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Good Practice Report on Enforcement
Under the Hague Convention of
25 October 1980 on the Civil Aspects
of International Child Abduction



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a report by

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Executive Summary

I. Introduction

The U.S.-based National Center for Missing & Exploited Children funded this research on the enforcement of return and access orders under the Hague Convention of 25 October 1980 on the Civil Aspects on International Child Abduction (hereafter ‘1980 Hague Convention’). This report draws from specifically commissioned reports on enforcement in 9 jurisdictions — Australia, England and Wales, France, Germany, the Netherlands, Romania, Slovakia, Sweden and the United States of America — as well as from previous investigations into the procedures and systems in 6 of those Contracting States to the 1980 Hague Convention: Australia, England and Wales, France, Germany, the Netherlands and the United States of America. 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 on Private International Law (hereafter ‘Permanent Bureau’).

The States Parties to the 1980 Hague Convention meet together periodically in a Special Commission organised by the Permanent Bureau to review and make recommendations on practice under the 1980 Hague Convention. At the Special Commission concerning the 1980 Hague 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, Implementing Measures, and Preventive Measures.¹

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 & Exploited Children. The role of Professor Lowe and the Cardiff Team has been to undertake empirical research on how the enforcement of 1980 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 and the recommendations are those of the Research team and not the Bureau. In co-ordination with the empirical research, the Permanent Bureau has also undertaken research on procedural law concerning enforcement in Contracting States generally. It is intended that the two enquiries will lay the foundations for a Good Practice Guide on Enforcement.

II. 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 the appeal system/legal system to delay enforcement;
- 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 or refuses to sign visa applications);
- Enforcement of the return order is delayed because the parent cannot re-enter the country of habitual residence (e.g. for immigration reasons or because of a criminal warrant);
- Enforcement is delayed due to non-compliance with the conditions/undertakings contained in the return order, or because there is a need to secure a mirror order in the requesting Contracting State (e.g. the applicant fails to pay money upfront or to comply with conditions; neither party can afford airfare; neither party can afford accommodation; the applicant is unable or unwilling to overturn a criminal warrant; lengthy process to secure mirror orders);

¹ These guides are available online at http://www.hcch.net/index_en.php?act=text.display&tid=21.

- Enforcement is delayed due to the impact of concurrent domestic custody proceedings in the requested/requesting Contracting State;
- Enforcement is delayed due to the health/welfare of the returning child;
- Enforcement is 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 did not seek enforcement of the return order;
- Enforcement is delayed because the applicant changed his/her mind about pursuing enforcement of the return order;
- Court orders do not specify how the child's handover/return is to be effected nor within what timeframe;
- Enforcement is delayed because of the pressure from the 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 1980 Hague Convention applications).

III. Methodology and Scope

In consultation with the Permanent Bureau, it was decided that 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; and
- the United States of America.

Slovakia was later added to this list, advantage being taken of the appointment of Katarina Horosova as a researcher for the project who also has experience 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 Hague 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 of first instance. On this basis, the issue of appeal falls within the scope but the reluctance to make a return order in the first place — because, for example, the requested court fears for the child's safety if returned to the requesting Contracting 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 based on standardised questions, have 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, the police, public prosecutors and non-governmental organisations. 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.

1. Background to the Issues

1.1 The 1980 Hague Convention

The 1980 Hague 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 1980 Hague Convention and by the various provisions of the Convention that require Contracting States to secure the prompt return of children and to act expeditiously, namely:

- Article 1 stipulates that the objective of the 1980 Hague Convention is “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”.

1.2 Interaction between the 1980 Hague Convention and Human Rights Conventions

The need for Contracting States to effectively and promptly 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, costs and expenses to applicants.

In the context of the enforcement of both domestic judgments and access and return orders pursuant to the 1980 Hague Convention, the ECHR has considered a number of cases where an applicant has alleged that a particular State has violated his/her rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, the ECHR 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 Hague Convention had been before the ECHR and was the first case addressing the failure by a Council of Europe State to enforce a national court order for return under the 1980 Hague Convention.⁴ Although a number of applications concerning the 1980 Hague Convention had previously been made to the ECHR, they had all been declared inadmissible. In this particular matter, the ECHR criticised: the failure of Romania 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 failure to give the mother proper notice of all the proceedings in relation to the child. In a six-vote-to-one decision, the ECHR found that there had been a violation of Article 8 and ordered Romania to pay penalties to the applicant-mother. Following this decision, the Romanian government undertook an extensive review of its legislative framework and administrative procedures dealing with 1980 Hague 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 ECHR. Other more recent decisions include *Maire v Portugal*,⁵ *Sylvester v Austria*⁶ and *Karadzic v Croatia*.⁷ Furthermore, in an interesting contrast, an abduct-

2 For more substantive information regarding Article 8 cases, see Mole, “The Hague Convention and Article 8 of the European Convention on Human Rights”, (2000) IFL 121; see also Schulz, “The 1980 Hague Child Abduction Convention and the European Convention on Human Rights”, (2002) 12 Transnational Law and Contemporary Problems, 335-392.

3 (App No. 31679/96) (2001) 31 EHRR 7.

4 Mole, *op. cit.*, n. 2, 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.

ing parent from a non-European State (Australia) submitted a communication to the United Nations Human Rights Committee⁸ claiming that she and her two children were victims of Australia's violation of various articles of the International Covenant on Civil and Political Rights. The abducting parent argued that the forcible removal (return) of one child pursuant to the 1980 Hague Convention amounted to a violation of the child's rights under the International Covenant. The Human Rights Committee, however, declared the communication inadmissible.

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

2. Enforcement of Incoming Return Orders

The system for the enforcement of return orders is different in all jurisdictions researched, although the practice and procedure evident in Australia, England and Wales and the USA is generally comparable. Research into the experiences of these countries indicates that enforcement issues have arisen in only a small number of 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, areas of concern, and areas for improvement have been previously identified with respect to each jurisdiction. Many of the points of good practice identified below are not limited to the enforcement process, but rather to 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. Summary of the Individual Country Reports on Enforcement

3.1. 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 1980 Hague Convention into domestic law through regulations known as the Family Law (Child Abduction Convention) Regulations 1986 (hereafter 'Regulations'). The Regulations are not in identical terms to the 1980 Hague Convention. The Regulations effectively redraft the 1980 Hague 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 to obtain any advantage or benefit under the 1980 Hague Convention. 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 1980 Hague Convention. In addition, a Central Authority has been appointed in each of the six States and the two mainland Territories (hereafter 'State Central Authorities'). 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 return applications on their own behalf and without the assistance of the Central Authority.¹⁰ Australia has not made a reservation under Article 26 of the 1980 Hague Convention and, therefore, all legal costs for applications (return 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 appointed by the State Central Authority) undertake the litigation and represent the applicant in court proceedings (acting on instructions from the Commonwealth Central Authority).

3.1.1. JUDICIAL SYSTEM FOR HEARING 1980 HAGUE CONVENTION APPLICATIONS

Jurisdiction to deal with family law matters (and, therefore, 1980 Hague 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 1980 Hague Convention applications. However, in reality, 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 1980 Hague Convention cases. There are currently six Judicial Registrars who are empowered to hear 1980 Hague Convention cases. Judicial Registrars exercise the

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.

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 five Judges appointed for the Family Court of Western Australia.

delegated power of the judge and their decisions are subject to a rehearing if either party wishes to have the decision reviewed. Generally, in 1980 Hague 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 (e.g. orders to prevent the child from being removed from the jurisdiction) within one or two days of the application being received by the State Central Authority.

3.1.2. 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.

Generally, the Regulations provide for the court to prioritise 1980 Hague Convention applications. This is supported by case management directions issued by the Family Court which ensure abduction matters are listed expeditiously. The Family Court of Australia also provides an “out-of-hours” court service for urgent matters.

3.1.3. 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 the Family Court of Australia. There are seven judges in the Appeal division, including the Chief Justice. 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 indicating 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 with respect to a 1980 Hague Convention 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 reconsideration.

3.1.4. EXPEDITED PROCEDURES FOR APPEAL CASES AND ‘GATEKEEPER’ SYSTEM

Using the legal system of appeals is one mechanism by which a respondent 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. However, it is usually heard within one or two months. Conversely, further appeal to the High Court tends to take longer and can ‘dramatically cool down the hot pursuit nature of the [1980 Hague] 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. This is evidenced by the fact that:

1. Leave to appeal is required for further appeal to the High Court.
2. Limited grounds for appeal apply.
3. A stay on the return order is required.

Although normally granted, the Family Court of Australia has refused to grant a stay on the

¹⁴ See Regulations 15(2) and 15(4).

¹⁵ See Lowe, Armstrong and Mathias, “Country Report: Australia” (NCMEC 2002).

return order in some cases pending appeal,¹⁶ which has rendered the appeal process nugatory in that the order has been enforced and the child returned to the foreign country.

3.1.5. ENFORCEMENT OF RETURN ORDERS

(i) Effective Preventive Measures

The available preventive measures used in Australia are as follows:

- making an order for the child's name to be included on the airport watch list which prevents the child from leaving Australia;¹⁷
- surrendering passports and all relevant travel documents to the court;
- handing back passports to the returning parent and the child only at the departure lounge;
- requiring Central Authority staff or Australian Federal Police to escort the respondent and the child to the airport;
- specifying in the return order detailed return arrangements including, where available, that the return be by direct flight. In cases where there is a concern that the respondent and the child may disappear because of a stopover, the return order may specify that the applicant or an escort accompany the respondent and the child on the return flight;
- specifying in the return order who will pay the cost of the return travel (order can be made for the respondent to pay costs pursuant to Regulation 30);
- making an injunction which restrains the movement of the parent/child to reside at a particular address;
- including in the order daily reporting to the police;
- requiring the respondent to provide a bond which will be forfeited if the child does not return as ordered;
- ordering the removal of the child and placing him/her in the care of another person or institution pending the child's return, where there are welfare concerns for the child or a risk that the respondent will abscond with the child;¹⁸
- using a private investigator to observe the respondent and the child's movements prior to return;
- ordering the child to attend counselling to assist him/her to come to terms with the return order;
- including other conditions within return orders to alleviate fears that the respondent has regarding the return, thereby reducing the risk of enforcement problems and ensuring the safe return of the child. However, there have been a number of cases where the applicant's failure to comply with conditions has led to the delay of enforcement or complete non-enforcement of the return. Mirror orders are increasingly being sought from jurisdictions which are prepared to issue such orders.

(ii) Effective Enforcement Measures

As previously 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 the requirements of the 1980 Hague Convention. This is

¹⁶ Saffari & Director-General, Department of Families, (2002) FamCA 1085.

¹⁷ This order is routinely made in all 1980 Hague Convention cases 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 prevent him/herself from leaving.

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

further supported by Regulation 20(1) which deals specifically with the responsibilities of a Central Authority following the making of a return as follows:

“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 provision permits the Central Authority to carry out a range of measures giving effect to the return order, without the need for any co-operation from the respondent or further court action. Regulation 20(2) further reinforces the requirement for the child to be returned promptly. It provides that if, within seven 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;
- return order made with detailed conditions specifying the mode and details of the return, including preventive measures, to ensure that the return order can be enforced;
- return order which includes 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;
- sanctions, including imprisonment, for failure to comply with an order of the court.

3.1.6. ENFORCEMENT OF ACCESS ORDERS

Access applications are equally processed under the Regulations and, therefore, the 1980 Hague Convention applies rather than domestic legislation. The Central Authority, as a matter of practice, applies Regulation 25(10) which authorises it to secure the applicant’s right of access through an amicable resolution of the case issue instead of before seeking court action. However, where the respondent opposes the application and refuses to agree to access, the Central Authority pursuant to Regulation 25(2) may petition the court for an order that “is necessary or appropriate to establish, organise or secure the effective exercise of the rights of access to which the application relates”. Attempts to negotiate an agreement will continue throughout the judicial hearing. Additionally, if the case involves an older child who refuses to have access with the respondent, the court may order a family and child counsellor or welfare officer to interview the child and to file a report. The findings of the report may effectively determine whether the Central Authority will proceed or withdraw the application.

As with return applications, Regulation 25(4)(c) gives broad powers to the court to “make any other order that the court considers appropriate to give effect to the Convention.” Therefore, the enforcement measures that may be used following the making of an access order include:

- warrant directing the police to find, recover and deliver the child;
- order setting up telephone access at the Central Authority offices;
- order requiring a staff member of the Central Authority or the police to escort the child to his/her flight;
- order authorising only supervised access;
- order requiring access to take place only in Australia;
- order permitting the Central Authority to receive and convey letters to a child whose address cannot be released because of prior incidents of family violence;
- order providing for a bond to be posted to ensure the child’s return;
- sanctions for failure to comply with an access order, including imprisonment and/or a fine.

3.1.7. EFFECTIVE COMMUNICATION AND CO-OPERATION BETWEEN ALL AGENCIES AND BODIES INVOLVED IN THE ENFORCEMENT PROCESS

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

3.1.8. EFFECTIVE LOCATION POWERS

The relevant authorities have a broad range of powers at their disposal to locate a child who is the subject of proceedings under the 1980 Hague Convention. Furthermore, the responsible Central Authority, the court and the police take a proactive approach to locating missing children. In addition to specifically authorising the issuance 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 1980 Hague 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 enter and search premises as well as utilise 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 the child's whereabouts (these orders apply, for example to relatives, banks, telephone companies, schools and the motor vehicle registry);
- Commonwealth Information Order²¹ (an order directed at various departments or Commonwealth instrumentalities to provide information they hold in their records about the child);
- subpoena for persons (such as relatives or friends) to attend court and give evidence on the respondent and the child's whereabouts;
- Publication Order²² which allows for the publication of the child's details in the media;
- use of private investigators in exceptional cases (for example, private investigators may be used to observe relatives of the missing child and the respondent or to do other observation).

3.1.9. SMALL POOL OF EXPERTS INVOLVED IN ABDUCTION WORK

Due to restricted jurisdiction, in practice, a limited number of Family Court judges (and an additional six Judicial Registrars) hear 1980 Hague Convention matters, all of whom have expertise in family law. As repeat players in litigation, both the Commonwealth Central Authority and the State Central Authorities have built a substantial amount of expertise in these matters. Where applicable, the responsible Central Authority also briefs a small pool of counsel who conducts the litigation. Many of those briefed have been acting in 1980 Hague Convention matters for the responsible Central Authority for many years.

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

20 See Order 28, Family Law Rules.

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

22 See *ibid* at Section 121.

3.2. England and Wales

Whilst England and Wales is a common law jurisdiction, 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 within the context of international child abduction. The 1980 Hague Convention is implemented in England and Wales (and for the United Kingdom) through the Child Abduction and Custody Act 1985 (hereafter ‘the 1985 Act’).

3.2.1. JUDICIAL SYSTEM FOR HEARING 1980 HAGUE CONVENTION APPLICATIONS

Pursuant to Section 4 of the 1985 Act, all 1980 Hague 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. In addition, there is a Duty Judge who is available 24 hours a day and all-year-round to handle urgent matters.

Jurisdiction is concentrated; there are only 18 full-time judges empowered to hear 1980 Hague Convention cases at first instance and 35 Lords Justices of Appeal, 4 of whom specialise in family law. Appeals are heard by three judges, one of whom is a specialist family judge. All hearings take place in London.

Concentrated jurisdiction, the high level of the court, the significant number of 1980 Hague Convention cases heard in England and Wales and the use of panel solicitors allow for the development of expertise among judges, barristers and solicitors.

3.2.2. 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 commonly by the Court of Appeal. An appeal will only be granted where the judge has misdirected him-/herself 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 the date permission was granted.²³

Appealing a case can be one mechanism by which a respondent 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:

- They are dealt with swiftly.
- Leave to appeal is required by the having a ‘gatekeeper’ system.
- The grounds for appeal are limited.

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 appeals:²⁴

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 a barrister/solicitor) which will apply a ‘merits’ test before granting an extension of legal aid.

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

²⁴ According to “A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction”, (Lowe, Atkinson, Horosova and Patterson), only 3 of the 99 Hague applications that went to court were appealed. The total average of appeals was 22%.

2. High-standard legal advice is given to the parties on the generally limited prospects of success for pursuing an appeal.

3.2.3. ENFORCEMENT OF RETURN ORDERS

(i) Effective Preventive Measures

In the context of enforcement, the existence of effective preventive measures reduces the risk that the abducting parent will abscond with the child and, therefore, hinder enforcement of any return order made. The following are the available preventive measures used:

- A passport order²⁵/location order is 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 proceedings under the 1980 Hague Convention.
- Passports and all relevant travel documents can be seized pursuant to the order above and held by the Tipstaff (a High Court enforcement officer) until further directions of the court.
- Injunctions are issued preventing respondent from applying for travel documents (including a passport) for the child (may need to liaise with UK Passport Agency as well as any applicable foreign embassy/consulate).
- Passports are usually only made available to the returning parent and the child at the departure lounge and the agent remains outside to ensure they do not leave the airport.
- The return order will specify return arrangements, including (usually) that the return be by direct flight (which is arranged by the applicant's lawyer).
- Children are placed on the Port Alert System (see outline below).
- An injunction may be made against the respondent, preventing the removal of the child from England and Wales (and from 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 the local welfare authority or in the care of the applicant, pending a final resolution of the 1980 Hague Convention application.²⁶
- A collection order can be made that enables the Tipstaff to remove the child and to deliver him/her to the care of the applicant or to the custody of the local care authority;
- In one exceptional case,²⁷ the use of an electronic tagging device (at the respondent's suggestion) was used because the parent had been in hiding for a period of four years.
- Use of undertakings within return orders may alleviate fears of the 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 and include: providing for the provision of maintenance or housing; upfront payment of money (e.g. for maintenance, rent and moving costs); 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 the

²⁵ A passport order is similar to a location order (except direction is not included for the Tipstaff to locate the child) in that it has the same restraints against removing the child from England and Wales etc.

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

²⁷ Ibid.

returning parent or other protection type measures; registration of undertakings and terms of the return order in a court in the requesting Contracting State (e.g. secure a mirror order).

The effectiveness of undertakings and their enforceability outside England and 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 Contracting States.

(ii) **Effective Enforcement Measures**

There are a broad range of factors that contribute to the effective enforcement of return orders made under the 1980 Hague 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.

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 Hague 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 the child and deliver them to 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 bring someone before the court, in rare cases the solicitor may file a notice or the court on its own motion might find a respondent or a 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 the

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 because, 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 the child in a very vulnerable position.

29 [2001] 2 FLR 515 at 542; see Lowe, Everall and Nicholls, “International Movement of Children Law Practice and Procedure”, (Family Law 2004) 21-99, n. 261.

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.

3.2.4. ENFORCEMENT OF ACCESS ORDERS

Currently, the English courts construe Article 21 of the 1980 Hague Convention as conferring "no jurisdiction to determine matters relating to access, or to recognise or enforce foreign access orders."³⁰ Accordingly, applications are filed pursuant to the requirements of the Family Proceedings Rules of 1991, Part IV. The court will make an independent judgment of the merits of the case applying the paramountcy of the child's welfare, yet, paying due regard to any existing foreign court orders.

Once a 'contact' order is issued, the applicant will need to institute fresh enforcement proceedings. The court has the discretion to order the following enforcement measures:

- order for contempt of court;
- order transferring custody of the child to the applicant;
- order temporarily removing the child and placing him/her into the local authority's accommodation for the duration of the access visit.

3.2.5. 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 governmental and non-governmental agencies involved in the enforcement process in England and Wales, including immigration/visa authorities, court staff, the police, Tipstaff, solicitors, airlines, embassies, local welfare agencies and the Central Authority. Solicitors have confirmed that good working relationships exist with all these bodies.

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

3.2.6. EFFECTIVE LOCATION POWERS

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 made to the High Court Applications Judge (on an ex parte basis) for a range of orders in order to locate a missing child. These include:

- location order;
- collection order;
- orders for the disclosure of information to assist in locating a child (such as address information obtained from telephone companies and government departments³¹ such as the Inland

³⁰ Practice Note – Child Abduction Unit – Lord Chancellor's Department, (5 March 1993)[1993] 1 FLR 804. , but note *Hunter v Murrow (Abduction: Rights of Custody)* [2005] EWCA Civ 976, [2005] 2 FLR 1119, in which Thorpe LJ signalled a possible change of approach, see the discussion by Lowe and Horosova *The Good Practice Report on Access* (ICMEC, 2007) at 5.1.1.

³¹ 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).

Revenue, the Vehicle Licensing Agency and the Department of Work and Pensions);

- order for persons (such as 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 notices;
- use of private investigators in exceptional cases (can be used without a court order);
- contempt of court powers to enforce orders.

3.2.7. USE OF COUNSELLING/MEDIATION

The 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, there is no systematic approach to the provision of counselling to assist a respondent (or a child) to come to terms with the return decision. This is why in 1999, Reunite commenced a three-year-mediation pilot project in parental abduction matters under the 1980 Hague 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.

3.2.8. CHILD'S OBJECTIONS/CHILDREN OPPOSING RETURN

Based on the interviews and research conducted in England and Wales, the majority of cases where enforcement measures have not been effective in securing the return of a child involved children who (sometimes violently) object to being returned in compliance with the return order. Upon appeal (in certain cases instituted by separate representatives intervening on behalf of the children), some return orders have been overturned where the child's objection seemed relevant. In some of these cases, upon hearing of the strength of the children's objections, the left-behind parent declined enforcement and the return order was eventually set aside.³² 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 Regulation³³ on the need for the court to hear children's views also has to be considered.

Additionally, 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 England and Wales (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.

3.3. France

³² See e.g. *Re HB (Abduction: Children's Objections)*, [1998] 1 FLR 422.

³³ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility repealing Regulation (EC) No. 1347/2000.

Once ratified, and upon the publication of a decree of ratification in the Official Journal (Journal Officiel), international conventions are directly enforceable in France. A decree of 29 November 1983 (Décret 83-1021 du 29 Novembre 1983),³⁴ published the 1980 Hague Convention and prescribed for its entry into force on 1 December 1983.

3.3.1. THE SYSTEM FOR HEARING 1980 HAGUE CONVENTION APPLICATIONS: THE PUBLIC PROSECUTOR

In France, a key role in proceedings under the 1980 Hague Convention 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 1980 Hague Convention abduction cases is that they are generally very familiar with Convention procedure.

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

The public prosecutor is responsible for locating the child in France. For this purpose, he/she has the right to request the assistance of the police and gendarmerie. In large cities for example, co-operation by police specialised in protection of minors is also available. In Paris, 3 groups comprising 10 investigators work on child abduction cases. These investigators are highly specialised in family law matters. Police specialised in the protection of minors are empowered to obtain personal data from various registries (e.g. local authority registries and social security files). 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 secure 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 emphasised that though the public prosecutor is present in court, he/she does not act as a legal representative of the applicant. His/her role is merely to support the return application before the court. In child abduction matters, representation by a private lawyer is not mandatory. 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 considerable. 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. Abduction cases are time-consuming. They demand many hours of work and require a good knowledge of private international law and the 1980 Hague Convention system.

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

3.3.2. JUDICIAL SYSTEM FOR HEARING 1980 HAGUE CONVENTION APPLICATIONS

In 2004, elements of the concentrated jurisdiction for hearing 1980 Hague Convention applications were introduced in France. Only one regional court per Court of Appeal has jurisdiction over 1980 Hague Convention cases. Some of the persons interviewed consider this specialisation sufficient. They argue that a further concentration of jurisdiction within the French court system would be difficult as there would be less material and geographical proximity of the judge to the parties. Others would like to see further concentration (e.g. that only a few courts be given

³⁴ Journal Officiel, 1 December 1983, p. 3466.

jurisdiction over 1980 Hague Convention cases for the French territory as a whole).

1980 Hague Convention cases are dealt with and decided by specialised 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 issuing the order. However, the terms of the 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 instance, 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, the order should contain 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 the right to order the removal of passports).

3.3.3. IMMEDIATE ENFORCEABILITY OF RETURN ORDERS

The applicant, the 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 is immediately enforceable, lodging an appeal does not prevent the enforcement of the return order. 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 case.

Since 1 January 2005, a new Article 1074-1 of the New Code of Civil Procedure (resulting from the Decree of 29 October 2004) has come into force, which provides that “measures concerning the exercise of parental authority [...] are immediately enforceable *ipso jure*”. Return orders 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.

3.3.4. APPEALS

At the appellate level, the parties must appoint counsel³⁵ 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/she also has the right to intervene in 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/her substitutes. This representative also acts as 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 two months from date of the notification. The Court of Cassation, however, only deals with questions of law.

3.3.5. ENFORCEMENT OF RETURN ORDERS

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.

35 Counsel is an ‘appointed advisor’ representing the parties during the proceedings before the Court of Appeal.

The public prosecutor first contacts the parents in order to negotiate voluntary compliance with the order. If it is not possible to agree on a voluntary return, there are several methods of enforcement available:

1. The applicant recovers his/her child in France (the most common situation in practice).
2. The respondent returns the child to his/her country of habitual residence.
3. 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/or 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 but are rarely used in practice.

3.3.6. ENFORCEMENT OF ACCESS ORDERS

There are no special provisions in France to ensure compliance with transfrontier access rights. The Central Authority can refer the application to the public prosecutor who undertakes the task of locating the child, contacting the custodial parent, and determining whether he/she intends to voluntarily comply with the access rights. The public prosecutor may call on the assistance of social services to facilitate negotiations and to ascertain the terms under which the custodial parent may consent to the exercise of the applicant's access rights.

In cases where negotiations fail, the prosecutor may refer the case to a family law judge. However, even if the court recognises the applicant's access rights, the fact remains that very few legal and coercive means exist to secure compliance.

3.3.7. COSTS OF THE RETURN OF THE CHILD

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

3.3.8. USE OF MEDIATION THROUGHOUT 1980 HAGUE CONVENTION PROCESSES

In France, there is a well developed system of mediation. 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, public prosecutors ask the specialised police service to visit the abductor and discuss the application prior to court proceedings being initiated. The public prosecutor attempts mediation also at later stages of the proceedings.

Second, mediation is possible through the help of lawyers specialised in international cases involving children. As specialists, they work in accordance with the 1980 Hague Convention, respecting its spirit and the need for the protection of the interests of the child.

Third, a separate body, MAMIF (Mission of International Mediation Assistance for Families) was set up in 2001 by the Ministry of Justice.³⁶ It can help parents at any stage of the proceedings, particularly where problems with enforcement occur, to engage in dialogue and seek negotiated solutions. MAMIF judges are assisted by social workers. MAMIF is a public body; this means that the mediators are not paid by the parties. However, MAMIF judges frequently have recourse to co-mediation (e.g. intervention of a third party whose action is usually justified by language problems). Mediation is a long procedure and one cannot expect everything

³⁶ In 1999, a Franco-German commission of parliamentary mediation, made up of three members of the French Parliament and three 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.

from this alternative method for settling disputes. The results obtained by MAMIF vary. Generally, mediation helps the parent understand the court decision and enables him/her to comply with it voluntarily. Mediation is available even after a return order has been made.

3.3.9. CRIMINALISATION OF ABDUCTION

International parental child abduction constitutes a criminal offence under French criminal law.³⁷ The victim parent can make a complaint to the police, the gendarmerie or the public prosecutor. When the public prosecutor's office receives a complaint for failure to comply with child custody arrangements when a child has been abducted, he/she may initiate a judicial investigation. An investigating judge is then appointed, with the power to deliver a warrant to arrest or a warrant for a suspect if it is difficult to ascertain 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.

3.3.10. PRACTICAL PROBLEMS IN ENFORCING DECISIONS

(i) Refusal by the Abducting Parent to Hand Over the Child Voluntarily

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 parents to better understand the decisions and to, therefore, accept decisions more readily.

(ii) 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/she 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.

As soon as the French Central Authority transmits the case file to the principal public prosecutor's office with jurisdiction, which in turn refers the case to the public prosecutor, the latter must determine the whereabouts of the child. To do so, he/she 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 (e.g. the child's school and known addresses of family members provided by the Central Authority or social security organisations). Once the whereabouts of the child are established, the police department specialising in the protection of minors quickly interviews the child and the respondent.

The police services also carry out a more all-encompassing investigation of the child's environment, including the family group's situation in France. An effort is made to immediately assess the risk of flight posed by the respondent. Generally, the risk of flight is reduced if the family is well established and maintains strong social and economic ties to the community.

³⁷ Article 227-5 of the Criminal Code states: "the act of wrongfully refusing to return a minor child to the person who has the right to demand his/her return is punishable by 1 year of imprisonment and a fine of 15.000 Euros". Article 227-7 states: "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 1 year of imprisonment and a fine of 15.000 Euros". Article 227-9 states: "the acts defined by Articles 227-5 and 227-7 are punishable by 3 years of imprisonment and a fine of 45.000 Euros (1) if the minor child is retained more than 5 days without those who have the right to claim his/her return knowing its whereabouts or (2) if the minor child is wrongfully retained outside French territory".

(iii) Removal of the Child Abroad

There are no provisions in French law that allow the court to withhold parents' passports. In some cases, the public prosecutor may be able to convince parents to hand over their passports voluntarily. In practice, however, it is relatively easy for a determined parent to flee across the border, especially when travelling within the European Union.

(iv) Cost of the Return of the Child

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

(v) Refusal of the Child to Return to His/Her 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 determine whether or not he/she is opposed to the return. It is necessary to explain the situation to the child when he/she is old enough to understand and refuses to return (in practice, this is particularly true of children who are 14 years of age or older).

(vi) Existence of Criminal Measures or Measures Related to the Entry and Stay of Foreigners

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 which prohibit the abducting parent from returning and remaining on French territory. Measures relating to the parent's entry and stay or prohibitions from the territory are all obstacles to voluntary return or voluntary enforcement of a return order.

(vii) 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 withholding information from those involved in the return. In May 2004, a case of international child abduction received widespread media attention. In this case, the police had intervened at the child's kindergarten during school hours when other parents were present. Their intervention was described as "forceful" and shocked public opinion. A committee to support the mother was organised and as a result the child was only returned six months later, after he had been placed in a foster family by a 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 1980 Hague Convention (the public knows even less about it), and the situation only worsens.

3.4. Germany

In Germany, the 1980 Hague Convention was adopted by the Act of 1 December 1990.³⁸ Since March 2005, implementation of the 1980 Hague Convention and the revised Brussels II Regulation into German procedural law is governed by the *Internationales Familienrechtsverfahrensgesetz* (hereafter 'IntFamRVG').³⁹

3.4.1. 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). Central Authority personnel are highly qualified in 1980 Hague Convention cases and play an important role in the efficient and expeditious processing of applications under the 1980 Hague Convention.

One of the main tasks of the Central Authority is to locate the abducted child within German territory. For this, the Central Authority can employ the help of the police and other State authorities. The Central Authority 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 agencies, accident insurance agencies, employment centres or welfare/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/her residence within Germany as there is legal duty to register such residence.

Additionally, the Central Authority initiates 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 (complicated) cases will the officers of the Central Authority argue directly before the courts or present briefs on certain legal issues. However, the Central Authority continues to monitor the activities of the counsel mandated particularly by receiving and analysing regular reports on the state of affairs.

3.4.2. COUNSEL

The participation of counsel appointed on behalf of the applicant is of crucial importance in 1980 Hague Convention proceedings. After the Central Authority has undertaken the initial steps, counsel is *spiritus rector* of subsequent proceedings: he/she attends hearings, submits pleadings, negotiates amicable solutions and keeps in touch with the applicant and the respondent or his/her representative. Counsel is always a *Rechtsanwalt* (qualified attorney).

Moreover, most counsel in 1980 Hague Convention matters are specifically qualified as *Fachanwälte für Familienrecht* (attorneys for family law, approved by the bar association) and have a profound knowledge of family law matters. Additionally, counsel involved in 1980 Hague Convention cases are often well experienced in abduction cases. The specialisation of counsel stems mainly from the fact that competition in 1980 Hague Convention cases among attorneys is comparatively low because these cases demand a high personal commitment and are not very profitable. Therefore, only a small number of practitioners in Germany are willing to undertake such cases. Consequently, the Central Authority allocates the incoming cases among a relatively small group of approximately 20 attorneys, spread all

38 BGBl (1991) II 329.

39 BGBl (2005) I 162.

over Germany. These attorneys are generally 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 1980 Hague Convention matters the courts normally fix that value at a sum between 2,500 and 5,000 Euros.⁴⁰ Given the fact that 1980 Hague Convention matters are quite time consuming, attorneys are often unable to cover their own costs. It is, therefore, likely that some attorneys will try to spend as little time as possible on legal aid cases concerning 1980 Hague Convention matters and this may be reflected in the quality of the legal service provided.

3.4.3. 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 1980 Hague Convention. However, concerns have been frequently voiced regarding the role of the youth welfare authorities, mainly because their officers are often unfamiliar with the aims of the 1980 Hague Convention. This is not surprising because, unlike the courts, there is no parallel concentration of competence in youth welfare authorities.

3.4.4. JUDICIAL SYSTEM FOR HEARING 1980 HAGUE CONVENTION APPLICATIONS

The key role in processing 1980 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 first instance.⁴¹ A *Familiengericht* consists of a single judge.⁴² Since 2000, jurisdiction for hearing 1980 Hague Convention cases has been concentrated in only those *Familiengerichte* in whose district an *Oberlandesgericht* (regional Court of Appeal) has its seat. Consequently, only 22 *Familiengerichte* have first instance jurisdiction for hearing 1980 Hague Convention cases. Moreover, Section 12 (3) of the IntFamRVG allows the *Bundesländer* (Federal States) to further concentrate local jurisdiction for 1980 Hague Convention matters in 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 is present at the moment when a return or access application is submitted to the Central Authority. Alternatively (e.g. if no application was submitted to the Central Authority), the *Familiengericht* in whose district the need for care exists will be vested with local jurisdiction. For 1980 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 the main factor for the effective processing of 1980 Hague Convention applications. This has led to the specialisation of judges and local counsel in 1980 Hague Convention matters. Additionally, and perhaps more importantly, in many cases the persons involved know each other from earlier cases, and this factor tends to contribute to the expeditious handling of proceedings.

3.4.5. UNDERTAKINGS

Undertakings in 1980 Hague Convention matters, in principle, are possible according to German procedural law,⁴³ 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.⁴⁴ The first refers to an interim order of the court; this ‘undertaking’

40 See also Vomberg, “Das Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung - Ein Buch mit sieben Siegeln?”, FPR (2000) 3, 6.

41 Gerichtsverfassungsgesetz (hereafter ‘GVG’) Section 23(b), BGBl (1975) I 1077.

42 GVG Section 22.

43 Carl, “Möglichkeiten der Verringerung von Konflikten in HKÜ-Verfahren”, FPR (2001) 211, 212 et seq; Mäsch, “Grenzüberschreitende Undertakings und das Haager Kindesentführungsabkommen aus deutscher Sicht”, FamRZ (2002) 1069, 1077 et seq.

44 Mäsch, *ibid.*

order creates an obligation for one of the parties that needs to be fulfilled before the return or access order will be made. The second 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.

3.4.6. 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 1980 Hague Convention matters are the *Oberlandesgerichte*. The return order of the *Familiengericht* becomes final after two weeks if there is no appeal. Only the respondent, the child (if he/she is older than 14 years of age) 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 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 (e.g. after two weeks if no appeal was lodged to the *Oberlandesgericht*). A successful applicant will, therefore, have to wait at least two weeks before he/she can actually enforce the return order.

3.4.7. ENFORCEMENT OF RETURN ORDERS

The enforcement of orders made under the 1980 Hague Convention is regulated in Section 44 of the IntFamRVG.⁴⁵ If the respondent does not comply with the court order the court can order:

1. the payment of a *Ordnungsgeld* (fine) up to 25.000 Euros;
2. *Ordnungshaft* (imprisonment) of the respondent;
3. the use of coercive measures to enforce its order.

The bailiff, as the primary enforcement body, is authorised to claim assistance from the police. If the bailiff cannot locate the child, the court can order any person who is bound to return the child to give an affidavit on the child's whereabouts.

(i) Competence for Ordering Enforcement Measures

All three possible enforcement measures have to be ordered by the court and are separate 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 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, and this caused enormous delays. If the respondent appealed against the enforcement order of the *Familiengericht*, the *Oberlandesgericht* was again asked to decide on enforcement measures.

⁴⁵ BGBI (2005) I 162.

(ii) **Ex Officio Enforcement of Return Orders**

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 orders *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 represents the winning party. They have the experience on how to enforce a specific case. Judges lack that experience. Second, the driving force in 1980 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. Third, and most importantly, Section 44(6) of the IntFamRVG is likely to overburden judges in practical terms. Proper enforcement might not be warranted anymore. Fourth, it is so far unclear what steps the applicant can take if the court does not comply with its duty to enforce its orders.

(iii) **Preventive Measures**

To prevent failure of potential enforcement measures and also to ensure expeditious proceedings, the courts have 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 from changing the whereabouts of the child, by imposing duties to appear regularly at a police office or by requiring the deposit of passports or by granting a border ban).

Overall, the possibility of taking preventive measures is an important tool to strengthen the effectiveness of the 1980 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 requested by the applicant. Thus, for example, the placement of a child in a foster family for the duration of proceedings can be quite traumatic for the child, especially if he/she does not speak the language of the forum State.

3.4.8. ENFORCEMENT OF ACCESS ORDERS

Enforcement of access orders are equally governed by Section 44 of the IntFamRVG. The Central Authority will initiate court proceedings with the *Familiengerichte* in whose jurisdiction the child resides at the time the access application is submitted. The Central Authority does not argue the case before the court. Rather, it delegates the case to local counsel for further proceedings. Access orders of the *Familiengerichte* enter into force upon their announcement.

Pursuant to Section 44(1) of the IntFamRVG, the court can order the non-compliant respondent to either pay a fine of up to 25.000 Euros or order his/her imprisonment. These two enforcement measures are imposed even when enforcement becomes impossible due to the respondent's obstructive actions.

3.4.9. MEDIATION

In Germany, generally, mediation is not considered an effective part of the enforcement of return orders. It is held 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.

46 Cf OLG Dresden 22 March (2002); FamRZ (2003), 468.

3.4.10. CONCLUDING OBSERVATIONS

(i) 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. Courts often summon the children for the hearing so that if they order the return of the child, enforcement can then take place immediately in the court room.

(ii) Coercive Force as an Enforcement Measure

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

(iii) 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 1980 Hague Convention matters. They then delayed proceedings by raising points which are of no relevance to the court's decision such as advancing arguments relating to the best interest and welfare of the child. Furthermore, counsel for the respondents are often unfamiliar with the special procedural rules for 1980 Hague Convention cases now embedded in the IntFamRVG. This causes additional delays because appeals are lodged which have no legal foundation.

(iv) Role of the Youth Welfare Authorities

Concern was expressed regarding the role of the youth welfare authorities within 1980 Hague Convention proceedings. Officers are often not familiar with the aims of the 1980 Hague Convention.

(v) 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 from which the child was abducted; however, this is done without giving notice to the applicant. After his/her return, the respondent and the child can then abscond again because the applicant does not know about their (temporary) return.

(vi) No Effective Enforcement of Access Orders

Most counsel who have dealt with access cases under the 1980 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. 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 to Germany if attempts to enforce an 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.

(vii) **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 1980 Hague Convention matters the courts normally fix that value at a sum between 2.500 and 5.000 Euros. The maximum fees resulting from that value thus amount to approximately 1.100 Euros. Therefore, counsel in custody matters often conclude a fee agreement which is not admissible in legal aid cases. As 1980 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 1980 Hague Convention matters. This could mean that the 1980 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 1980 Hague Convention procedures.

(viii) **Media Pressure**

In some interviews it became apparent that counsel is often exposed to intense media pressure. In rural areas, especially where the respondent is rooted in the local community, it is sometimes difficult for counsel representing the applicant to pursue the case. Press and media often report rather negatively about proceedings under the 1980 Hague Convention, ignoring the purpose of the Convention altogether. They often assert that the children involved are the objects of international relations and allege that their best interests are violated. There is evidence that, in some cases, counsel were not present during attempts by the bailiff and the police so as to not be recognised as the applicant's attorney and risk damaging their reputation as family lawyers and risk losing future clients. Such media pressure could perhaps be decreased by improving public relations handling and media management by the concerned public authorities.

3.5. The Netherlands

In the Netherlands, the 1980 Hague Convention is implemented by the 1990 Implementation Act (*Uitvoeringswet*).

3.5.1. 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*). Central Authority personnel are highly experienced in child abduction cases and have developed a consistent practice for handling 1980 Hague Convention applications.

One of the main duties of the Central Authority is to locate the abducted child within 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.⁴⁷ Where there is no address indicated, the Central Authority will write to the head of the public prosecutors of the district where the child may possibly reside 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 are, within reason, authorised to enter all locations in their search for an abducted child. In at least one case, a prosecutor asked the court to permit wiretapping of a missing child's grandparents' home.⁴⁸

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

47 In the Netherlands, everyone is required to register a change of residence with their municipality within five days following their move.

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

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.

3.5.2. JUDICIAL SYSTEM FOR HEARING 1980 HAGUE CONVENTION APPLICATIONS

There is no system of concentrated jurisdiction for hearing 1980 Hague Convention cases in the Netherlands. This means that 19 District Courts (courts of first instance), 5 Courts of Appeal (*Gerechtshof*) and 1 Supreme Court (*Hoge Raad*) have jurisdiction to hear 1980 Hague Convention applications.

If the child’s return is ordered, the District Court usually determines a timeline during which 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 prepare 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.⁴⁹ Nevertheless, there have been at least two decisions where a court ordered return under certain conditions.

3.5.3. 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. Additionally, Dutch law has reduced the period within which the appeal can be lodged. More importantly, 1980 Hague Convention applications have priority over other cases.

Notice of appeal to the *Gerechtshof* has to be given within two weeks after the decision of the District Court. Further appeals, ‘appeal in cassation,’ on a question of law must be submitted to the *Hoge Raad* and must be lodged within four weeks of the decision of the *Gerechtshof*. Nevertheless, despite the expedited time frames in the legislation, in practice some delays have occurred in obtaining a decision from the *Hoge Raad*.

3.5.4. ENFORCEMENT OF RETURN ORDERS

The length of 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 two to three weeks. During this period, the respondent is given the opportunity to comply with the return order voluntarily.

(i) 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 hand over the child or escort them to the airport. At times, a member of the Child Protection Board accompanies the police.

(ii) 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 the child be taken into provisional guardianship (*voorlopige voogdij*) or order the child to be removed and placed into temporary care (*ondertoezichtstelling met uithuisplaatsing*). However, these measures are rarely utilised. Unlike other countries, the respondent in the Netherlands does not normally have to hand over

⁴⁹ 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.

his/her passport or the child's passport or any other travel documents.

(iii) 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. Alternately, the court can order the imprisonment of the respondent for a maximum period of one year for failure to comply with a judicial order (*lijfsdwang*).⁵⁰ Of course, neither the imposition of fines nor detention may result in the return of the child 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 an appeal is lodged.

3.5.5. ENFORCEMENT OF ACCESS ORDERS

Upon receipt of an access application the Central Authority will contact the respondent and request an amicable resolution prior to filing the application with the court. Should negotiations with the respondent fail, the Central Authority will forward the case to the District Court.

Whilst access applications are filed before the District Court under Article 21 of the 1980 Hague Convention, in practice these cases are decided on their merits applying domestic legislation such as Articles 1:377a-377h of the Civil Code. Access orders are enforceable upon issuance even if an appeal has subsequently been lodged. If the respondent does not comply with the access order, the District Court may:

- order the respondent to pay a daily monetary fine until the order is complied with;
- order the respondent's imprisonment for a term of one year;
- order the suspension of all child maintenance payments;
- order the reduction or denial of spousal maintenance;
- order supervised visitation when the threat of an abduction is present;
- grant the applicant sole custody of the child.

3.5.6. PROBLEMS ENCOUNTERED IN PRACTICE

(i) 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.

(ii) 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 the child had gone into hiding.

(iii) Sickness of Child

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

⁵⁰ 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 *lijfsdwang* in an interim injunction proceeding after the abductor fails to comply with the order for return.

3.5.7. APPEALS

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

Overall, however, enforcement does not appear to be an issue in most 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 when and where necessary.

3.6. Romania

Once ratified, international conventions are directly applicable in Romania. Consequently, there is no need to implement the conventions into domestic legislation by a separate act of implementation. On 15 September 2004, Romania passed Law No. 369/2004 on the Application of the Convention on Civil Aspects of International Child Abduction.⁵¹ This new law was enacted to address serious problems affecting the practical operation of the 1980 Hague Convention in Romania. Specifically, there was no uniform interpretation of the 1980 Hague Convention by Romanian courts which in turn led to inconsistent practices and extremely long periods for handling applications. However, despite the fact that the new law was passed to address many of the general concerns with the Romanian system, the law has yet to be implemented in practice. Specialised courts with concentrated jurisdiction have not been formed and the duties of the Central Authority have not been defined by regulation.

3.6.1. 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 (Legal Directorate). Regulations describing the status and responsibilities of the Central Authority are to be approved by the Minister of Justice in the near future.⁵²

The Central Authority is primarily responsible for locating the abducted child within Romanian territory. To this effect, the Central Authority co-operates with the Ministry of Administration and Interior. The Central Authority is empowered to employ the assistance of the police and gendarmerie and is 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 voluntary return of the child or another amicable resolution of the case. However, mediation usually fails because parents do not want to negotiate. Consequently, the Central Authority informs the Legal Directorate about the case and asks it to initiate return proceedings before the competent court. The applicant is represented by legal counsel from the Legal Directorate. This practice is at variance with the stated procedure. Under the new law, the Central Authority is required to be present and actively involved in the court proceedings.

3.6.2. JUDICIAL SYSTEM FOR HEARING 1980 HAGUE CONVENTION APPLICATIONS

In 2004, a concentrated jurisdiction for hearing 1980 Hague Convention cases was provided for in Romania. Law 369/2004 prospectively established that a specialist from the Bucharest Tribunal (Bucharest Court for Minors and Families) should deal with 1980 Hague Convention cases. However, this specialised court has not yet been formed. In addition, none of the courts approached in connection with the research had any knowledge of any 1980 Hague Convention cases despite 14 pending cases reported by the Central Authority and the existence of the ECHR judgment.⁵³

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

52 At the time of research, the draft regulation was under consideration but has since been enacted.

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

The court has the right to take measures to protect the child and to prevent the respondent from going into hiding or from absconding with the child (this can be accomplished by ordering the removal of passports or the payment of a financial bond). The court can also impose a civil fine of up to 25 million lei for possible non-compliance with the order.

3.6.3. ENFORCEMENT OF RETURN ORDERS

The new legislative framework in Romania, which is particularly relevant to enforcement, requires the Central Authority to have a proactive role in all aspects of applications under the 1980 Hague Convention. 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. The court can also order further enforcement measures if a respondent who has been fined does not return the child. These measures include the collection and/or removal of the child by the police.

3.6.4. ENFORCEMENT OF ACCESS ORDERS

On receiving the access application, the Central Authority will contact the respondent and attempt to resolve the matter amicably. If the respondent refuses to allow the applicant access to the child, the Central Authority will then ask the competent court to settle the case. The Court, for instance, may authorise the exercise of access rights outside Romanian borders once the applicant has posted the requisite bond.

3.6.5. PRACTICAL ASPECTS OF THE 1980 HAGUE CONVENTION:

IGNACCOLO-ZENIDE V ROMANIA

On 22 January 1996, Mrs Ignaccolo-Zenide lodged a complaint before the ECHR for breach of Article 8 of the European Convention on Human Rights (hereafter ‘European Convention’) which guarantees the right to respect for family life. She specifically alleged that Romanian authorities did not take appropriate measures to execute the court decision that had ordered the return of the children to her custody.

Mrs Ignaccolo-Zenide complained of the half-hearted attempts made to execute the order of 14 December 1994, pointing out that nothing had been done to find her daughters who were systematically hidden by the father prior to each of the bailiff’s visits. She also criticised Romanian authorities for their complete inactivity between December 1995 and January 1997.

In its memorial, the Romanian Government maintained it had discharged the positive obligations imposed by Article 8 of the European Convention and was, therefore, not in violation of that provision.

The Romanian Government stressed that the authorities in question had taken adequate and effective steps to have the order of 14 December 1994 executed. For instance the bailiff was authorised to seek the assistance of the police in carrying out the order and the respondent-father was summoned to the Ministry of Justice. The Government pointed out that the failure to execute the order was due primarily to the father’s non-compliance. The Government declared that it could not be blamed for the father’s behaviour and/or the children’s refusal to return to their custodial mother.

The ECHR, however, saw things differently, declaring that “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.”

3.6.6. OTHER PROBLEMS

There are doubts as to which court is competent to determine the issue of regulating the legal status of a child involved in an international abduction where the custody of the child is a secondary count vis-à-vis the main count of the dissolution of a marriage.

It is unclear whether there is a distinction between “child” and “minor”, taking into account that the 1980 Hague Convention covers children involved in international abductions.

It is unclear as to who is the competent guardian authority to conduct a social investigation in this matter.

3.7. Slovakia

The 1980 Hague Convention entered into force in Slovakia on 1 February 2001.⁵⁴ In Slovakia, the incorporation of international treaties into 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.

3.7.1. 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 specialised in 1980 Hague Convention matters. They have developed considerable expertise and are proactive with their involvement in abduction matters.

The Central Authority is primarily concerned with locating the child and the respondent. In most cases, the applicant is able to provide the child’s full address in Slovakia. Nevertheless, if the whereabouts of the child are unclear, 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.

Prior to 1 January 2006, the police were not required to co-operate with the Central Authority to locate the child and the respondent. This has since changed because parental abduction has become a crime⁵⁵ and the Central Authority anticipates receiving police support in cases where the child cannot be located by other means.

Furthermore, the Central Authority plays a key role in mediating between the parties involved. To this effect, the Central Authority requests that the local authority of the district where the child resides contact the respondent and arrange a meeting. If the respondent agrees to attend the meeting, immediate arrangements are made to hold the meeting at the office of the local authority. 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 recorded mail requesting the voluntary return of the child within a period of 10 days. When attempts to secure the voluntary return fail and no other amicable resolution is reached, the Central Authority, as the legal representative of the applicant, forwards the case to the competent court.

3.7.2. JUDICIAL SYSTEM FOR HEARING 1980 HAGUE CONVENTION APPLICATIONS

There is no system of concentrated jurisdiction for hearing 1980 Hague Convention applications in Slovakia. This means that all 45 District Courts (courts of first instance), 8 Regional

⁵⁴ The adoption of the 1980 Hague Convention was announced by the Notification of the Ministry of Foreign Affairs of the Slovak Republic No. 119/2001 Coll.

⁵⁵ On 1 January 2006, a new Penal Code (Act No. 300/2005 Coll.) which recognised 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 from 6 months to 5 years.

Courts (courts of appeal) and 1 Supreme Court have jurisdiction over 1980 Hague Convention applications. The lack of concentrated jurisdiction impedes the speedy disposal of 1980 Hague Convention proceedings. Judges are usually unfamiliar with the 1980 Hague Convention and, consequently, the courts are unable to follow the principle of expedient procedure enunciated in the Convention.

3.7.3. UNDERTAKINGS

Undertakings in 1980 Hague Convention matters are theoretically possible, although they are not explicitly regulated by Slovak law. The legal nature of undertakings in Slovakia is, therefore, uncertain.

3.7.4. APPEALS

Paragraph 204(1) of the Code of Civil Procedure allows an appeal of the first instance decision to be filed within a period of 15 days from time the decision is served on the parties. If there is no appeal, the return order becomes final after 15 days. When an appeal is filed, the enforcement of the decision is stayed until an appeal decision is handed down.

3.7.5. ENFORCEMENT OF RETURN ORDERS

Return orders are not immediately enforceable. The successful applicant has to wait 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 timeframes for appellate proceedings. Moreover, there are no expedited timeframes for 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 does it specify what to do if the respondent does not comply with the return order voluntarily. Given the relatively small number of 1980 Hague Convention cases which resulted in the issuance of return orders, the Central Authority does not have a procedure for securing return when the respondent refuses to comply with a court ordered return. Moreover, coercive measures are applied only in cases where return orders are declared enforceable by a competent court and the coercive measures to secure the return of the child are specified by the court.

If the respondent does not comply with the return order within three days of its issuance, the applicant must then file a petition for enforcement of the order with the competent court.

(i) Voluntary Adherence

The presiding judge must call upon the respondent to comply with the order prior to issuing an enforcement order. The judge must equally warn the respondent of the consequences resulting from the failure to observe the conditions stipulated in the court decision. The judge concurrently orders 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.

(ii) Coercive Measures

If the call by the presiding judge remains fruitless, the judge has a right to order the physical removal of the child and his/her handover to the applicant. 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 hand over of the child to the applicant.

(iii) Preventive Measures

Although preventive measures such as collection of the child's and the respond-

ent's passport or removal of the child from the physical custody of the respondent, are an important tool to strengthen the effectiveness of the 1980 Hague Convention, no such measures are expressly provided for in Slovak law. Nevertheless, the 'right of discretion' of the court allows for the inclusion of deterrent measures in the return order or the order of enforcement. Applicants are reluctant to petition the court for some of these measures as they might cause psychological harm to the child (for example, the removal of the child from the physical custody of the respondent and placing him/her temporarily with a foster family for the duration of the proceedings).

3.7.6. ENFORCEMENT OF ACCESS ORDERS

The Central Authority will try, initially, to persuade the respondent to comply voluntarily with the access order or to agree on suggested terms for access if a court decision has not yet been rendered. If the attempt to bring about an amicable resolution fails, the Central Authority will forward the case to the competent District Court. In order to enforce an access order, the Central Authority must petition the court to have the access decision enforced.

The enforcement procedure for access orders is essentially the same as the one used to enforce return orders.⁵⁶ Additionally, the Code of Civil Procedure gives the presiding judge the right to impose (on the respondent who refuses to voluntarily comply with the court decision) a fine that must not exceed 2.000 Slovak Crowns.

The effective enforcement of an access order depends to a 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 an 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.

3.7.7. FINAL OBSERVATIONS

Despite some obvious weaknesses in the Slovak legal system, there has been only one incoming return case where a serious enforcement problem occurred. In this case, the respondent-mother wrongfully removed 3 children (boys aged 3, 5 and 7 years old) from Germany to Slovakia in June 2004. The Central Authority, acting on behalf of the applicant-father, initiated 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 appeals court upheld the first instance decision. Despite the final return order the mother refused to return the children arguing that the oldest child had started his first year of primary education in Slovakia and interruption of studies before the end of the school year would not be in the best interest of the child. 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 with the competent court. Even though the children at the time had been residing in Slovakia for 20 months, the return order was enforced in February 2006.

It is difficult to draw meaningful conclusions when Slovakia has only handled a limited number of cases since it ratified the 1980 Hague Convention. Nonetheless, the operation of the 1980 Hague Convention could be enhanced by improving the legal framework for child abduction matters. The issues which merit attention 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.

⁵⁶ See *supra* Enforcement of Return Orders.

3.8. Sweden

In Sweden, the 1980 Hague Convention is implemented by the 1989 Act on Recognition and Enforcement of Foreign Decisions on Custody and Related Matters and on Return of Children⁵⁷ (hereafter ‘the 1989 Act’).

3.8.1. JUDICIAL SYSTEM FOR HEARING 1980 HAGUE CONVENTION APPLICATIONS

Since 1 July 2006, jurisdiction to hear 1980 Hague Convention applications has been restricted within the Swedish system.⁵⁸ The applications are heard by the Stockholm District Court at first instance and by the Svea Court of Appeal in Stockholm at the second instance.

According to the requirements stipulated in the 1989 Act, return applications must be dealt with expeditiously. If a decision has not been granted within six weeks from the date of application, the court is obliged to explain the reasons for the delay upon the request of the applicant.

3.8.2. APPEALS

Using the legal system of appeals can be one mechanism by which a respondent 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 enforceable without hindrance of legal force. In practice, most respondents apply for, 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 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.

3.8.3. ENFORCEMENT OF RETURN ORDERS

The enforcement of return orders is regulated by Sections 18 to 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. To summarise, 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).

(i) Penalty Fee

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 have 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 pro-

⁵⁷ Swedish Code of Statutes (SFS 1989:14).

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

⁵⁹ According to the 2003 statistical survey, *op. cit.*, n. 24, 29% of applications were appealed. The global average was 22%.

cedure 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 to 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.

(ii) 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 or a child psychologist. The police arrive on the premises in plainclothes. If a mediator is also present, he/she will talk to the respondent first. The applicant may also be present to receive the child.

An order for police-assisted enforcement gives the police 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. 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, where a perceived grave risk to the child exists, the police may show up without prior notice. If the respondent is not present during the first visit, the police are authorised to visit the house or the child's school a second time without announcing their arrival prior to enforcement.

The police may also accompany a respondent and child to the airport to ensure they board their flight.

(iii) 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 terms of the return order and result in a voluntary return.

(iv) 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, the child to be taken into immediate care if there is a risk that he/she will be removed from Sweden or that enforcement will be obstructed. The 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.

3.8.4. ENFORCEMENT OF ACCESS ORDERS

Applications for access are dealt with by the court according to rules contained within the Parental Code for domestic access disputes. Pursuant to Chapter Six of the Parental Code, the best

interest of the child should be paramount in any order and decision regarding custody, residence and contact. Amicable agreements are sought and encouraged over court orders. Accordingly, parents are given access to the services of the Social Welfare Body to facilitate such agreements.

The court does not normally give specified directions in contact cases; it merely specifies the periods during which the applicant may exercise his/her access rights. If an access order is made and enforcement is sought, the applicant will need to institute an application for enforcement of the order. Chapter Six, Section 21 of the Parental Code authorises the court to impose a fine if the respondent does not comply with the enforcement order. Generally, the court will not order the police to enforce an access order unless it is clear that the enforcement will not otherwise take place and the best interest of the child requires that he/she have access to the applicant. If police-assisted enforcement is ordered, the court must commission social services to initiate mediation. The court also has the discretion to order the placement of the child in protective care. Lastly, the court cannot enforce an access order against the will of a child who is 12 or older unless it is necessary or is in his/her best interest.

3.8.5. EFFECTIVE LOCATION POWERS

There are normally no issues in locating a child within Sweden, as all persons have to be registered in the population register. Both the Swedish Central Authority and the 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. In addition, the solicitor to whom the case has been referred might also conduct searches or hire a private detective.

3.8.6. USE OF MEDIATION THROUGHOUT 1980 HAGUE CONVENTION PROCESSES

In accordance with Section 15 of the 1989 Act the court may commission a member of the social services board or social services to mediate to secure 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 to 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 or 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 help the respondent deal with the return terms and make the child available. For example, in police-assisted enforcement the mediator may enter the house to speak to the respondent prior to the police coming in to enforce the order.

3.8.7. 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, although access applications were generally more difficult to enforce. In the context of return orders, difficulties were experienced in getting the courts to make orders for police-assisted enforcement. This has since changed and is due, in part, to the specific law reforms introduced by Sweden in 1993 to address problems with enforcement.

Practitioners also indicated that in 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 prevention enforcement measures available such as obtaining an order from the court for the child to be removed and placed in care. Enforcement remains difficult in those rare cases where the parent absconds due to a lack of clear, transparent and effective location powers.

3.9 United States of America

The 1980 Hague Convention is the fourth Hague Convention and the first family law convention to which the USA has become a party. The 1980 Hague Convention came into force on 1 July 1988 following implementation of the International Child Abduction Remedies Act of 1988. Under US law, an international treaty is recognised as the “supreme law of the land”. Consequently, the 1980 Hague Convention takes precedence over any conflicting Federal or State laws other than the US Constitution.

The National Center for Missing & Exploited Children (NCMEC) handles incoming 1980 Hague Convention cases on behalf of the US Department of State’s Office of Children’s Issues under a tri-party agreement with the Department of State, which is the US Central Authority.

3.9.1. EFFECTIVE LOCATION POWERS

NCMEC assists in discovering the whereabouts of wrongfully removed or retained children in the USA⁶⁰ and has a mandate to locate missing children.⁶¹ NCMEC works with law enforcement authorities (e.g. Federal Bureau of Investigation (FBI), State and local authorities and US Marshals) to locate children and has available many other tools for locating missing children, namely:⁶²

- The 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 Contracting State.
- US Immigration and Customs Enforcement may identify respondents and abducted children at US borders and international airports.
- US law enforcement personnel may, in any capacity (e.g. State, local and FBI) and anywhere (e.g. at ports of entry or elsewhere in the country) use the National Crime Information Center (NCIC) to cross-check information against NCIC files.
- Local, State or Federal law enforcement officers may request change-of-address information through the US Postal Inspection Service.
- The Defense Department Legal Assistance Officers and Worldwide Military Locator Services can, if the respondent or other accompanying family member is a member of the armed services, 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. 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 conduct 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 State-wide law enforcement agencies and as such can coordinate law enforcement investigations.⁶⁴

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.

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, available at http://www.hcch.net/upload/abd_return_us.pdf.

63 Op. cit., n. 60, pp. 38-39.

64 National Centre for Missing and Exploited Children, “Family Abduction: Prevention and Response”, p. 60, available at http://www.missingkids.com/en_US/publications/NC75.pdf.

- 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, but can help parents organise a search and recovery.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 US authorities about an abduction if they believe that the respondent may travel to the USA. The Interpol-US National Central Bureau may work with NCMEC and/or local authorities to locate children abducted to the USA.⁶⁷

3.9.2. JUDICIAL SYSTEM FOR HEARING 1980 HAGUE CONVENTION APPLICATIONS

There is no system of concentrated jurisdiction for hearing 1980 Hague Convention applications in the USA. Both Federal and State courts have original jurisdiction to hear 1980 Hague Convention cases. This means that over 30,000 judges may potentially have jurisdiction to hear a 1980 Hague Convention case.⁶⁸

3.9.3. PROCESSING APPLICATIONS

Two particular approaches to processing applications under the 1980 Hague Convention have been identified.

(i) Texas

The respondent is served with notice of the return hearing at 7.30 am on the date of the court hearing by US 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.

(ii) California and Illinois

In California and Illinois, the respondent is given advance notice of the final hearing date (usually within one to two weeks of the application being filed). However, a range of ex parte orders may be obtained to secure the whereabouts of the child pending the return order.

The US Central Authority will contact courts handling 1980 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 whereas others state only in general terms that the child should be returned to the requesting Contracting State.

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

⁶⁵ Ibid at 61.

⁶⁶ Ibid at 74.

⁶⁷ Op. cit., n. 60, p. 39.

⁶⁸ See Lowe, Armstrong and Mathias, "Country Report: United States", (NCMEC 2002) 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., n. 24.

3.9.4. 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 1980 Hague 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 Circuit Court or the final State Court of Appeal may be made to the US Supreme Court. Only one appeal of a return order is permitted at each court level.

3.9.5. ENFORCEMENT OF ORDERS

As a general matter, an order for return is 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 on his/her own behalf. Enforcement of orders is supervised by the court issuing the order and assisted by law enforcement officers (e.g. US 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 and 30 days). Nevertheless, a court may allow a period of time for voluntary compliance with the return order or 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

3.9.6. ENFORCEMENT MEASURES

Once a return order has been made, courts seem willing to utilise 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 which are explained below.

(i) Civil and Criminal Contempt Proceedings

Courts may enforce return orders through their contempt powers, which include fine or imprisonment. If the person found in contempt (e.g. 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 a civil contempt action can take weeks or even months;

70 Op .cit., n. 60.

(ii) **Pick-Up Orders**

Pick-up orders are ex parte orders directing law enforcement officers to pick up the abducted child. This enforcement measure is far more expeditious than contempt proceedings.

Pick-up orders are also referred to as a warrant for a US Marshal or a local law enforcement officer to collect the child, writ of habeas corpus, writ of attachment, writ of enforcement and a warrant in lieu of a writ of habeas corpus.

(iii) **Federal and State Warrants for Arrest of Respondent**

In Massachusetts, for example, the arrest order is a condition for the police to be involved in enforcement. In California, practice involves obtaining an 'order directing return' that authorises assistance from the police or US Marshals to enforce the order if necessary. However, our empirical research shows that in practice the applicants have rarely had to rely on assistance from the police or US Marshals to secure enforcement of the return order.

(iv) **District Attorney's Office**

The District Attorney's Office can be used to make certain that the order is enforced (only in California).

3.9.7. 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:

- removal of passports and travel documents;
- detailed return orders;
- use of port alert system to prevent departure from the country;
- ex parte orders compelling the respondent to appear in court;
- ex parte orders compelling the respondent to keep the court informed of the child's location at all times;
- ex parte orders for non-removal of the child;
- interim orders to place the child in care, pending proceedings where the respondent attends court and seeks adjournment to get legal advice, the child is placed in the care of the applicant or sometimes a neutral third person;
- temporary custody order entrusting the child to the applicant;
- use of a financial bond;
- use of electronic tagging device (in one California case).

3.9.8. MEDIATION

In the USA,⁷¹ 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 mediated cases in the USA.

71 The Child Find of America web site is available at <http://www.childfindofamerica.org/programs.htm>.

4. Summary of Common Problems Encountered

Although this research has been able to identify some weaknesses in 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 that do not 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. Enforcement problems encountered in each jurisdiction generally fall under the following categories:⁷²

- The child and respondent go into hiding (e.g. Australia, England and Wales, France, the Netherlands, Romania, Sweden and the USA).
- The child is removed to another country (e.g. the Netherlands (rarely) and France (rarely)).
- The child objects to being returned and refuses to travel/co-operate (e.g. Australia, England and Wales and France).
- The use of appeals and/or the legal system to delay enforcement (e.g. Australia, England and Wales, France (rarely, given the fact that as a rule return orders are enforceable notwithstanding an appeal), Romania, Slovakia, Sweden and the USA).
- The respondent engages in obstructive behaviour to delay/avoid enforcement such as refusing to reveal travel plans, changing travel plans, claiming moving difficulties or refusing to sign visa applications (e.g. Australia, England and Wales, France, Slovakia and Sweden).
- Enforcement of the return order is delayed because the parent cannot re-enter the country of habitual residence, due to immigration reasons or a criminal warrant, for example (e.g. Australia, England and Wales, France, Germany and the Netherlands).
- Enforcement is delayed due to non-compliance with conditions/undertakings contained in a return order or a need to secure a mirror order in the requesting Contracting State, including the applicant's failure to pay money upfront or to comply with conditions, the inability of both parties to afford airfare and/or accommodations, the inability or unwillingness of the applicant to overturn a criminal warrant and/or the lengthy process of securing mirror orders (e.g. Australia, England and Wales, Germany and the USA).
- Enforcement is delayed due to the impact of concurrent domestic custody proceedings in the requested/requesting Contracting State (e.g. the Netherlands, Romania, Slovakia and the USA).
- Enforcement is delayed due to the health/welfare of the returning child (e.g. Australia, the Netherlands and Sweden).
- Enforcement is delayed due to the health of the respondent such as illness or pregnancy (e.g. the USA).
- Enforcement is delayed because the parents cannot fund travel arrangements, which is also relevant to conditions/undertakings (e.g. Australia, England and Wales, France, Romania, Slovakia and the USA).
- Enforcement is delayed because the applicant did not seek enforcement of the return order (e.g. Australia).
- Enforcement is delayed because the applicant changed his/her mind about pursuing enforcement of the return order (e.g. Australia, England and Wales and Sweden).
- The court order does not specify how the child's handover/return is effected nor does it specify within what time frame (e.g. France, Slovakia and the USA).
- Enforcement is delayed because of pressure from the public/media (e.g. France and Germany).
- Enforcement is delayed because the appellate court did not rule on the case for a long time without stating any reason (e.g. the USA). This is related to lack of awareness and knowledge of judges hearing 1980 Hague Convention applications.

⁷² For an excellent analysis of enforcement problems as evidenced by current law in Australia see Justice Joseph Kay in The Judges' Newsletter, op. cit., n. 48, p. 10.

5. Points of Good Practice

5. 1. Key Operative Principles (Pervasive Points)

5.1.1. SPEED

The obligation under the 1980 Hague 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 Contracting State, the more likely there are to be enforcement difficulties.

5.1.2. FAMILIARITY OF ALL THOSE INVOLVED WITH THE 1980 HAGUE CONVENTION

It is vital that all those involved (e.g. judges, advocates, Central Authority personnel, mediators and experts) are familiar with the 1980 Hague Convention. It is evident from this research that many potential enforcement problems can be avoided if those involved are experienced. Moreover, if those involved are experienced, applications are likely to be disposed of more quickly. Mediators need to be familiar with the 1980 Hague Convention so as to know the parameters within which they are working.

5.1.3. EFFECTIVE COMMUNICATION

It is important that communication can be had with the Central Authority at all times. This will ensure speedy processing and prosecution of applications. It is just as important that there be 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

- Location orders which enable various searches to be made (including authorising the police to enter premises and search for the child) are vital (e.g. Australia, England and Wales, the Netherlands and Romania).
- The use of police assistance to locate children is important (e.g. Australia, England and Wales, France (police specialised in protection of minors) Germany, the Netherlands, Romania, Slovakia (if criminal proceedings have been brought), Sweden and the USA). Some countries require location orders (see above).
- The use of wire taps can be helpful in locating children (e.g. 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 (e.g. Australia (broad range of bodies), England and Wales (broad range of bodies), France (local authorities registries, the police, gendarmerie and social security files), Germany (Federal Criminal Police Office, youth welfare authorities, social affairs authorities, Federal Bureau of Motor Vehicles and Drivers and other authorities), the Netherlands (municipality registers and public prosecutor), Romania (the police, gendarmerie, local council and other authorities), Slovakia (local authorities, municipalities and Central Registry of the Population), Sweden (population register) and the USA (FBI, State and local authorities, US Marshals, US Postal Inspection Services, NCIC, US Postal Service, Defense Department Legal Assistance Officers and Worldwide Military Locator Services, Federal Parent Locator Service, State Missing Children's Clearinghouses and non-profit missing children's organisations).
- The use of private investigators can be helpful to locate children (e.g. Australia, England and Wales, France, Sweden and the USA).
- The ability to require relatives or friends to attend court and give information can also be helpful in locating children (e.g. Australia and England and Wales).
- The use of the media after securing a publicity order from the court (e.g. Australia and England and Wales).

- Interpol (normally assists where a warrant for the abducting parent has been issued in the requesting Contracting State) and International Social Services may be beneficial.

5.3. Effective Preventive Measures

5.3.1. PREVENT PARTY FROM GOING INTO HIDING OR ABSCONDING

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

- removing passports and travel documents in the majority of cases (e.g. Australia, England and Wales, Germany (if ordered by the court), Romania, Slovakia (if ordered by the court) and the USA);
- ordering the respondent to appear regularly at a police office (e.g. Australia and Germany);
- making an injunction restraining the movement of the parent/child to reside at a particular address (e.g. Australia);
- making of ex parte orders compelling the respondent to appear in court and/or to keep the court informed of the child's location at all times and/or ordering non-removal of the child (e.g. the USA);
- using a port alert system to prevent departure from the country (e.g. Australia, England and Wales, Germany, and the USA);
- using private investigators to observe the respondent and the child's movements prior to return (e.g. Australia);
- only returning passports to the respondent and the child at the place of departure (e.g. Australia and England and Wales);
- escorting the respondent and the child to the airport/departure lounge (e.g. Australia, England and Wales, the Netherlands (rarely utilised), Sweden (rarely utilised) and Slovakia (if ordered by the court));
- making a collection/removal order to remove the child(ren) from the respondent for purposes of securing return (e.g. Australia, England and Wales, the Netherlands and Sweden (rarely utilised));
- making a collection/removal order to place the child in care, pending proceedings, or to ensure the return order will be enforced (e.g. Australia, England and Wales, the Netherlands, Sweden (rarely utilised) and the USA);
- making an order providing for the child to attend counselling to assist him/her in coming to terms with the return order and, therefore, alleviating risks of enforcement issues (e.g. Australia);
- parents making a financial bond to return the child (e.g. Australia, England and Wales, Romania and the USA);
- using tracking devices (e.g. England and Wales and the USA (possible though not often utilised));
- requesting that the handover of the child be at the Embassy of the requesting Contracting State in the requested Contracting State (e.g. Slovakia).

5.3.2. AMICABLE RESOLUTION OF ISSUES

Procedures that assist parties to reach an amicable resolution, and in particular to achieve 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 co-operate, 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 and Wales;

- the well-developed system of mediation in France, particularly through MAMIF, and the availability of mediation even after a return order has been made;
- amicable resolutions of the issues which are regularly sought by the Central Authority prior to court proceedings being initiated (parties may also be referred to mediation) such as in the Netherlands;
- requiring mediation to take place prior to a court referral (procedures implementing this rule are relatively unknown in practice) such as in Romania;
- making amicable resolutions of issues a top priority both, prior to court proceedings being initiated and over the course of enforcement proceedings (after a return order has been made) such as in Slovakia;
- use of court-ordered mediation in Sweden, for example, which can help the parties 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 and 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 ORDERS

The use of undertakings/conditions within a return order can assist enforcement in two ways. First, it can alleviate any fears, concerns or safety issues that the abducting parent may have regarding a return to the child's country of habitual residence (e.g. provision of accommodation, maintenance, temporary residence of the child and protection measures). Second, it can ensure the prompt return of the child and prevent illicit removal (e.g. the child and the respondent must return by direct flight and passports will only be returned when the parties reach the requesting Contracting State).

Both Australia and England and Wales have systems whereby undertakings/conditions 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 Contracting State prior to the return order being enforced. This is particularly relevant in cases where there are concerns for the safety of the returning parent or the child or where the returning parent has no access to funds to support him-/herself and the child.

In Germany, undertakings in 1980 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 can 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 requires conditions to be met by the applicant as part of the amicable resolution of the matter.

In Slovakia, undertakings/conditions are not explicitly provided for. Nevertheless, it is believed⁷³ that if an undertaking/condition is to be attached to a return order, the judge can decide whether to incorporate the undertakings into the return order.

As in the Netherlands, Sweden does not recognise the concept of undertakings/conditions but such are currently under legislative consideration.

In the USA, undertakings or pre-conditions on return involving actions to be taken in the requesting Contracting State are rarely issued but there is ample experience of making safe harbour 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.

⁷³ Interview with lawyers at the Central Authority (4 January 2006).

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 Contracting State, but can also apply to a range of external personnel in the requesting Contracting State. The use of judicial liaisons between judges in the requesting and the requested Contracting State 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 must be placed directly into care upon his/her return). Using an incoming return application to England and Wales as an example, the following bodies might be involved in the enforcement process at any given time:

1. internally, including judges, the Tipstaff, the police, solicitors, child welfare authorities, court staff, airlines, immigration authorities, passport offices and Central Authority personnel.
2. externally, including immigration and visa authorities of the requesting Contracting State, passport offices, Embassy staff, foreign Central Authority staff, judges, solicitors and the police.

The number of possible personnel involved in the process reinforces the need for Contracting States to ensure that effective co-operation and communication are 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 which may be undertaking the enforcement procedure(s) are 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 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 THE CHILD

In Australia and England and Wales, urgent orders can be made on an ex parte basis for the police/welfare authorities to remove/collect the child if necessary for enforcement, with the child to be handed over to the applicant or to 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/her 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 are plainclothed and can be accompanied by a member of the relevant child welfare authority when enforcing orders.

5.4.2. PLACEMENT INTO CARE

Australia, England and 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 rarely used in these jurisdictions.

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.

- In Australia, the system offers counselling, mediation and use of welfare workers to assist a respondent in coming to terms with the return decision or to achieve voluntary returns.
- In England and 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 a child) to come to terms with the return decision.
- 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 the issues. In most cases, the public prosecutor asks the specialised 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 filing and an appeal he/she mediates between the parents the conditions for the return of the child. Second, mediation is possible through the help of lawyers specialising in international cases involving children. Third, a separate body, MAMIF, was set up in 2001. It can assist 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 an effective means of settlement of 1980 Hague Convention issues and there is no specialised 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 is present with the police and talks to the abducting parent before the child is collected or enforcement occurs (such as the police escorting the abducting parent and the child to the aircraft).
- In the USA, 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, the police are required to be present on 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 arrival. Social workers will usually talk to the parent before the child is removed. The police will normally wear civilian clothes to lessen the impact of the police presence on the child. In the USA (e.g. Massachusetts), the police can become involved once an 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 the respondent and the 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 hand over 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 positions are 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) of up to 5.000 Euros. If the respondent does not comply with the return order, the court can order his/her imprisonment (Ordnungshaft).
- 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 imprisoned (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 timeframe 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 obtained from 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 and Wales and the USA, if a respondent does not comply with the return court order, it is possible for the court to find him/her 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 the 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.⁷⁴

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's compliance 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 1980 Hague Convention process (see in particular the discussion at 5.1 of the Guide to Good Practice, Part II — Implementing Measures).⁷⁵ There are also obvious benefits to an application for enforcement being heard by a judge and other personnel familiar with the 1980 Hague Convention and

⁷⁴ In Australia, there is one recorded contempt case where the abductor in an outgoing abduction matter was imprisoned in Australia due to failure to comply with domestic court orders and the return order made by the foreign court pursuant to the 1980 Hague Convention.

⁷⁵ Published by Jordans (2004).

familiar with invoking coercive measures in abduction matters. Australia, England and Wales, France,⁷⁶ Germany and Sweden have concentrated jurisdiction whereas the Netherlands, Slovakia and the USA do not. Under the new laws in Romania,⁷⁷ 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 specialised section of the Bucharest Tribunal.

5.6. Expedited Access to the Courts for Enforcement Measures

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 and Wales, Germany and Sweden have systems in place to ensure applications for enforcement are dealt with quickly by the courts. In particular, the system in Australia where the Family Court of Australia provides an out-of-hours court service for urgent matters; in England and Wales, a 24-hour Duty Judge is available as well as daily access to the High Court Applications Judge; in Germany, the new rule stipulates that if an appeal is lodged, it is for that regional Court of Appeal (Oberlandesgericht) alone to decide on enforcement measures); and 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 (e.g. Australia and England and Wales);
- requiring permission/leave to appeal or requiring lodging an appeal within certain time-frames (e.g. Australia, England and Wales, Germany, France, the Netherlands, Romania, Slovakia, Sweden and the USA);
- having an expedited process for appeal applications (e.g. Australia (occurs in practice as much as possible), England and Wales, the Netherlands, Sweden and 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 (e.g. England and 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 on appeal (e.g. Australia, England and Wales, Germany and the Netherlands);
- having enforceable orders 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 and 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 but 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;

⁷⁶ Elements of concentrated jurisdiction introduced in 2004.

⁷⁷ Law No. 369 of 15 September 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 over abduction matters. However, the court has yet to be established.

in Sweden, a return order may be made enforceable without hindrance of legal force (in practice, most respondents apply for 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

The existence of a small pool of experts can be a consequence of 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 and Wales, the use of a small panel of solicitors, primarily located in London, has led to the development of a specialised group of legal experts involved in abduction matters (a similar process occurs in Germany and in Australia through the use of State Central Authorities). In England and 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 1980 Hague 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 Authorities act as the applicant in the proceedings and, therefore, have developed considerable expertise and are proactive 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 1980 Hague Convention procedure. Similarly, it is very helpful that judges dealing with applications under the 1980 Hague Convention are specialised 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 1980 Hague Convention proceedings. Counsel attends hearings, submits pleadings, negotiates amicable solutions and keeps in touch with the applicant and the respondent or his/her representative. Counsel is always a qualified attorney who is highly specialised in family law and experienced in 1980 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 1980 Hague Convention cases. 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 proactive role in all aspects of 1980 Hague Convention applications.

5.9. Judges' Role

When making a return order, it is helpful if judges are aware of 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 Contracting State. Thought also needs to be given to the travel documents needed and whose responsibility it 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 concern that the respondent and the child may disappear because of a stopover, the return order may

specify that the applicant or an escort accompany the respondent and the 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 the 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 orders that do not contain 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.

6. Overall Summary of Recommendations

6.1 Speed

- Enforcement should be made a part of the 1980 Hague Convention so far as timing is concerned in order to ensure that return orders are enforced within the timeframe indicated by the Convention.
- Contracting States should have an effective mechanism for the expeditious enforcement of return orders in order to handle the application within the timeframe indicated by the 1980 Hague Convention.

6.2 Familiarity of All Those Involved with the 1980 Hague Convention

- All those involved in the enforcement procedure (e.g. judges, advocates, Central Authority personnel, mediators, and experts) should be familiar with the 1980 Hague Convention.

6.3 Effective Communication

- Central Authorities should reply promptly to all communications.
- The different agencies involved in enforcement should communicate effectively in order to co-ordinate efforts and to prevent unnecessary delay.

6.4 Effective Location Powers

- The use of police assistance and Interpol should always be available.
- In appropriate cases, location orders which enable various searches to occur (including authorising the police to enter premises and search for the child) should be expeditiously issued.
- Central Authorities should be able to obtain disclosure of information from various authorities (e.g. government agencies and services, local authorities' registries, municipality registers, youth welfare authorities, social affairs authorities, police, gendarmerie, and population register).
- Where appropriate, private investigators should be invited to participate in locating the child.
- Where appropriate, tracking devices such as wire taps should be permitted.
- It should be possible to require relatives to attend court and give information on the child's whereabouts.

6.5 Effective Preventive Measures

- Courts should be able to order removal of passports and travel documents.
- Passports should only be returned to the respondent and the child at the place of departure.
- Where appropriate, the respondent and the child should be escorted to the airport/departure lounge.
- A mechanism such as a port alert system should be in place to prevent departure from the country.
- Where appropriate, it should be possible to order the respondent to appear regularly at a police station office.
- Procedures that assist parties to reach an amicable resolution prior to court proceedings as well as in the course of enforcement proceedings should be put in place. A body providing mediation services should be established in every Contracting State. The possibility of an international mediation service should be considered.
- Where the respondent has agreed to return the child voluntarily after court proceedings have been initiated, it should be possible to stipulate the terms of the 'voluntary return' by way of entering into consent orders. This would give a legally enforceable basis for the voluntary return agreement and thus help to prevent enforcement problems.

- Where appropriate, it should be possible to attach conditions or undertakings to the return order.

6.6 Effective Enforcement Measures

- Mediation should always be available in the course of enforcement proceedings.
- Where necessary for enforcement, it should be possible to secure urgent orders for the police/welfare agencies to remove/collect the child from the respondent for the purpose of securing the child's return (e.g. the child is uplifted and given to an escort or the applicant).
- Systems should be in place whereby, pursuant to a court order, it is possible to remove and to place the child into temporary care for the purposes of enforcement.
- It should be possible to impose a civil fine on the respondent as a way of ensuring compliance with the return order.
- Contempt of court procedures (or their equivalent) against the respondent and family members, including the risk of imprisonment, should be available.

6.7 Concentrated Jurisdiction and Centralised/Proactive Central Authority

- The advantages of concentrated jurisdiction at all stages of the 1980 Hague Convention process (e.g. a limited number of judges who consequently have a good understanding and experience in handling 1980 Hague Convention applications; a small pool of experts who are similarly expert in Convention work; the development of consistent practices for the handling of applications and the methods of enforcement; the availability of sound legal advice for the parties on the operation of the Convention; defences; prospects of success of an appeal; and enforcement measures) should be considered especially by the Contracting States where further court orders are required for the enforcement.
- Central Authorities should act proactively in all aspects of 1980 Hague Convention applications, including the enforcement stage.

6.8 Expedited Access to the Courts for Enforcement Measures

- Systems should be put in place to ensure applications for enforcement are dealt with quickly by the court, and preferably by the court that made the final order.

6.9 Expedited Procedures for Appeals/Restrictions on Appeals

- Return orders should be immediately enforceable notwithstanding an appeal.
- Appeals should be discouraged. For this purpose there should be restrictions on appeals. Namely, the lodging of an appeal:
 1. should only be permitted on limited grounds,
 2. within a certain and relatively short timeframe (e.g. two weeks), and/or
 3. only with permission/leave to appeal.
- Systems should be in place to ensure the expedited processing of appeal applications.

6.10 Judges' Role

When making a return order, judges should be alive to the potential issue of enforcement and where possible, spell out exactly what is expected by each party and the time within which the specified actions should be taken.

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