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## GERMANY

## HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

**Introduction**

Germany ratified the Hague Convention on the Civil Aspects of International Child Abduction<sup>1</sup> [hereinafter the Hague Convention] on April 5, 1990,<sup>2</sup> and it entered into effect for Germany on December 1, 1990.<sup>3</sup> Since then, Germany has experienced a steady stream of requests for the return of abducted children.<sup>4</sup> According to international criticism, much of it coming from the United States,<sup>5</sup> Germany has frequently refused to return children when the taking parent was German.<sup>6</sup> This criticism was particularly strong in the years 1999 to 2002, and it led Germany to enact a procedural reform. In addition, Germany and the United States set up a binational commission to pursue cooperative approaches.

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

The German Implementing Act<sup>7</sup> designates the Federal Public Prosecutor of the Federal Court of Justice as the Central Authority<sup>8</sup> for the Hague Convention. The Central Authority is called upon to undertake all necessary measures to locate a child and to effect its return to the claimant from the requesting country and to assist in visitation cases. For these purposes, the Central Authority is empowered to communicate with other German and foreign authorities, file appropriate actions in German courts, represent the claimant from the requesting state in and out of court, and to act on its own initiative

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<sup>1</sup> The Hague, Oct. 25, 1980, T.I.A.S. 11670.

<sup>2</sup> Gesetz, Apr. 5, 1990, BUNDESGESETZBLATT, (BGBl, official law gazette of the Federal Republic of Germany) II 206.

<sup>3</sup> Bekanntmachung, Nov. 12, 1990 (BGBl. 1991 II 329).

<sup>4</sup> A. Schulz, *Internationale Regelungen zum Sorge- und Umgangsrecht*, 50 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT [FamRZ] 342 (2003).

<sup>5</sup> June 2003 Report to Congress on International Child Abductions, [U.S. Department of State, <http://travel.state.gov/abduct>]; T. Johnson, *The Hague Child Abduction Convention: diminishing Returns and Little to Celebrate for Americans*, 33 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS [NYUJ Int'L] at 125 (2000). K. Siehr, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction*, 33 NYU JInt'L at 207 (2000).

<sup>6</sup> In 2003, 41 open abduction cases and 37 open access cases were listed for Germany [*Id.* Attachment A: Open Abduction Cases by Country]

<sup>7</sup> The German Act Implementing Custody Agreements [Gesetz zur Ausführung von Sorgerechtsübereinkommen 9 (SorgÜbAG), Apr. 5, 1990 (BGBl. I 701)] implements both the Hague Convention and the European Convention on Recognition on Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children [Luxembourg, May 20, 1980, ratified by Gesetz, *supra* note 2].

<sup>8</sup> On August 1, 1999, the Central Authority moved from Berlin to Bonn. The current address is:  
Der Generalbundesanwalt beim Bundesgerichtshof  
-- Zentrale Behörde  
53094 Bonn  
GERMANY  
Telephone: 49.228.41040; Fax: 49.228.4105050.

to uphold the purposes of the Convention.<sup>9</sup>

Claimants under the Hague Convention may submit their applications directly to the German Central Authority or route the application through the Central Authority of the requesting country. Claimants also may forego the services of either Central Authority and make their claims directly in the German court. In cases where a voluntary solution appears unlikely, the latter approach may save time. In either event, applications and accompanying documents must be translated into German.

The German Central Authority will check received applications for propriety and completeness. Then, the person who has abducted the child will be requested to return the child within 5 days. If the abductor does not comply, the Central Authority first will work toward a voluntary return of the child before recommending legal action. Throughout the pendency of an application the Central Authority may involve the German Youth Welfare Offices to provide various services to facilitate the voluntary return of the child. If the child cannot be located, the Central Authority may ask the Federal Prosecutor for assistance.<sup>10</sup> If the abductor continues to refuse cooperation, a court proceeding will be initiated. In visitation cases, the process is similar, also involving the Youth Welfare Offices.

In recent years Germany appears to have received between 70 and 100 requests per year, and allegedly 60 to 70% of these have been resolved in a non-controversial fashion, whereas the remaining 30 to 40% have required court proceedings, with a fair percentage of the latter having resulted in a refusal to return the child.<sup>11</sup> A contributing factor in the judicial denials of these requests may have been the length of the German proceedings, and this problem was addressed in the reform legislation of 1999 that centralized the venue for Hague Convention proceedings in 20 family courts.<sup>12</sup>

## B. Implementation by the Courts

The statutory base for a German court decision on a Hague Convention request is the Convention itself, and German statutory law has not changed the substantive requirements of the Convention. Nevertheless, German courts have interpreted the Convention in a manner that has led to the rejection of many requests, and many of the first instance decisions have been upheld by higher courts, even at times by the Federal Constitutional Court. In particular, Germany has often applied article 12 of the Convention to justify the refusal of a request in which a child had been away with the taking parent for longer than 1 year. Germany also has applied article 13 of the Convention to find the threat of serious harm in the foreign environment from which the child was taken and allowed children of a tender age to express a preference for remaining with the taking parent. It may be of interest which features of German law in general favor the German judicial practice.

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<sup>9</sup> The functions of the Central Authority are described in: P. Finger, *Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung*, 86 ZENTRALBLATT FÜR JUGENDRECHT 15 (1999); other recent articles on the German practice are A. Bach, *Das Haager Kindesentführungsübereinkommen in der Praxis*, 44 ZEITSCHRIFT FÜR DIE GESAMTE FAMILIENRICHTSPRAXIS [FamRZ] 1051 (1997); N. Lowe and A. Perry, *Die Wirksamkeit des Haager und des Europäischen Übereinkommens zur internationalen Kindesentführung zwischen England und Deutschland*, 45 FamRZ 1073 (1998); M. D. Krüger, *Das Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung*, 52 MONATSSCHRIFT FÜR DEUTSCHES RECHT 695 (1998).

<sup>10</sup> A. Hutchinson, Rachel Roberts, and Henry Setright, *INTERNATIONAL PARENTAL CHILD ABDUCTION* 100 (London, 1998).

<sup>11</sup> Schulz, *supra* note 4.

<sup>12</sup> Gesetz zur Änderung von Vorschriften auf dem Gebiet der Anerkennung und Vollstreckung ausländischer Entscheidungen, Feb. 19, 2001, BGBl. I 288, art. 2, No. 6.

An important aspect of German law is the Federal Constitution's human rights guarantees,<sup>13</sup> in particular, article 6 guaranteeing the family and rights of children and parents; articles 1 and 2, guaranteeing human dignity and liberty; and article 103, guaranteeing due process. These come into play in adjudicating both domestic and international child abductions cases. Three decisions of the Federal Constitutional Court may indicate how various aspects of German domestic law may influence decisions to return a child under the Hague Convention.

The first case [hereinafter *Tiedman* case]<sup>14</sup> involved two children of a French mother and a German father. The children had first been abducted to France by the French mother, contrary to a German court order, and had then been re-abducted by the German father and brought back to Germany. The mother's request for a return of the children was granted by the German Appellate Court; however, this decision was reversed by the Federal Constitutional Court. The court held that a careful examination of the welfare of the child is constitutionally mandated in re-abduction cases so that the child will not be shuttled back and forth due to the conflicting court decisions of different countries. Moreover, the court held that the Constitution mandates the appointment of special counsel for a family court proceeding on child abductions if there is a possibility that the interests of the child may conflict with those of the parents, as is required since the 1999 law reform (see above). In the case at issue, such counsel had been appointed and had initiated the complaint to the Federal Constitutional Court.

In the second case<sup>15</sup> the Federal Constitutional Court upheld the decisions of the lower courts that ordered the return of two children to Sweden where they had been abducted by their German mother. The court distinguished the case from the *Tiedman* case by stating that it did not involve a re-abduction and the possibility of having the children moved back and forth on the basis of contrary court decisions.

In the third case, the Federal Constitutional court upheld the decisions of a German family court and appellate court that refused to return a child under a Hague Convention request. The court upheld the use of the exception of article 13, paragraph 2, because the children had been questioned about their preference and stated that they preferred to stay with the German parent.<sup>16</sup> The court held that there is no rigid minimum age for considering the wishes of the child. In the case at issue, the children were 4 and 7 years of age when they were questioned. One of the lower courts had held that the statements of the older child were relevant and that separating the children would have been too hard on the children.

More recent cases show a more differentiated picture. Some of these uphold the international understanding of the purposes of the Convention, whereas others appear to continue the German practice of interpreting the best interest of the child into the Convention.

A decision of the Appellate Court of Zweibrücken of January 2000,<sup>17</sup> ordered the return of children to the United States and rejected the claimed exception of article 13 by the mother, who alleged that the children would suffer grave injury, because the father had left the mother prior to the abduction and

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<sup>13</sup> Grundgesetz für die Bundesrepublik Deutschland, May 23, 1949, BGBI 1.

<sup>14</sup> Decision of Bundesverfassungsgericht [BVerfG], Oct. 29, 1998, docket No. 2 BvR 1206/98, EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 612 (1998).

<sup>15</sup> BVERFG decision, Mar. 9, 1999, docket No. 420/1999.

<sup>16</sup> BVERFG decision, May 3, 1999, docket No. 2 BvR 6/99, reprinted 46 FamRZ 1053 (1999).

<sup>17</sup> Decision of Pfälzisches Oberlandesgericht [OLG] Zweibrücken, Jan. 15, 2000 docket number 5 UF 112/00.

thereby had caused the mother to suffer serious financial difficulties. The court held that these circumstances did not indicate that the father no longer had custody and also did not amount to a serious jeopardy for the children. The court also disregarded the argument of the mother that her return with the children to the United States would be a financial hardship.

The decision, however, was not executed. The mother refused to relinquish the children, and the father requested that the children be removed, if need be, by force through the sheriff and the Youth Welfare Office. The court rejected these requests on the grounds that the exception of article 13 of the Hague Convention – serious injury to the children – applies to the entire proceeding, including the execution of a court decision. The court had requested an expert opinion on the effects of a forceful removal of the children, and the expert had determined that the forceful removal would pose a grave risk to the emotional welfare of the children.<sup>18</sup> The case has since become moot, because the parents agreed that the mother should have custody.<sup>19</sup>

A decision of the Appellate Court of Rostock of 2001<sup>20</sup> appears to introduce a novel concept in the interpretation of the Hague Convention. The court held that the purpose of the Convention is the best interest of the child, which usually is promoted by returning the child, yet the court found that this abstract idea of the best interest of the child is to be disregarded when the actual best interest of the child is better promoted by leaving the child in the place to which he has been abducted.

The case was brought by the father, a naturalized Canadian citizen. The German mother had abducted the child by failing to return from a visit to Germany. The father pressed criminal charges in Canada which the prosecutor upheld even after the father tried to retract them. The mother argued that a return would cause serious harm to the child, because the air pollution existing in the province of Alberta caused the child to suffer from asthma, a condition which was cured when the child stayed in Germany. In addition, the separation from the mother that might ensue from the criminal prosecution of the mother in Canada also was a serious risk for the child.

The court rejected the arguments concerning the air pollution in Alberta. The court held that the general living conditions in a country are part of the general risks of life from which the Hague Convention cannot protect children. The court, however, found that there was the danger of serious emotional injury arising from the threat of being separated from the mother, who for the past 15 months had been the sole caretaker of the child. The child was 3 years old. By referring to the best interests of the child, the court distinguished the case at issue from a Federal Constitutional Court decision that had held that a returning parent can be expected to suffer the sanctions imposed on him by the country from which the child was taken.<sup>21</sup> In addition, the court surmised that the Alberta court would have to award custody to the mother under the circumstances of the case, which would lead to the return of the child to Germany in any event, and it would not be in the best interest of the child to be sent back and forth.

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<sup>18</sup> OLG Zweibrücken, decision of Mar. 21, 2001, docket No. 5 UF 112/00.

<sup>19</sup> OLG Zweibrücken, decision of Dec. 17, 2002, docket No. 5 UF 112/00.

<sup>20</sup> Decision of OLG Rostock of July 4, 2001, docket No. 10 UF 81/01.

<sup>21</sup> BverfG decision of Oct. 29, 1998, docket No. 2 BvR 1206/98.

This case was severely criticized by a K. Siehr, a Swiss law professor,<sup>22</sup> who pointed out that the anticipation of custody decisions was not the purpose of Hague Convention proceedings and that the decision amounts to judicial kidnapping. To counteract the threat of imprisonment for a returning mother, the author points to the institution of undertakings, conditions that can be imposed in the decision to return the child.

In turn, Siehr's views were rebutted by P. Winkler v. Mohrenfels, a German law professor.<sup>23</sup> He argued that the German Constitution required an examination of circumstances that might lead to serious harm for the child, whenever it appeared possible that an exception within the meaning of article 13 of the Convention might exist. In addition, this expert found reasons for expanding the German Constitutional Court's holding that custody considerations are appropriate when there are conflicting requests for the return of the child.<sup>24</sup> V. Mohrenfels argued that the threat imposed on the child by the possible imprisonment of the mother poses an equally serious danger for the child as that of being shuffled back and forth by conflicting court decisions.

A decision of the District Court of Schleswig of 2001<sup>25</sup> refused to return a child to a parent who was residing in Germany. The petitioner in this case was an American soldier who was transferred to Germany for duty in the fall of 1999, and 1 year later discovered that the abducting mother also resided in Germany. The child had been taken by his German mother in 1997 and moved first to the Czech Republic and then to Belgium,<sup>26</sup> before her return to Germany in 2000. The court held that the Hague Convention did not apply, because the petitioner resided in Germany. The court was aware of the difference of opinions among the negotiators of the Hague Convention on whether a child should be returned only to the state from which it was taken or whether it should be returned to the requesting parent irrespective of his location. The court, however, found the preamble of the Convention to be controlling, which stresses the purpose of returning the child to the place of his or her habitual abode.

The decision was reviewed favorable by A. Schulz, a German expert of conflicts law.<sup>27</sup> According to Schulz, the Hague Convention protects the rights of states and not directly those of individuals. Moreover, this author argues that granting a Hague Convention request to someone residing in Germany would place him or her in a better position than the other resident parents who seek domestic remedies. In addition, this author found the decision motivated by the length of time (3 years) that had passed between the taking and the application.

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<sup>22</sup> K. Siehr, *Desavouierung des Haager Kindesentführungsübereinkommens*, 22 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRax] 199 (2002).

<sup>23</sup> P. Winkler v. Mohrenfels, *Von der Konfrontation zur Kooperation*, 22 IPRax at 372 (2002).

<sup>24</sup> *Supra* note 14.

<sup>25</sup> Amtsgericht Schleswig, decision of Jan. 5, 2001, docket number 90 F 239/00 HK

<sup>26</sup> The Hague Convention was not in force in these countries when the mother stayed there.

<sup>27</sup> A. Schulz, *Zum Aufenthaltswechsel des Antragstellers im Rahmen des Haager Kindesentführungsübereinkommen*, 22 IPRax 201 (2002).

## II. Domestic Laws Regarding Child Abduction and Parental Visitation

### A. Child Abduction – Civil Provisions

In German domestic law, child abduction is governed by section 1632 of the Civil Code,<sup>28</sup> which provides that custody over a child includes the right to claim the child from anyone who keeps him unlawfully. If one parent claims the child from the other parent, then jurisdiction lies with the local family court. In the ensuing court proceeding, the judge examines any arising custody issues and also hears from the child. German domestic law does not have a summary proceeding that would correspond to the Hague Convention's return mechanism. Instead, each German domestic request for the return of an abducted child may lead to a review of the custody issue, and it is generally advisable for a parent who leaves the marital home to take the children with him, as long as he does not take the child abroad. It has been suggested that this practice in domestic cases may also lead the German courts to conduct a more thorough evaluation of the circumstances in Hague Convention requests for the return of the child than might be done in other countries.<sup>29</sup>

According to German law, custody is held jointly by a married couple until the child reaches the age of 18. For children born out of wedlock, custody is usually held by the mother; however, the father may obtain joint custody together with the mother through a joint declaration made before a notary or by marrying the mother. During and after divorce proceedings, the family court awards custody either jointly to the parents or to one parent while giving rights of visitation to the other, unless this would be harmful to the child under the circumstances.

Joint custody for divorced parents is a fairly new institution in Germany, having been enacted in 1997.<sup>30</sup> It is possible that the courts may still be reluctant to award joint custody and may still be inexperienced in dealing with the problems arising from joint custody.<sup>31</sup> In all custody decisions, the guiding principle of the court is the welfare of the child, and the decision will be made to promote this purpose.<sup>32</sup>

### B. Child Abduction – Criminal Provisions

The abduction of a child to a foreign country is a criminal offense, punishable by up to 5 years in prison or a fine. Equally punishable is the unlawful retention of a child in a foreign country. Either offense, however, is punishable, but only if the person entitled to custody presses charges or, if the prosecutor decides that there is a special public interest in the prosecution.<sup>33</sup> In 1999, the German Federal Supreme Court [*Bundesgerichtshof*] upheld a conviction of a German parent of Pakistani origin, who had custody over his child, for removing him to Pakistan to be educated by the child's grandfather, because

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<sup>28</sup> Bürgerliches Gesetzbuch, Aug. 18, 1896, REICHSGESETZBLATT [RGBL, official law gazette of the German Reich] 195, as amended.

<sup>29</sup> W. Gutdeutsch and J. Rieck, *Kindesentführung – ins Ausland verboten – im Inland erlaubt*, 45 FamRZ 1488 (1998).

<sup>30</sup> Gesetz zur Reform des Kindschaftsrechts, Dec. 16, 1997, BGBl. I at 2942.

<sup>31</sup> These issues are being studied by the Federal Ministry of Justice [R. Proksch RECHTSTATSÄHLKICHE UNTERSUCHUNGEN ZUR REFORM DES KINDSCHAFTSRECHT, 5, Köln, 2002].

<sup>32</sup> BGB, §§ 1627-1671.

<sup>33</sup> Strafgesetzbuch, repromulgated Mar. 10, 1987, BGBl I at 945, as amended, § 235.

this violated the visitation rights of the mother.<sup>34</sup>

### C. Visitation

The Civil Code provisions on visitation (sections 1684 through 1688) were reformed in 1998 in order to expand visitation rights to grandparents and siblings. If a German court were called upon to rule on a Hague Convention request for visitation, it is conceivable that the court might apply the law of the state of residence of the child, in keeping with Germany's membership in the Hague Convention on the Protection of Minors.<sup>35</sup> Nevertheless, it appears that the German courts would not apply any foreign law in a manner that would not be deemed to be in the best interest of the child.

### III. Court System and Structure - Courts Handling the Hague Convention

Germany is a federated country that consists of 16 states. Nevertheless, substantive and procedural law on domestic relations is federal law. There is one uniform court structure under which the trial courts and appellate courts are state courts, whereas the courts of last resort are federal courts.<sup>36</sup>

Until recently, venue for Hague Convention requests was placed in the court of the district where the child was located. This provision of the Implementing Act, however, was amended in 1999,<sup>37</sup> so as to centralize venue for Hague Convention requests in one family court in each higher appellate court district and to allow each of the states to have an even more centralized venue by designating one family court to have venue over all or several higher appellate court districts within the state. It is hoped that the more centralized venue for Hague Convention requests will lead to more uniformity in the decisions, which until now had been lacking.<sup>38</sup>

A petition to the family court to have a child returned under the Hague Convention should be accompanied by motions to have the costs awarded and to have the decision executed. The petition must be accompanied by a written justification describing family relationship and the age, citizenship, and residence of the children. In addition, all existing decisions dealing with the divorce of the parents, and with custody and right of access must be presented, preferably translated by a translator that is sworn-in and recognized by the court. Moreover, the abduction of the child must be described, and details must be furnished on the social and cultural circumstances, family structures and relationships, the language spoken in the home, and the efforts undertaken to have the child returned voluntarily.<sup>39</sup>

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<sup>34</sup> Bundesgerichtshof decision of Feb. 11, 1998, docket number 4 StR 594/98.

<sup>35</sup> Convention Concerning the Powers of Authorities and Law Applicable to the Protection of Infants, done Oct. 5, 1961, at The Hague, 658 UNTS 143; ratified by Germany Apr. 30, 1971, BGBl. II, 217.

<sup>36</sup> W. Heyde, *JUSTICE AND THE LAW OF THE FEDERAL REPUBLIC OF GERMANY* 7 (Heidelberg, 1994).

<sup>37</sup> Gesetz zur Änderung von Zuständigkeiten nach dem Sorgerechtsübereinkommens-Ausführungsgesetz, Apr. 13, 1999, BGBl. I, 702, amending SorgÜbAG, § 6.

<sup>38</sup> Finger, *supra* note 9.

<sup>39</sup> Krüger, *supra* note 9.

Proceedings on Hague Convention requests are non-contentious, *i. e.*, not adversarial.<sup>40</sup> The judge moves the proceeding and orders whatever measures and testimony that are deemed necessary, including the involvement of the youth welfare agencies. It is advisable that the parents are represented by counsel. In addition, the court may appoint on its own initiative counsel for the child, if in situations where there may be conflicting interests between the child and the parent. The judge may also insist on granting the children a hearing, even if they are quite young. The family court may involve the Youth Welfare Office to give information on the social circumstances of the parties. In addition, the family court may also request an expert opinion of a psychologist. However, because this might delay the proceeding, this should only be done in exceptional cases.<sup>41</sup>

Delays in proceedings appear to have been one of the main problems in applying the Convention. It was the legislative intent of the German Implementing Act to have the family court decide Convention requests within 6 weeks.<sup>42</sup> Nevertheless, the Federal Supreme Court found that the due process guarantees of the German Constitution were not violated when a proceeding before the family court for the return of a child lasted 11 months.<sup>43</sup> In that case, the court reasoned, the fault for the delay lay not with the German family court. Instead, the delay was caused by the courts' request that the applicant furnish a decision of the French court of residence of the child to prove that the removal of the child from France was wrongful, as is foreseen in article 15 of the Convention. In the absence of special circumstances, however, the court indicated that a 6 week time limit for the decision of the family court was appropriate.

Decisions of the family court can be appealed to the higher appellate court [Oberlandesgericht], and an appeal usually stays enforcement.<sup>44</sup> The decision of the appellate court is final and enforceable, and the only remedy against such a decision could be a constitutional complaint to the Federal Constitutional Court, alleging the violation of civil rights through the proceeding or the applied legislation. Ordinarily the lodging of a constitutional complaint does not stay the execution of a final judgment. However, in exceptional cases, the Federal Constitutional Court may issue an injunction to postpone execution. The Federal Constitutional Court accepts constitutional complaints only if they are significant from a constitutional point of view and have a reasonable chance of succeeding.<sup>45</sup>

#### IV. Law Enforcement System

If a German court decides that a child should be returned in response to a Hague Convention request, the judgement will usually order the abducting parent to return the child to the claiming parent or other designated agent who then can remove the child to the requesting country. The abducting parent will not be ordered to take the child to the foreign country, but merely to hand him over in Germany. The abducting parent, however, may express a desire to return the child which the court may make the basis of its decision. In addition, the court may specify that the requesting parent pick up the child himself or

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<sup>40</sup> Zivilprozessordnung [ZPO], re-enacted Sept. 12, 1950, BGBL. I at 533, as amended, § 621 *et seq.*; Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit [FGG], re-enacted May 20, 1898, BGBL. I at 771, as amended.

<sup>41</sup> Bach, *supra* note 9, at 1056.

<sup>42</sup> BUNDESTAG. DRUCKSACHE. No. 11/5314 at 54, note 105.

<sup>43</sup> *Supra* note 16.

<sup>44</sup> FGG, § 24.

<sup>45</sup> Bundesverfassungsgerichtsgesetz, re-enacted Aug. 11, 1993, BGBL. I at 1473, as amended, §§ 90 *et seq.*

herself.

If there is no compliance, then the court may make use of the enforcement instruments of the Act of Non-Contentious Jurisdiction that are designed to enforce decisions of family law.<sup>46</sup> According to these, the court may impose a coercive fine or coercive detention and the costs of the execution proceeding on the person detaining the child. The fine is to be commensurate with the income of the party to be coerced, but may not exceed €25,000 (US\$31,617). A fine can be imposed repeatedly, yet must always be preceded by a warning.<sup>47</sup> In addition, the court may order the use of force through the marshal of the court, who in turn may ask for the assistance of the local police. If the child is not found, the court may order the party responsible to bring the child forth to give an explanation under oath as to the child's whereabouts.<sup>48</sup>

The German courts vary in their use of enforcement devices.<sup>49</sup> Some courts issue the necessary measures expeditiously, even including orders to restrain the abducting parent from leaving the country.<sup>50</sup> Other courts appear less vigorous and may even be suspected of a certain amount of foot-dragging. In a decision of 2001, the Higher Appellate Court of Stuttgart<sup>51</sup> remanded a case to the court of first instance to issue the procedure ally required warnings before coercive measures could be undertaken.

Decisions on visitation rights are enforced according to the same principles as decisions ordering the return of the child. However, in all such cases, the courts will aim at achieving the desired results as much as possible with non-coercive means, such as involvement of the Youth Welfare Offices, the appointment of special counsel for the child, and the acting of the court as a mediator.<sup>52</sup> The tools for the application of such gentler pressures have been given to the courts in the 1998 Reform of Family Law.<sup>53</sup>

The courts may also use coercive tools to find a hidden child. However, cases appear to exist in which coercion was not used successfully. In the above discussed case of the American soldier returning to Germany, the parents of the abducting mother alleged that they did not know of her whereabouts, even though they sent her money.<sup>54</sup>

Finding a child in Germany should be facilitated by the registrations laws that require all individuals to register their residence or their place of sojourn with the police. These registration requirements are regulated and implemented by the states, on the basis of the Federal Framework Act on

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<sup>46</sup> FGG, § 33.

<sup>47</sup> P. Bassenge and G. Herbst, *GESETZ ÜBER DIE ANGELEGENHEITEN DER FREIWILLIGEN GERICHTSBARKEIT* 172 (Heidelberg, 1995).

<sup>48</sup> Decision of OLG Stuttgart, Oct. 22, 2001, docket number 17 WF 385/01.

<sup>49</sup> H. Roth, *Internationale Kindesentführung, "undertakings", und Zwangsvollstreckung nach § 33 FGG*, 23 IPRax 231 (2003).

<sup>50</sup> OLG Dresden, decision of March 22, 2002, docket number 10 UF 753/01.

<sup>51</sup> *Supra* note 48.

<sup>52</sup> S. Motzer, *Die gerichtliche Praxis der Sorgerechtsentscheidung*, 46 FAMRZ 1101 (1999).

<sup>53</sup> FGG, as amended, §§ 50, 52, and 52 (a).

<sup>54</sup> *Supra* note 25.

Registration.<sup>55</sup> The police may also become involved in finding a child or the abducting parent either through the involvement of the Federal Prosecutor, upon referral by the Central Authority, or through an international warrant of arrest through Interpol. Nevertheless, there may be circumstances under which it might be advisable for a Hague Convention claimant to hire a private detective to find the child.<sup>56</sup> Moreover, even if the police locate a child or parent in an Interpol request, Germany does not extradite a parent for foreign criminal charges of child abduction.<sup>57</sup>

## V. Legal Assistance Programs

Germany ratified the Hague Convention under the reservation that Germany will assume the costs of attorneys and court proceedings of a requesting party only to the extent that the applicant is deserving of legal aid according to German law. In keeping with this reservation, the German Central Agency may require that an applicant submit a payment for the expected fees in advance. The work of the Central Agency itself is provided free of charge. If an applicant wishes to claim legal aid, an application to that effect should be submitted.

Legal aid for court costs is governed by sections 114 through 127a of the Code of Civil Procedure.<sup>58</sup> According to these provisions, the court will grant legal aid for court costs and for counsel in the proceeding if representation is required or advisable. The party must apply for legal aid to the court, however, the Central Authority will apply for the claiming parent.

Legal aid will be granted if the party is unable to defray these costs from current income or other available assets, and if the intended legal action has an adequate chance of success and does not appear to be vexatious. The court has some discretion to consider individual circumstances in the granting of legal aid. However, the suggested statutory income thresholds are quite low. For 2003, they have been set at a net monthly income of € 364 (US\$460) for each party, plus the same amount for the spouse of the party, plus € 256 (US\$324) for each dependent of the party.<sup>59</sup> Parties of higher income levels that still have difficulties paying for their court costs must pay the incurred expenses in monthly installments that are graduated in accordance with the income level.

Legal aid for attorney services outside of a proceeding may also be granted under conditions similar to those prevailing for court costs. Such assistance is governed by the Federal Act on Counseling Assistance<sup>60</sup> which is further implemented by state legislation. Consequently, there may be local changes in how this form of assistance is granted. In most of the states, however, the petitioner will be given a voucher that he can use with the attorney of his choice. It appears that no legal assistance is available for the services of private detectives. However, the court decision on the return of the child may award the expenses of the detective to the successful claimant.<sup>61</sup>

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<sup>55</sup> Melderechtsrahmengesetz, re-enacted June 24, 1994, BGBL. I at 1430, as amended.

<sup>56</sup> Finger, *supra* note 9.

<sup>57</sup> Krüger, *supra* note 9.

<sup>58</sup> ZPO, *supra* note 40.

<sup>59</sup> Prozesskostenhilfebekanntmachung 2003, June 16, 2003, BGBL. I 918.

<sup>60</sup> Beratungshilfegesetz, June 18, 1980, BGBL. I at 689, as amended.

<sup>61</sup> Finger, *supra* note 9.

## **VI. Conclusion**

Germany has been quite aware of the international criticism and adverse publicity that it has incurred for the frequent refusal of Hague Convention requests through German judges. The increased discussion of this issue in the legal literature and the media may have led to a more in depth study of the involved legal issues by the deciding judges who also have become more specialized through a concentration of Hague Convention cases in a small number of family courts. Nevertheless, several recent German decisions have resulted in allowing an abducted child to stay in Germany, and after these decisions have become final, there are no legal remedies to affect their change. Yet it appears that in some of these seemingly hopeless cases some improvements were achieved through cooperative efforts.

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