/or the child's handover to the applicant. One practitioner indicated that they always ensure that in the return orders (and voluntary agreements for return) there is a clear stipulation that failure to comply with the order is an offence under the relevant penal code and will result in imprisonment. The methods in which return orders are enforced vary from State to State; however, the enforcement mechanisms are basically the same. Those enforcement mechanisms include both statutory and non-statutory enforcement mechanisms, and are as follows:

1. Civil & Criminal Contempt Proceedings – courts may enforce return orders through their contempt powers, which include fine or imprisonment. If the person found in contempt (i.e. respondent) has the ability to comply with the return order but refuses to do so, the court may imprison the person until he/she complies with the order. In some US jurisdictions (e.g. Massachusetts), however, the process for filing civil contempt action can take weeks to months!
2. Pick-up order (also called a warrant for a Federal Marshall or a local law enforcement officer to collect the child, writ of habeas corpus, writ of attachment, writ of enforcement, warrant in lieu of a writ of habeas corpus) – *ex parte* order directing law enforcement officers to pick-up the abducted child. This enforcement measure is far more expeditious than contempt proceedings.

⁷⁰ Op .cit. n 61.

3. Federal and State Warrants for arrest of respondent parent – in Massachusetts, for example, the arrest order is a condition for the police to be involved in the enforcement. In California, there is a practice to obtain an ‘order directing return’ that authorizes the police/federal Marshall’s assistance to enforce the order if necessary. However, our empirical research showed that in practice the applicants have rarely had to rely on police or federal Marshall’s assistance to secure enforcement of the return order.
4. The use of the District Attorney’s Office to make certain that the order is enforced (only in California).

Preventive Measures

To prevent failure of potential enforcement measures (e.g. there is concern that the respondent may go into hiding or leave the country with the child), the following measures are available:

1. Removal of passports and travel documents;
2. Details of the return (i.e. specific conditions) within the return order;
3. Use of port alert system to prevent departure from the country;
4. *Ex parte* orders compelling the respondent to appear in court;
5. *Ex parte* orders compelling the respondent to keep the court informed of the child’s location at all times;
6. *Ex parte* orders for non-removal of child;
7. Interim order to place child in care, pending proceedings – where the respondent attends court and seeks adjournment to get legal advice, child is placed in care of applicant (or sometimes a neutral third person);
8. Temporary custody order entrusting the child into the custody of the applicant;
9. Use of a financial bond;
10. Use of electronic tagging device (in one case in the State of California).

Mediation

In the USA⁷¹, mediation is available through an independent charity “Child Find of America”. “Child Find’s” mediation programme is designed to prevent parental abduction and to return parentally abducted children to a legal environment through free, confidential dispute resolution. This programme features a toll free number that reaches staff mediators and caseworkers. The programme also offers a national network of volunteer professional mediators experienced in divorce, custodial and family mediation. Nevertheless, our empirical research has not indicated a high number of cases mediated in the USA.

4. SUMMARY OF COMMON PROBLEMS ENCOUNTERED

Although this research has been able to identify some weaknesses in the substantive law provisions, or the enforcement procedures used in each jurisdiction, in the jurisdictions surveyed, the enforcement system generally works in practice. Even those jurisdictions that do not routinely remove passports, or have border alert systems in place, few cases have been reported by those countries where enforcement has been unsuccessful because the respondent absconds with the child outside the jurisdiction. The enforcement

⁷¹ URL <http://www.childfindofamerica.org/programs.htm>
On Web April 2006.

problems encountered in each jurisdiction generally fall under the following categories:⁷²

- The child and respondent go into hiding [Australia, England & Wales, France, the Netherlands, Romania, Sweden, the USA].
- The child is removed to another country [the Netherlands-rarely, France-rarely].
- The child objects to being returned and refuses to travel/cooperate [Australia, England & Wales, France].
- The use of appeal system/legal system to delay enforcement [Australia, England & Wales, France- rarely -given the fact that as a rule return orders are enforceable notwithstanding an appeal, Romania, Slovakia, Sweden, the USA].
- The respondent engages in obstructive behaviour to delay/avoid enforcement [Australia, England & Wales, France, Slovakia, Sweden].
-Eg: the respondent refuses to reveal travel plans, changes travel plans, claims moving difficulties, refuses to sign visa applications etc.
- Enforcement of the return order is delayed because the parent cannot re-enter country of habitual residence [Australia, England & Wales, France, Germany, the Netherlands].
-Eg: for immigration reasons or because of a criminal warrant.
- Enforcement is delayed due to non-compliance with conditions/undertakings contained in return order, or a need to secure a mirror order in the requesting State [Australia, England & Wales, Germany, the USA].
-Eg: the applicant fails to pay money upfront or to comply with conditions; neither party can afford airfares; neither party can afford accommodation; the applicant is unable or unwilling to overturn a criminal warrant; lengthy process to secure mirror orders etc.
- Enforcement is delayed due to the impact of concurrent domestic custody proceedings in the requested State/requesting State [Netherlands; Romania, Slovakia, the USA].
- Enforcement is delayed due to the health/welfare of returning child [Australia, Netherlands, Sweden].
- Enforcement delayed due to the health of the respondent (e.g. illness, pregnancy) [the USA].
- Enforcement is delayed because the parents cannot fund travel arrangements (also relevant to conditions/undertakings) [Australia, England & Wales, France, Romania, Slovakia, the USA].
- Enforcement is delayed because the applicant parent did not seek the enforcement of the return order [Australia].
- Enforcement is delayed because the applicant parent changed his/her mind about pursuing the enforcement of the return order [Australia, England & Wales and Sweden].
- Court orders do not specify how the child's handover/return is to be effected nor within what time frame [France, Slovakia, the USA].
- Enforcement is delayed because of the pressure of public/media [France, Germany].
- Enforcement is delayed because the appellate court did not rule on the case for a long time without stating any reason (related to lack of awareness and knowledge of judges hearing Convention applications) [the USA].

5. POINTS OF GOOD PRACTICE

5. 1. Key Operative Principles (Pervasive Points)

⁷² For an excellent analysis of enforcement problems as evidenced by current law in Australia see Justice Joseph Kay in *The Judges' Newsletter* Volume VII/Spring 2004 p.10.

5.1.1. Speed

The obligation under the 1980 Convention to ensure the child's prompt return should apply equally to enforcement. Quite apart from the general need to keep the disruption in the child's life to a minimum the longer the child stays in the requested State the more likely there are to be enforcement difficulties.

5.1.2. Familiarity of All Those Involved with the Convention

It is vital that all those involved, i.e. judges, advocates, Central Authority personnel, mediators and experts are familiar with the Convention. It is evident from this research that a lot of potential enforcement problems can be avoided if those involved in the case are experienced. Moreover, if those involved are experienced, applications are likely to be disposed of more quickly. Mediators need to be familiar with the Convention so as to know the parameters within which they are working.

5.1.3. Effective Communication

It is important that communication can be made with the Central Authority at all times. This will ensure speedy processing and prosecution of the application. It is just as important that there is effective communication between the different agencies involved in enforcement so as to co-ordinate efforts and to prevent unnecessary delay.

5. 2. Effective Location Powers (prior to, and after, return order made)

- Location orders which enable various searches to be made (including authorising the police to enter premises and search for the child) are vital [*Australia, England & Wales, the Netherlands* (in which State a court order is not required); *Romania*⁷³].
- The use of police assistance to locate children is important [*Australia, England & Wales, France*- police specialized in protection of minors, *Germany*, , the *Netherlands, Romania, Slovakia* - if criminal proceedings has been brought, *Sweden, the USA*] – some countries require location orders (see above).
- The use of wire taps can be helpful in locating children [the *Netherlands*].
- The ability to obtain disclosure of information on children's whereabouts from various official authorities is crucial to speedy location in difficult cases [*Australia* (broad range of bodies); *England & Wales* (broad range of bodies); *France* (local authorities registries, police, gendarmie, social security files); *Germany* (Federal Criminal Police Office, youth welfare authorities, social affairs authorities, Federal Bureau of Motor Vehicles and Drivers, other authorities); the *Netherlands* (municipality register, public prosecutor); *Romania* (police, gendarmie, local council and other authorities); *Slovakia* (local authority, municipality, Central Registry of the Population); *Sweden* (population register) and the *USA*-FBI, State and local authorities, US Marshals, Federal Inspection Services, National Crime Information Centre, U.S. Postal Service, Defence Department Legal Assistance Officers and Worldwide Military Locator Services, Federal Parent Locator Service, State

⁷³ The extent to which Romanian location powers are effective might be questionable given the European Court of Human Rights decision, *Ignoccolo-Zenide -v- Romania*, op cit. n 3.

Missing Children's Clearinghouses, Non-Profit Missing Children's Organisations].

- The use of private investigators can be helpful to locate children [*Australia, England & Wales, France, Sweden, the USA*].
- The ability to require relatives etc to attend court and give information can also be helpful in locating children [*Australia, England & Wales*].
- The use of the media (after securing publicity order from the court) [*Australia, England & Wales*].
- Interpol (normally assists where a warrant for the abducting parent has been issued in the requesting State); International Social Service.

5. 3. Effective Preventive Measures

5.3.1. To Prevent Party Going into Hiding or Absconding

The following measures can be helpful to prevent the defendant from going into hiding or absconding with the child:

- The removal of passports and travel documents in majority of cases [*Australia, England & Wales, Germany-if ordered by the court, Romania, Slovakia – if ordered by the court, the USA*].
- Ordering the respondent to appear regularly at a police office [*Australia, Germany*].
- The making of an injunction restraining the movement of the parent/child to reside at a particular address [*Australia*].
- The making of *ex parte* orders compelling respondent to appear in court/to keep the court informed of the child's location at all times/order for non-removal of child [the *USA*].
- The use of a port alert system to prevent departure from the country [*Australia, England & Wales, Germany, the USA*].
- The use of private investigators to observe respondent and child's movements prior to return [*Australia*].
- Only returning passports to defendant and child at place of departure [*Australia, England & Wales*].
- Escorting the defendant and child to airport/departure lounge [*Australia, England & Wales, the Netherlands – rarely utilised, Sweden – rarely utilised, Slovakia-if ordered by the court*].
- The making of a collection/removal order to remove the child(ren) from the respondent for purpose of securing return (i.e. child uplifted and given to escort or applicant) [*Australia, England & Wales, the Netherlands and Sweden - rarely utilised*].
- The making of a collection/removal order to place the child in care, pending proceedings or to ensure return order can be enforced (*Australia, England & Wales, the Netherlands, Sweden – but rarely utilised in all jurisdictions, the USA*).
- Making an order providing for the child to attend counselling to assist them to come to terms with the return order and therefore alleviate risk of enforcement issues [*Australia*].
- Parents making a financial bond to return the child [*Australia, England & Wales, Romania, the USA*].
- The use of tracking device [*England & Wales, the USA-possible though not often utilised*].
- Requesting the handover of the child be at the embassy of the requesting State in the requested State [*Slovakia*].

5.3.2. Amicable Resolution of Issues

Procedures that assist parties to reach an amicable resolution, and in particular to achieve a voluntary return, can prevent enforcement problems from occurring in the first place. Clearly, where the parties have reached an agreement on the issues between them, they are much more likely to cooperate and abide by the terms of the agreement reached, and return the child voluntarily without enforcement issues arising. Examples of this practice are:

- The reunite pilot mediation programme in *England & Wales*.
- In *France*, there is well-developed system of mediation, particularly through the organisation called MAMIF (Mission of International Mediation Assistance for Families); availability of mediation even after a return order has been made.
- In the *Netherlands*, amicable resolutions of the issues are regularly sought by the Central Authority prior to court proceedings being initiated and may also refer the parties to mediation).
- Mediation is required to take place in *Romania* prior to referral to court (existing procedure and likely to be in new regulations for Central Authority procedure, but extent to which occurs in practice unknown).
- In *Slovakia*, an amicable resolution of issues is a top priority and it is sought prior to court proceedings being initiated as well as in course of enforcement proceedings (after a return order has been made).
- Use of court-ordered mediation e.g. in *Sweden* can help the parties to reach an amicable resolution.

It is also worth noting that where the respondent has agreed to return the child voluntarily after court proceedings have been initiated, jurisdictions such as *Australia* and *England & Wales* may stipulate the terms of the 'voluntary return' by way of entering into consent orders, therefore giving a legally enforceable basis for the voluntary return agreement.

5.3.3. Use of Undertakings / Conditions in Return Order

The use of undertakings/conditions within a return order can assist enforcement in two ways. It can

- (i) alleviate any fears, concerns or safety issues that the abducting parent may have regarding a return to the country of habitual residence (e.g. provision of accommodation, maintenance, temporary residence of child, protection measures etc); and
- (ii) ensure the prompt return of the child and to prevent illicit removal (i.e. child and respondent to return by direct flight and passports only returned when the parties reach the requesting State).

Both *Australia* and *England & Wales* have systems whereby conditions or undertakings can be attached to the return order. In some cases the courts in these jurisdictions have required a mirror order/safe harbour type order to be made in the requesting country prior to the return order being enforced. This is particularly relevant in cases where there are concerns for the safety of a returning parent or child or where the returning parent has no access to funds to support themselves and the child.

In *Germany*, undertakings in Hague Convention matters, in principle, are possible according to German procedural law, although they are not explicitly regulated in the relevant legislation and their legal nature is therefore uncertain.

The concept of undertakings or mirror orders is not recognised in the *Netherlands*. However, the court might write down certain conditions for the return within the considerations of the decision (particularly if the applicant

makes promises to the court). There have also been a few cases where the court ordered the child's return under certain conditions. Furthermore, the Dutch Central Authority also requires conditions to be met by the applicant as part of the resolution of the matter amicably.

In *Slovakia*, undertakings/conditions are not explicitly provided for. Nevertheless, it is believed⁷⁴ that if an undertaking/condition to be attached to a return order is applied for, the judge can decide as to whether incorporate the undertakings into the return order.

As in the *Netherlands*, the concept of undertakings or conditions is not recognised in *Sweden* but is currently under consideration for legislative reform.

In the *USA*, undertakings or pre-conditions on return involving actions to be taken in the requesting State are rarely issued but there is ample experience of making safe harbor orders and/or requiring mirror orders.

In contrast, there are also cases where the use of conditions/undertakings/mirror orders has resulted in delays to the enforcement of the return order.

5.3.4. Effective Co-operation and Communication between Agencies and Bodies involved in the Enforcement Process

The need for effective co-operation and communication is not just limited to internal co-operation within the requested State, but can also apply to a range of external personnel in the requesting State. For example, the use of judicial liaison between judges in the requesting and the requested States may aid enforcement by ensuring conditions for the return are complied with (for example, where it is desirable that the criminal warrant for the returning parent be suspended, or that the children need be placed directly into care upon their return etc). Using an incoming return application to *England & Wales* as an example, the following bodies might be involved in the enforcement process at any given time:

Internally: Judges, Tipstaff (High Court enforcement officer), police, solicitors, child welfare authorities, court staff, airlines, immigration authorities, passport office, Central Authority personnel etc.

Externally: Immigration and visa authorities of the requesting State, passport office, embassy staff, foreign central authority staff, judges, solicitors, police etc.

As highlighted, the number of possible personnel involved in the process reinforces the need for Contracting States to ensure effective co-operation and communication is maintained between all those involved. Additionally, in *Australia*, the effective communication and co-operation between the Commonwealth Central Authority and the responsible State and Territory Central Authority who may be undertaking the enforcement procedure(s) is particularly worth noting.

5.4. Effective Enforcement Measures

In some countries, such as *France*, the *Netherlands* and *Sweden*, the return order may be enforced immediately (the order is immediately executable even when an appeal is pending) although in practice further orders for enforcement are regularly obtained. A number of countries have a broad range of enforcement measures at their disposal which means enforcement can be tailored to the circumstances of the case and the most coercive measures can be utilised as a

⁷⁴ Interview with the lawyers at the Central Authority, January 4, 2006.

last resort (hence minimising the impact on the child). Set out below are examples of effective enforcement measures identified throughout this enquiry:

5.4.1. Collection / Removal of Child

In *Australia* and *England & Wales* urgent orders can be made on an *ex parte* basis for the police/welfare to remove/collect the child if necessary for enforcement, with the child to be handed over to the applicant, or another escort. The child can also be removed /collected in *Germany*, the *Netherlands* and *Sweden* through police assisted enforcement (see below). In *Romania*, a writ of execution can be issued by the court authorising the applicant (or through his representative) to take the child with the assistance of the police. It is worth noting that both *Sweden* and the *Netherlands* have a system whereby the police wear plainclothes and can be accompanied by a member of the relevant child welfare authority when enforcing orders.

5.4.2. Placement into Care

Australia, *England & Wales* and the *USA* have systems in place whereby, pursuant to a court order, the child can be removed and placed into temporary care for the purposes of enforcement. This may be whilst the applicant travels to collect the child, or to prevent the child from being removed whilst the return proceedings are pending (children may also be removed for welfare reasons). This option is also available in *France*, *Germany*, the *Netherlands* and *Sweden* but is even more rarely used in these jurisdictions than in the three jurisdictions originally mentioned.

5.4.3. Mediation / Use of Social Welfare Officers

Mediation and/or the use of Social Welfare Officers can be crucial in the enforcement process. Outlined below is the position in the States studied:

- In *Australia*, there is a system available to offer counselling, mediation, use of welfare workers to assist a respondent in coming to terms with the return decision, or to achieve voluntary returns.
- In *England & Wales*, the practitioners interviewed have indicated that children and family court reporters do provide some level of assistance in enforcement matters, particularly in those cases where a child is opposing the enforcement of the order. However, aside from the valuable work undertaken by Reunite, there is no systematic approach to the provision of counselling to assist a respondent (or child) to come to terms with the return decision. Nevertheless, in 1999 Reunite commenced a 3 year mediation pilot project in parental abduction matters under the 1980 Convention.
- In *France*, there are three bodies involved in providing mediation services in the course of return proceedings. First, it is the responsibility of the public prosecutor to seek an amicable resolution of issues. In most cases, the public prosecutor asks the specialized police service to visit the abductor and discuss the application prior to court proceedings being initiated. The public prosecutor attempts mediation also at the later stage of the proceedings. After an appeal being lodged against the return order, he mediates between the parents the conditions for the return of the child. Secondly, mediation is possible through the help of lawyers specializing in international children cases. Finally, a separate body, MAMIF, was set up in 2001. It can help the parents at any stage of the proceedings, particularly where problems with enforcement occur, to engage in dialogue and seek negotiated solutions.
- In *Germany*, mediation is generally not considered as an effective means of settlement of Hague Convention issues and there is no specialized body offering

mediation services to the parties. Nevertheless, at the enforcement stage, courts try to achieve an amicable solution even once the court order has become final and enforceable.

- If the child is taken into hiding, the *Netherlands* sometimes uses the Child Protection Board to prepare the respondent/child for return and to avoid the use of coercive enforcement measures. The Dutch Central Authority is actively involved in pursuing amicable resolution of applications prior to court action and may refer the parties to mediation.
- *Romania* and *Slovakia* also have a system of seeking an amicable resolution/mediation prior to court proceedings.
- In *Sweden*, the court can order mediation to be used in combination with an order for police assisted enforcement or penalty fines. Furthermore, when police assisted enforcement takes place, a social worker or psychologist attends with the police and talks to the abducting parent before the child is collected or enforcement occurs (such as police escorting abducting parent and child to the aircraft).
- In the *USA*⁷⁵, mediation is available through an independent charity "Child Find of America". *Child Find's* mediation programme is designed to prevent parental abduction and to return parentally abducted children to a legal environment through free, confidential dispute resolution. The programme also offers a national network of volunteer professional mediators experienced in divorce, custodial and family mediation.

5.4.4. Police Assisted Enforcement

In all countries the police can provide assistance to remove/collect the child for enforcement. In *Sweden*, there is a particular procedure of police assisted enforcement which is worth noting. Under this procedure, police are required to attend the premises with social workers and a doctor. Police assisted enforcement is undertaken as a result of a court order, with the respondent normally participating in those proceedings. In addition, the date and time for enforcement is usually announced to the respondent prior to police attendance. Social workers will usually talk to the parent before the child is removed. The police will normally wear civilian clothes (as in the *Netherlands*) to lessen the impact of the police presence on the child. In the *USA* (Massachusetts) the police can become involved once arrest order against the respondent is issued.

5.4.5. Escort to Flight

In *Australia*, it is possible to order the Central Authority staff or Australian Federal Police to escort respondent and child to the airport. In *England and Wales*, it is common where the respondent is returning with the child, for someone to be present at the airport on the day of departure and for that person to handover the travel documents and passports at the departure gate.

5.4.6. Penalty / Fines / Imprisonment in Civil Law Jurisdictions

Most jurisdictions can impose fines as a way of ensuring compliance with return orders. In the civil jurisdictions studied the position is as follows:

- In *Germany*, if the respondent does not comply with the return order, the court can order him/her to pay a fine (*Ordnungsgeld*) up to 5.000 Euros. If the respondent does not comply with the return order, the court can order his/her imprisonment (*Ordnungshaft*).

⁷⁵ URL <http://www.childfindofamerica.org/programs.htm>
On Web April 2006.

- In the *Netherlands*, the court can order the respondent to pay a daily fine (*Dwangsom*) until the order is complied with. It is also possible for a respondent to be committed to prison (*liifsdwang*) for a maximum of one year for failure to comply with a judicial order.
- In *Romania*, as part of the return order a civil fine for non compliance can be imposed. Once the time-frame for the return of the child has passed, the Central Authority can apply for a writ of execution which the court transmits to the tax authorities for enforcement. If, after payment of the fine, the child is still not returned, further enforcement measures can be applied for in the courts including the payment of a daily fine by the respondent until the child returns.
- In *Sweden*, the court can also include a penalty fine as an enforcement measure prior to invoking measures such as police assisted enforcement.

5.4.7. Contempt of Court / Imprisonment in Common Law Jurisdictions

In *Australia, England & Wales* and the *USA*, if a respondent does not comply with the court order for the child to be returned it is possible for the court to find them in contempt/impose a sanction for failure to comply with an order of the court and impose a penalty of imprisonment and/ or a fine. Contempt procedures, including the risk of imprisonment, may also be utilised as a means of persuading family members to provide evidence as to the respondent and child's location if they are in hiding. In the context of incoming abduction matters, contempt proceedings have rarely been utilised, as the ability to collect and remove the child has secured enforcement of the return order. Practitioners in *England and Wales* could only recall one case in recent years where contempt proceedings have been used and a relative imprisoned as a means of locating the child.⁷⁶

However, practitioners in these jurisdictions have noted that by informing parties of the existence of contempt laws, they can be persuasive in ensuring a respondent complies with the return order, or persuasive in persuading family members to disclose a child's whereabouts.

5.5. Concentrated Jurisdiction

The advantages of concentrated jurisdiction apply to all stages of the Convention process (see in particular the discussion at 5.1 of the *Guide to Good Practice, Part II – Implementing Measures*).⁷⁷ There are also obvious benefits to an application for enforcement being heard by a judge and other personnel familiar with the Convention and familiar with invoking coercive measures in abduction matters. *Australia, England & Wales, France*⁷⁸, *Germany* and *Sweden* have concentrated jurisdiction whereas the *Netherlands, Slovakia* and the *USA* do not. Under the new laws in *Romania*⁷⁹, jurisdiction is to be concentrated in one specialist court, with the law specifying that until this court is established, abduction applications are to be heard in a specialized section of the Bucharest Tribunal.

5.6. Expedited Access to the Courts for Enforcement Measures

⁷⁶ In *Australia*, there is one recorded contempt case where the abductor in an outgoing abduction matter was imprisoned in *Australia* due to their failure to comply with domestic court orders and the return order made by the foreign court pursuant to the Hague Convention. However, this was a punishment rather than an enforcement measure.

⁷⁷ Published by Jordans (2004).

⁷⁸ Elements of concentrated jurisdiction introduced in 2004.

⁷⁹ Law no. 369 of September 15 2004 on the application of the Convention on Civil Aspects of International Child Abduction (Law no. 369/2004) specified that the Bucharest Court for Minors and Family will have jurisdiction for abduction matters, however, the court still needs to be established.

In the context of enforcement, where further court orders are required, the ability to access the courts on an urgent basis is important.

Australia, England & Wales, Germany and Sweden have systems in place to ensure applications for enforcement are dealt with quickly by the court (note in particular the system in *Australia* where The Family Court of Australia provides an out of hours court service for urgent matters, the system in *England & Wales* where a 24 hour Duty Judge is available as well as daily access to the High Court Applications Judge; in *Germany* – it is a new rule that if an appeal has been lodged, it is for that regional Court of Appeal (*Oberlandesgericht*) alone to decide on enforcement measures). In the *USA*, courts may issue emergency orders on an *ex parte* basis. In many instances emergency orders can be obtained after hours.

5.7. Expedited Procedures for Appeals / Restrictions on Appeals

Concentrated jurisdiction and in particular the hearing of abduction matters by a higher level court can restrict the number of appeal avenues available to an unsuccessful defendant. Examples of good practice in the context of appeals are as follows:

- Having limited grounds on which the first instance decision can be appealed [*Australia and England & Wales*].
- Requiring permission/leave to appeal, requirement to lodge appeal within certain timeframe [*Australia, England & Wales, Germany, France, the Netherlands, Romania, Slovakia, Sweden, the USA*].
- Having an expedited process for appeal applications [*Australia* – occurs in practice as much as possible, *England & Wales, the Netherlands, Sweden, the USA*; but unknown in *France, Romania and Slovakia*].
- Restricting funding on legal aid for appeals – by only granting it on the merits of the case [*England & Wales*].
- Having a small pool of experts involved – so that applicants (and sometimes respondents) are given sound advice as to whether they have good prospects of success if they appeal [*Australia, England & Wales, Germany, the Netherlands*].
- Return orders being enforceable pending an appeal unless a stay is secured to ensure that prompt enforcement can occur in those cases where the appeal is clearly being used to delay enforcement and has no prospects of success [in *Australia*- although normally granted, the Family Court of Australia has refused to grant a stay on the return order in some cases pending appeal; in *England & Wales* – return orders are immediately enforceable unless the respondent has applied for a stay on enforcement of the return order; in *France*- a return order is, as a rule, immediately enforceable, though in practice it is often delayed; in *Germany*- a return order is not, as a rule, immediately enforceable; however, the regional Court of Appeal (*Oberlandesgericht*) is obliged to order the immediate enforceability of the return order if the appeal is obviously ill-founded, or if, after consideration of due interests of the parties involved, the return of the child even before the appellate decision appears reconcilable with the child's best interests; in the *Netherlands*-return orders are immediately enforceable; in *Romania and Slovakia* - return orders are not immediately enforceable; in *Sweden* - a return order may be made enforceable without hindrance of legal force. In practice, most respondents apply, and are granted, a stay of action; in the *USA* - a return order is immediately enforceable unless otherwise specified in the order or stayed pending an appeal.].

5.8. Small Pool of Experts Involved in Abduction Work (judges, practitioners, authorities etc) and Centralised/Proactive Central Authority

The existence of a small pool of experts can be a consequence of a concentrated jurisdiction. As already noted, concentrated jurisdiction ensures there is a group of experienced judges hearing applications, including applications for the purposes of enforcement. In *England & Wales*, the use of a small panel of solicitors, primarily located in London, has led to the development of a specialized group of legal experts involved in abduction matters (a similar process occurs in *Germany* and in *Australia* through the use of the State Central Authorities). In *England & Wales*, the respondent is also often referred to a solicitor from a panel firm. Where a restricted number of practitioners are used in a jurisdiction, parties are more likely to be given sound legal advice from experienced lawyers on the operation of the Convention, defences, prospects of success should they wish to appeal, and what enforcement measures can be taken should they not comply with the order.

A limited group of experts involved can also lead to the development of consistent practices for the handling of applications and the methods of enforcement best used (as well as the development of good working relationships with the other agencies involved in enforcement such as the police or welfare authorities). This is particularly relevant in *Australia*, the *Netherlands* and *Slovakia* where the Central Authority acts as the applicant in the proceedings and therefore has developed considerable expertise and is pro-active with their involvement in abduction matters.

In *France*, public prosecutors play an essential role at every stage of the return proceedings. Generally, they are familiar with the Hague Convention procedure. Similarly, it is very helpful that judges dealing with Convention applications are specialized in family law matters.

In *Germany*, the Central Authority initiates the court proceedings and then transmits the case to local counsel. The participation of counsel appointed on behalf of the applicant is of crucial importance in Hague Convention proceedings. Counsel attends hearings, submits pleadings, negotiates amicable solutions, keeps in touch with the applicant and the respondent or his/her representative, etc. The counsel is always a qualified attorney who is highly specialized in family law and experienced in Hague Convention cases. There is a relatively small group of approximately 20 counsel spread all over Germany. Similarly, the Central Authority personnel are highly qualified in the Convention case. The Central Authority plays an important role especially at the 'location' stage of the proceedings.

The new legislative framework in *Romania*, which is particularly relevant to enforcement, requires the Central Authority to have a pro-active role in all aspects of Convention applications and the duties of the Central Authority will also be set out by regulation.

5.9. Judges' Role

When making a return order it is helpful if judges are alive to the potential issue of enforcement and, wherever possible, spell out exactly what is expected by each party and the time within which the specified actions should be taken. For example, the order should contain details of the time, location and mechanisms of the child's handover to the parent and/or concerning the return journey to the requested State. Thought also needs to be given to the travel documents needed

and whose responsibility that is and, where appropriate, specific guidance should be given about the safe keeping of the child's passport.

In *Australia*, for example, the return order will specify detailed return arrangements, including, where available, that the return be by direct flight. In cases where there is a concern the respondent and child may disappear because of a stopover the return order may specify that the applicant parent or an escort accompany the respondent and child on the return flight. Moreover, the return order may specify who will pay the cost of the return travel (order can be made for the respondent to pay costs pursuant to Regulation 30).

In *France*, it has been found useful to spell out in the return order details such as exact time and location of the surrender of the child to the applicant and if there is a risk of non-compliance with the return order, to decide also on a possible penalty for the breach of the return order. It appears that there are fewer appeals against such return orders compared with the orders not containing terms of enforcement and/or penalties for possible non-compliance.

Similarly, in the *USA* some of the attorneys interviewed stated that it was important to make certain that the order for return was as specific as possible. Orders that lack specificity may not be easily enforceable.