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HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

Austria ratified the Hague Convention on the Civil Aspects of International Child Abduction¹ [hereinafter the Hague Convention] in September 1988,² and it became effective for Austria on October 1, 1988.³ Austria made no reservations to the Convention and the implementing legislation provides effective and generous mechanisms for processing Hague Convention requests. Nevertheless, it has been alleged that refusals to return children to foreign countries frequently occur in Austria,⁴ and in 2001, 2002, and 2003, the U. S. Department of State listed Austria as a non-complying country⁵ on the basis of one case that in 2003, caused the European Human Rights Court to issue a judgment against Austria.⁶

I. Domestic Laws and Regulations Implementing the Hague Convention**A. Statutory Law – Implementation in General**

The Austrian Implementing Act for the Hague Convention [hereinafter the Implementing Act]⁷ became effective on October 1, 1988, together with the Convention. The Implementing Act designates the Austrian Federal Ministry of Justice [hereinafter the Ministry] as the Central Authority⁸ within the

¹ The Hague, Oct. 25, 1980 T.I.A.S. 11670.

² Promulgated Sept. 14, 1988, BUNDESGESETZBLATT [BGBl, official law gazette for Austria] no. 1988/512.

³ BUNDESGESETZBLATT [official law gazette of Germany] 1991 II at 336.

⁴ A German newspaper article suggested that Austria was almost as reluctant as Germany to return abducted children [C. Brinke, *Im Zweifel für den Kidnapper*, SÜDDEUTSCHE ZEITUNG 12 (Oct. 21, 1999)].

⁵ The U. S. Department of State's assessment of non-compliance [U.S. Department of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction (Jun. 2003) <http://travel.state.gov/2003haguereport.html> (last accessed Jan. 3, 2004)] was based on one case in which the Austrian Courts refused to return a child after ordering its return on the grounds that circumstances had changed between the decision and its enforcement [Oberster Gerichtshof (OGH) decision, Oct. 15, 1996, docket no. 4 Ob 2288/96 s., 38 ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG, INTERNATIONALS PRIVATRECHT UND EUROPARECHT (ZfRV) 33 (1997)].

Various diplomatic and administrative attempts were made yet these did not resolve this impasse. The Austrian Ministry of Justice tried to get the parties to agree to more generous visitation rights, yet these efforts failed. The Austrian press expressed surprise at the intensity of U.S. diplomatic and administrative efforts which was viewed as an attempt to influence the Austrian courts [Kindesentführung: US-Tadel an Österreich, Die Presse (Jul. 11, 2000) <http://www.diepresse.at> (last accessed Jan. 3, 2004)]. The position of the United States was vindicated by the judgment of the European Court for Human Rights [*infra* note 6]. Various aspects of the case are discussed throughout this report.

⁶ European Court of Human Rights, Apr. 24, 2003, *Sylvester v. Austria*, 2003 Eur. Ct. H. R. 36812/97.

⁷ Bundesgesetz zur Durchführung des Übereinkommens vom 25. Oktober 1980 über die zivilrechtlichen Aspekte internationaler Kindesentführung HKÜG], June 9, 1988, BGBl. no. 1988/513.

⁸ Requests are to be directed to the Federal Minister at the following address:
Der Bundesminister für Justiz
A 1070 Wien
Museumstrasse 7
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meaning of article 6 of the Hague Convention and makes provisions for fitting Hague Convention requests into the Austrian administration of justice. In December 2003, the Implementing Act was amended by centralizing venue for Hague Convention proceedings in a smaller number of Districts Courts, so as to build judicial specialization and allow the judges to decide the cases faster.⁹

When a request arrives from abroad, the Ministry must first examine whether the child is located in another country, in which case the request will be forwarded in accordance with article 9 of the Convention. If it appears that the child is in Austria, the Ministry is called upon to have the request and the underlying documents translated into German, if they have been provided in a foreign language. This is done at the expense of the Austrian Federal Government. The Ministry then forwards the request to the president of the Austrian District Court [Bezirksgericht], which has venue over the case, who in turn assigns the case to the appropriate judge.

Upon receipt of the case, the judge must grant legal aid, including attorney services, to the requester, irrespective of the latter's financial circumstances. If the parties cannot be persuaded to settle on the return of the child, the judge must decide the case expeditiously in a non-contentious proceeding. In the enforcement of returns or visitation privileges, the judge may involve the youth welfare agencies, if this is deemed beneficial for the child.

The president of the District Court must keep the Ministry apprized of any steps taken in the proceeding and written explanations must be given if the proceeding is not terminated within 6 weeks. The Ministry may also ask the court and requester's counsel about the status of the proceeding.

B. Implementation by the Courts

In the past 15 years, the Austrian Supreme Court, in its role as the second and final appellate instance, has ruled on questions of law in a fair number of Hague Convention proceedings.¹⁰ In some of these cases the Supreme Court upheld return refusals when the abducted child did not have a habitual abode in the country from where he was taken¹¹ and when the claiming parent did not have custody or had not exercised custody.¹² In one such case the Supreme Court had upheld a return refusal, because the mother had been awarded sole custody in Canada, the habitual residence of the child, even though the Canadian courts had ordered the mother to stay in Canada with the child.¹³ These cases appear to indicate that the Austrian courts will refuse the return of the child, unless all the requirements of the Hague Convention are met. Moreover, the Austrian interpretation of the purposes of the Convention and of its

⁹ Ausserstreit-Begleitsgesetz [Companion Act to the Non-Contentious Proceedings Act]. Dec. 31, 2003, BGBl I no. 2003/112, art. 24, amending [HKÜG § 5, effective date Jan 5, 2005].

¹⁰ The reported cases involve claiming parents from other European countries, and from Canada and New Zealand. The only reported case involving an abduction from the United States appears to be the Sylvester case, *supra* notes 5 and 6.

¹¹ OGH decision, Oct. 25, 2002, 44 ZfRV 98 (2002)

¹² OGH decision, Oct. 30, 2003, docket no. 80b121/03g; OGH decision, Apr. 15, 1998, docket no. 7 Ob 72/98h, ÖSTERREICHISCHE JURISTEN-ZEITUNG 667 (1998).

¹³ OGH decision, Feb. 12, 1997, docket no. 35/97s, 70 ENTSCHEIDUNGEN DES ÖSTERREICHISCHEN GERICHTSHOFES IN ZIVILSACHEN, no. 27 (1998). The Court distinguished the case from its 1992 decision [OGH, Feb. 5, 1992, docket number 2 Ob 596/91, 34 ZfRV 32 (1993)] in which a similar order by English authorities was deemed to indicate joint custody.

limits is similar to that of the German courts. In fact, German case law is frequently cited in the Austrian decisions.¹⁴

A few of the Supreme Court decisions deal with the exception of article 13, subparagraph (b) that justifies a refusal when the return of the child would involve the risk of grave harm. In such cases the Supreme Court has held that one of the purposes of the Hague Convention is to protect the best interest of the child by not returning him to a dangerous situation.¹⁵ The evaluation of the facts in the individual cases is left to the courts of lower instance, and their judgments prevail unless errors of law are apparent.¹⁶

According to the Supreme Court, not every inconvenience or separation or minor difficulty, such as language difficulties or length of separation from the habitual residence amounts to a serious danger.¹⁷ However, the “grave harm” exception was applicable in a case involving the claiming father’s proven violence against the mother, as well as his unemployment and history of substance abuse.¹⁸ The exception was also deemed applicable in the denial of enforcement in the Sylvester case,¹⁹ because of the criminal prosecution of the taking mother in the state of residence, in conjunction with a custody decision over the abducted infant that was pronounced *in absentia* of the taking mother.

On visitation, the Supreme Court has ruled that Austrian domestic law governs the granting of visitation in Hague Convention requests, and that the Central Authority does not determine the extent of visitation, but merely serves to facilitate the request of the claiming parent.²⁰

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Best Interest of the Child

An explanation of Austrian domestic law on issues related to child care and custody may help to provide understanding of the legal environment in which Hague Convention requests are adjudicated in Austria. In particular, an understanding of the concept of the best interest of the child is essential. This concept is of overriding importance in all domestic decisions concerning children,²¹ and it is possible that this philosophy may carry over into the adjudication of Hague Convention requests.

¹⁴ OGH decision, Feb. 12, 1997, *supra* note 13.

¹⁵ OGH decision, May 29, 2000, docket no. 7 Ob 123/001, 42 ZfRV 30 (2001).

¹⁶ OGH decision, Mar. 28, 2000, 41 ZfRV 186 (2000).

¹⁷ OGH decision, Oct. 17, 2003, docket no. 1Ob246/03p.

¹⁸ OGH decision, June 19, 1997, 38[ZfRV] 249 (1997).

¹⁹ *Supra* notes 5 and 6.

²⁰ OGH decision, Jan. 18, 2000, 41 ZfRV 147 (2000).

²¹ M. Schwimann, 1 ABGB PRAXISKOMMENTAR 388 (Wien, 1997); B. Verschraegen, *Das Kind “Helene,”* in F. Matscher *et al.*, EUROPA IM AUFBRUCH – FESTSCHRIFT FRITZ SCHWIND 227 (Wien, 1993).

The criteria for determining the best interest of the child are expressed in the section 178 (a) of the Civil Code,²² which translates as follows:

In adjudging the welfare of the child, the personality and the needs of the child must be taken into appropriate consideration, in particular, his or her aptitudes, abilities, inclinations, and potential for development, as well as the lifestyle of the parents.

To determine what is in the best interest of the child, the court has to hear the child in all proceedings that involve custody, visitation, and related issues, unless the best interest of the child allows for no delay in the proceeding or the child is not capable of giving an intelligible response. Questioning can be delegated to the suitable youth welfare professional under certain circumstances, such as the questioning of a child younger than age 10.²³

B. Child Abduction – Civil Provisions

Austrian civil law appears to have no provisions on domestic child abductions. It appears that if the court is invoked about a domestic child abduction, the ensuing decision will be a custody decision that will decide according to the governing Civil Code provisions,²⁴ and these emphasize the best interest of the child.

C. Custody

In July 2001, a family law reform²⁵ became effective that brought significant changes to Austrian custody law. Prior to that reform, joint custody was generally not possible for divorced parents.²⁶ Since the reform, joint custody remains in effect when parents get divorced or separate permanently. However, one of the parents must be designated as the primary caretaker, with whom the child is to reside primarily. As to all other aspects of child care, the parents may agree on a division of tasks among them, and they may also agree that only one parent should have custody.²⁷ The parent who is not the primary caretaker has extensive rights of visitation, as well as the right to be kept informed and to be consulted.²⁸

In determining custody, the family courts play a central role. They must review the custody agreements of the parents and approve of them if they are in the best interest of the child. When a child is in an unsuitable custody situation, anyone may petition the court to remedy the situation, and a number of relatives, youth officials, as well as parents and foster parents, may petition for a change in custody.²⁹

²² Allgemeines Bürgerliches Gesetzbuch [ABGB], June 1, 1811, GESETZE UND VERORDNUNGEN IM JUSTIZFACHE no. 946, as amended.

²³ Currently Ausserstreitgesetz [old AusserStrG], August 9, 1854, REICHSGESETZBLATT [RGBL] number 1854/208, as amended, § 182 (b), formerly ABGB § 178 (b); as of January 1, 2005, Ausserstreitgesetz [new AusserStrG], Dec. 12, 2003, BGBl I no. 111/2003], § 105

²⁴ ABGB §§ 145-178 (a).

²⁵ Kindschaftsrechts-Änderungsgesetz 2001, BGBl I no. 2000/135.

²⁶ H. Weitzenböck, *Die Schwerpunkte des neuen österreichischen Kindschaftsrechts*, 54 DAS STANDESAMT 289 (2001).

²⁷ ABGB, § 177.

²⁸ ABGB, § 178.

²⁹ ABGB, § 176.

D. Child abduction – Criminal Provisions

The abduction of a child or a minor from the person who has custody is a criminal offense. It is punishable with up to 3 years in prison, if the child was younger than age 14, and with up to 1 year in prison if the minor is between the ages of 14 and 16. In either event, the offense can be prosecuted only upon request of the person whose custody rights had been breached.³⁰

E. Visitation

The parent who does not have custody or is not the primary caretaker has rights of visitation, and the extent of these rights may be determined by the court if the parents cannot agree.³¹ Since the 2001 reform of family law, visitation is viewed not only as a right of the parent, but also as also as a right of the child. The best interest of the child is to be considered in any judicial determinations, and parents have duties of good conduct,³² the violation of which may lead to changes in visitation rights or their entire cancellation.³³

The court may decide that visits must be supervised by an observer, of this appears to be in the best interest of the child, particularly if the child and the visiting parent have not seen each other for a long time or if there are reasons to fear that the visiting parent may behave inappropriately. Observed visits are a novelty in Austrian law, having been introduced through the 2001 Family Law Reform,³⁴ and practice on how these cases are to be handled may not as yet have evolved.³⁵

Difficulties may also arise in the enforcement of visitation rights decisions. Whereas contempt of court measures have been available in the currently effective version of the Non-Contentious Proceedings Act,³⁶ it appears that the courts tread carefully when contemplating coercive measures in decisions that relate to the welfare of the child.³⁷

III. Court System and Structure – Courts Handling the Hague Convention

Although Austria is a federated country, procedural law and the administration of justice are centralized in the Federation. Judicial independence is guaranteed by the Constitution which also prohibits forum shopping by requiring the courts to assign all cases to judges according to an assignment plan made in advance.³⁸ The Austrian court system is very specialized, providing, in addition to the courts of

³⁰ Strafgesetzbuch [Criminal Code], Jan. 23, 1974, BGBl no. 1974/60, as amended, § 195.

³¹ ABGB, §§ 148 and 178.

³² ABGB, § 145 (b).

³³ Weitzenböck, *supra* note 26 at 292.

³⁴ Old AusserStrG, § 185c; new AusserStrG § 111.

³⁵ Weitzenböck, *supra* note 33.

³⁶ Old AusserStrG, § 19.

³⁷ Weitzenböck, *supra* note 33. *See also infra*, note 48 and 49 and accompanying text.

³⁸ Bundes-Verfassungsgesetz, BGBl. no. 1/1930, art. 87, as amended.

ordinary jurisdiction, special courts for labor disputes and administrative matters, while constitutional issues are decided by the Constitutional Court.³⁹

Hague Convention requests are adjudicated by the courts of ordinary jurisdiction, in non-contentious proceedings.⁴⁰ These family court proceedings tend to be even more inquisitorial than Austrian proceedings in general, thus allowing the judge much latitude in organizing the proceeding, while requiring a less formal conduct by the parties. The judge decides what use is to be made of the youth welfare offices to provide counseling, evaluations, or other services. The judge may also call for expert testimony by child care professionals. However, in doing so, the judge must balance the desirability of investigations with the obligation to speed the proceeding as much as possible, as is provided in the Convention and the Implementing Statute. In the interest of speed, it is even permissible for the Austrian court to deny a hearing.⁴¹

In the past, Austrian case law justified procedural delays to protect the welfare of the child.⁴² Since the judgment of the European Human Rights Court in the Sylvester case,⁴³ the Austrian Supreme Court, when remanding a case, has urged the lower courts to decide speedily.⁴⁴

The chain of appeals in Hague Convention requests goes from the single judge at the local court [Bezirksgericht] to a panel of judges at the Regional Court [Landesgericht] as the first appellate instance,⁴⁵ and from there to a panel of judges at the Supreme Court as the second and last appellate instance. In appeals before the Regional Courts, new developments may be pleaded and the facts may be reevaluated. Before the Supreme Court, only questions of law are reviewed, and the Supreme Court will deny certiorari if the lower court judgment contains no errors that need to be corrected.⁴⁶

IV. Law Enforcement System

Enforcement of final Hague Convention decisions is carried out by applying the measures provided for contempt of court in non-contentious proceedings.⁴⁷ The primary means of coercion foreseen by the statute are the issuance of orders and the imposition of coercive fines or detention. In addition, direct force may be exercised through the bailiff or the police forces. The court of execution may also involve the youth welfare agencies in effecting the return of the child or in the enforcement of visitation rights.

³⁹ F. Schwind and Fritz Zemen, *Austria*, in I INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW A 67 (Tübingen, 1973).

⁴⁰ HÜKG § 5.

⁴¹ OGH decision, Apr. 28, 1992, docket no. 4 Ob 1537/92, 34 ZfRV 32 (1993).

⁴² OGH decision, Jun. 19, 1997, 38 ZfRV 249 (1997).

⁴³ *Supra* note 6.

⁴⁴ *Supra* note 17.

⁴⁵ Jurisdiktionsnorm [Court Organization Act], August 1, 1895, RGBl no. 1895/111, as amended, § 3.

⁴⁶ Currently, old AusserStrG, § 14; E. Feil, VERFAHREN AUSSER STREITSACHEN 236 (Wien, 2000); as of Jan. 2005, new AusserStrG, §§ 53 and 62.

⁴⁷ Currently old AusserStrG, § 19; Feil, *supra* note 46, at 237. Verfahren ausser Streitsachen 237 (Wien, 2000); as of Jan. 5, 2005, new AusserStrG § 110 in conjunction with its § 79.

If necessary, the court may also appoint a warden, at the expense of the non-complying party.

It appears that in the past the Austrian courts have been reluctant to use all the coercive means at their disposal when enforcing the return of a child. At least, this appears to have been the case in the Sylvester case,⁴⁸ when two attempts at enforcing the return of the child could not be carried out, because the mother could not be located. According to the new Act on Non-Contentious Jurisdiction, the courts may be even more justified in refusing enforcement, because the law now specifically states that the court may refrain from initiating or continuing enforcement if this would be detrimental to the best interest of the child.⁴⁹

A Supreme court decision of 1996,⁵⁰ also in the Sylvester case, indicates that the welfare of the child can still be raised as an issue even after a court decision ordering the return of a child becomes enforceable. According to the 1996 holding of the Supreme Court, the local court called upon to execute the decree to return the child must first decide whether this execution would serve the welfare of the child. This decision is to be made in accordance with Austrian law, while taking into consideration the purposes of the Hague Convention. It appears that a decision refusing the return of the child at such a late stage in the proceeding must be made by the court on its own initiative if the court becomes aware of circumstances warranting such a measure. In addition, the party ordered to produce the child may also request a denial of the execution at this stage. In order to do so, the party must bring new evidence of circumstances that indicate that the welfare of the child would be seriously endangered by the execution. Such execution decisions are again appealable in two instances up to the Supreme Court.

The sequence of events in the Sylvester case was as follows: on October 30, 1995, the Austrian mother abducted the child, a 13 month old infant, from the State of Michigan, where she and the child and the father, a U.S. citizen, had been residing. The Austrian District Court ordered the return of the child on December 20, and the appellate court upheld this decision on January 19, 1996. The Supreme Court rejected the appeal on February 27, 1996, but there was a 2-month delay before the file of the case was returned to the District Court, which issued an enforcement order on May 8, 1996. The actual enforcement on May 10 could not be carried out because the mother could not be found by the bailiff.

Further court applications by the taking mother led to a decision of October 15, 1996, of the Austrian Supreme court in which the Court upheld a refusal to return the child, on the grounds of changed circumstances.⁵¹ The lapse of time made the father unfamiliar to the child, and the increased importance of the taking mother's allegations of the father's sexual misconduct was more damaging considering the child's increased age. Further applications for the return of the child were dismissed by the District Court and Appellate Court in April and May of 1997, primarily because of the threatening criminal prosecution of the taking mother in Michigan, and the importance of a safe harbor agreement by the father was downplayed.

On April 14, 2003, the European Court of Human Rights issued a judgment against Austria⁵²

⁴⁸ *Supra* notes 5 and 6.

⁴⁹ New AusserStrG, §110, ¶ 3.

⁵⁰ *Supra* note 5.

⁵¹ *Id.*

⁵² *Supra* note 6.

holding that Austria's manner of enforcing the underlying return decision violated the claiming parent's and the abducted child's right of privacy and family life that is guaranteed by article 8 of the European Human Rights Convention.⁵³ The Court also awarded costs and damages for non-pecuniary suffering to the claimant. The Court held that the 2-month delay between the Supreme Court decision of February 27, 1996 and the return of the file to the enforcing District Court was inappropriate, as was the lack of action on the part of the authorities to locate the child at time of enforcement.

It should not be difficult to locate a child in Austria, because Austria is a small country and residents and visitors must report any changes in their residence or temporary abode to the local authorities. Landlords and innkeepers are required to cooperate in the observance of these legal provisions that are enforced by the Federal police, and in smaller communities, by the local administrative authorities.⁵⁴

V. Legal Assistance Programs

As of January 1, 2005, Austria will provide legal aid for all court proceedings of claiming parents, and this assistance will include representation by an Austrian attorney, free of charge.⁵⁵ Even under current law, there appears to be little need for legal aid in Hague Convention requests, because Austria has made no reservation to article 26 of the Convention and, therefore, should be willing to bear the expenses from any administrative action and court proceedings. Moreover, Austria has provided, in the Implementing Act, that translations of documents will be made at the expense of the Austrian Federal Government and that legal assistance is provided to requesting parties at the trial stage through the assignment of a law clerk, and for appellate proceedings, through the appointment of an attorney, both free of charge to the party requesting the return of the child or the granting of visitation rights.⁵⁶

Austria grants legal assistance to needy parties in Austrian proceedings. A party must apply for this benefit with the trial court where the case is pending and the decision on the granting of legal aid and on the extent and types of benefits to be provided is made by that court, after evaluation of the circumstances of the individual case. Legal aid benefits can be fairly extensive, covering costs directly related to the proceeding. Not included as a benefit, however, is the cost of investigative work during the pre-trial phase or in preparation of enforcement.⁵⁷

VI. Conclusion

Austria has recently undertaken steps to improve Hague Convention proceedings. Following the controversy with the United States over the Sylvester case, Austria has drafted legislation to centralize venue in a handful of local courts and to increase the already generous level of legal assistance for claiming parents. These measures have been enacted and are scheduled to go into effect in January 2005. Following the European Human Rights Court's judgement against Austria, also in the Sylvester case, it

⁵³ Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, EUROPEAN TREATY SERIES No. 5, ratified by Austria Mar. 20, 1952, BGBl no. 1958/210.

⁵⁴ Meldegesetz 1991, BGBl. no. 1992/2.

⁵⁵ HKÜG, as amended by Ausserstreit-Begleitgesetz, *supra* note 9, § 5.

⁵⁶ HKÜG, as initially enacted, § 5.

⁵⁷ Zivilprozessordnung, Aug. 1, 1895, RGBl. no. 1895/113, as amended, §§63 - 73.

appears that the Austrian judiciary aims at faster adjudications of initial decisions, appeals, remands, and enforcement orders.

It may be too early to tell what new case law will result from the 2001 Family Law Reform and the, not as yet effective, 2004 reform of family proceedings and how these will affect Hague Convention requests. In the meantime, a guess may be hazarded that Austrian courts will continue to refuse the return of a child if the prerequisites of the Convention are not met and if the return is deemed to be contrary to the best interests of the child. It is possible that in determining what is best for the child, the same high standards may be imposed in Hague Convention requests that are required by law in domestic cases. It appears moreover, the visitation cases will continue to be adjudged according to Austrian law.

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