COUNTRY REPORT

GERMANY

By **Professor Nigel Lowe, Sarah Armstrong and Anest Mathias***
of the Centre for International Family Law Studies, Cardiff Law School, Wales, United Kingdom.

1. GENERAL BACKGROUND

The Federal Republic of Germany is a Federal State comprising 16 *Länder* (that is constituent regional States) each of which has an elected parliament (which selects its own government) and its own independent judiciary.[1] It operates a civil law system. The primary criteria for family law, including that governing the legal position of children, derive from the provisions of the German Constitution (the Basic Law – *Grundgesetz*). These provisions are binding both on Parliament and the courts and take precedence even over international obligations including, therefore, the 1980 Hague Convention on Civil Aspects of International Child Abduction.[2] Jurisdiction, recognition and enforcement issues in Germany, as in other EU States,[3] has been complicated by the Brussels II Regulation[4] which came into force on 1 March 2001 and has priority over German domestic legislation.

1.1 Implementation of the Convention

Provided the Convention is self-executing (as in the case of most Hague Conventions, including the 1980 Hague Abduction Convention) then in Germany there is no need to incorporate it word for word into a national statute. It is sufficient that a statute is passed formally approving the Convention subject to any reservations that may have been made. It is, however, necessary to legislate specifically to create any necessary competent authorities under a Convention.

So far as abduction is concerned Germany formally became a Contracting State to the 1980 Hague Convention on 1 December 1990.[5] It was the 16th Contracting State (the 14th to ratify but with two other States, Belize and Hungary, also having acceded).

* We particularly thank Mariama Diallo, Permanent Bureau, Hague Conference on Private International Law; Jan MacLean, German Central Authority; Barbara Schuck, German Central Authority; Satish Sule, Cardiff Law School; Wolfgang Weitzel, German Central Authority; and Hans-Michael Veith, Head, German Central Authority, for their help with this report.

[1] See Foster: *German Legal System and Laws* (2nd edn) pp. 31 and 36-37 and the authorities there cited.

[2] Article 1 of the Constitution and see e.g. Wolfe "A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany (2000) 33 NYU J Int'l L & Pol. 285, p. 308.

[3] With the exception of Denmark which is not a party to this Regulation.

[4] Council Regulation (EC) No. 1347/2000 of 28 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses OJ No. L160, 30.6.2000, p. 19.

[5] "*Gesetz zu dem Haager Übereinkommen vom 25. Oktober 1980 über die zivilrechtlichen Aspekte internationaler Kindesentführung und zu dem Europäischen Übereinkommen vom 20 Mai 1980 über die Anerkennung und Vollstreckung von Entscheidungen über das Sorgerecht für Kinder und die Wiederherstellung des Sorgeverhältnisses*" dated 5 April 1990, BGBl. II (*Bundesgesetzblatt Teil II* [Federal Law Gazette Part II]) 1990, p. 206, Under this Act Germany also became a Contracting State to the 1980 European (or Luxembourg) Convention on Recognition and Enforcement of Custody Decisions.

The implementing legislation, *Gesetz zur Ausführung des Haager Übereinkommens vom 25. Oktober 1980 über die zivilrechtlichen Aspekte internationaler Kindesentführung und des Europäischen Übereinkommen vom 20. Mai 1980 über die Anerkennung und Vollstreckung von Entscheidungen über das Sorgerecht für Kinder und die Wiederherstellung des Sorgeverhältnisses (Artikel 1 des Gesetzes zur Ausführung von Sorgerechtsübereinkommen und zur Änderung des Gesetzes über die Angelegenheiten der freiwilligen Gerichtsbarkeit sowie anderer Gesetze)*, '*SorgeRÜbkAG*', was passed on 5 April 1990. Being Federal legislation it applies throughout the Federal Republic and therefore both to the former West and East Germany which became united in October 1990 (i.e. after this legislation was passed but before it took effect). For the reasons already explained the implementing legislation had no need to repeat the text of the Convention since the very act of Parliamentary approval made it internally applicable. Instead the Act makes provision for the setting up and regulating of the Central Authority, determining which courts have jurisdiction, setting out the procedure for dealing with incoming applications and determining the relationship between the Convention and courts and legal aid.

The 1990 Act has since been amended by a 1999 Act (*Gesetz zur Änderung von Zuständigkeiten nach dem Sorgerechtsübereinkommens – Ausführungsgesetz*) which was passed in April and came into force in July 1999, and which limits the courts empowered to hear Convention applications.[6] This is discussed further at p. 5.

1.2 OTHER CONTRACTING STATES ACCEPTED BY GERMANY

Germany as a member State of the Hague Conference ratified the Convention and as with all other Contracting States it must accept all other ratifications. Nevertheless, under Article 38, non-Member States may accede to the Convention and Contracting States are not obliged to accept accessions. The last accessions accepted by Germany were Estonia and Paraguay on 1 December 2001.

For a full list of States for whom the Convention is in force with Germany, and the dates that the Convention entered into force for the relevant States, see Appendix 1.

1.3 BILATERAL AGREEMENTS WITH NON-CONVENTION STATES

Germany has no bilateral agreements with non-Hague States.[7] However, EU Member States are exploring the possibility of arrangements with non-Convention States chiefly in North Africa.

[6] The latest amendment on19 February 2001 implements the Brussels II Regulation.

[7] See the German response to the questionnaire concerning the practical operation of the convention and views on possible recommendations, sent out by the Permanent Bureau of the Hague Conference prior to the Fourth Special Commission. (Hereafter 'Germany's Response to the Hague Questionnaire').

1.4 CONVENTION NOT APPLICABLE IN INTERNAL ABDUCTIONS

Domestic abductions in Germany are governed by Sec. 1632 of the Civil Code.[8] According to this section, custody over a child includes the right to claim the child from anyone who keeps it unlawfully. If one parent contests custody of the child from the other parent jurisdiction lies with the local family court. There is no summary procedure in German domestic law corresponding to the Hague Convention's return mechanism. Instead the judge will fully examine any custody application and will also hear the child. It has been suggested[9] that this practice in domestic cases may lead the German courts to undertake a more thorough examination of the circumstances in Convention cases than might be done in other States.[10]

2. THE ADMINISTRATIVE AND JUDICIAL BODIES DESIGNATED UNDER THE CONVENTION

2.1 CENTRAL AUTHORITY

Pursuant to s 1 of the 1990 implementing Act it is the Federal Prosecutor General at the Federal Court of Justice (FPG) who is responsible for carrying out the duties of the Central Authority. The Central Authority has no mandate to deal with non-Convention cases. Originally the FPG's branch acting as Central Authority was located in Berlin. In August 1999 it moved to Bonn. Its current address is:

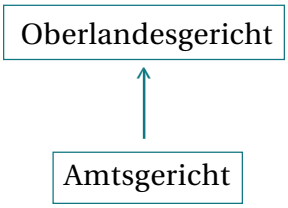
Der Generalbundesanwalt beim Bundesgerichtshof
– Zentrale Behörde –
53094 BONN
GERMANY
Tel: + 49 (228) 410 40
Fax: + 49 (228) 410 5050
Email: *sg41-42@bzr.bund.de*
Web site: *http://www.bundeszentralregister.de*

[8] Burgeriches Gesetzbuch, 18 August 1896, *Reichsgesetzblatt* [RGBl., official law gazette of the German *Reich*] at 195, as amended.
[9] See W Gutdeutsch and J Rieck, *Kindesentfuhrung—ins Ausland verboten—im Inland erlaubt*, 45 FamRZ 1488 (1998). Quoted in HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION Applicable Law and Institutional Framework Within Certain Convention Countries. A REPORT TO THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE BY THE LAW LIBRARY OF CONGRESS One Hundred Sixth Congress Second Session October 2000. (Hereafter 'A Report to the Committee on Foreign Relations United States Senate'). Available at: *http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_co…:70663.wais*
[10] Information in this paragraph relies heavily upon A Report to the Committee on Foreign Relations United States Senate, op. cit., n. 9.

Since its initial move in 1999 (and reflecting the high priority which Germany attaches to operating the Hague Convention) the Central Authority's personnel has been increased. It is headed by a *Referatsleiter*, (Head of Section). There are two *Referenten* (Counsellors / Legal Advisers)[managers] and a chief administrative officer (*Sachgebietsleiterin*). In addition there are seven caseworkers (*Sachbeareiter*) and a number of administrative and clerical workers (*Geschäftsstelle* and *Kanzlei*).

The Central Authority is responsible both for operating the 1980 Hague Abduction Convention and the 1980 European Convention.[11] It is also responsible for operating the 1986 German Foreign Maintenance Act under which it performs similar functions as Central Authority – roughly half of the Central Authority's workload involves dealing with applications in maintenance matters.

2.2 Courts and Judges Empowered to Hear Convention Cases



Under the original 1990 implementing Act (s 5) jurisdiction to hear Hague Convention return applications was vested, in the first instance, in a single judge sitting in the local court (the *Amtsgericht*) of which there are about 600. Some, but by no means all, of these courts have specialist Family Courts which are likely (but again, not bound) to have more experienced judges. Appeals were frequent and lay to the relevant appeal court (*Oberlandesgericht*, Higher Regional Court) which comprises a panel of three judges. Not surprisingly, given the large number of courts involved, judges generally lacked experience of Convention cases. Indeed, according to research undertaken by Lowe and Perry[12] it was rare for an *Amtsgericht* to have heard more than one Convention application and relatively unusual even for an *Oberlandesgericht*.[13] It is to be noted, however, that the 1990 Act did limit Convention cases to two court levels rather than the usual three, in that there is no further right of appeal from an *Oberlandesgericht* to the Federal Court of Justice (*Bundesgerichtshof*), the supreme court for Civil and Criminal Matters.[14] However, any individual addressee of a court order can lodge a *Verfassungsbeschwerde* (constitutional complaint) within a month of the service of the order claiming that this court order violates his or her constitutionally guaranteed basic rights. Although many complaints are lodged each year the Federal Constitutional Court

[11] The European Convention on Recognition and Enforcement of Custody Decisions also known as the Luxembourg Convention.
[12] Lowe, N and Perry A. "The Operation of the Hague and European Conventions on International Child Abduction between England and Germany, Part II" [1998] IFL 52.
[13] According to Lowe and Perry, ibid., when analysing German cases notified to the Permanent Bureau no *Oberlandesgericht* had heard more than three Convention applications between 1993 and 1996.
[14] See s 8 (2) of the 1990 Implementing Act.

(*Bundesverfassungsgericht*)[15] rejects the vast majority of these as either not founded or inadmissible.

Sensitive to the need to improve the system for dealing with Hague Convention applications an amending Act of 13 April 1999[16] was passed, which came into force on 1 July 1999. This Act concentrated jurisdiction at first instance, in just 24 family courts (i.e. *Amtsgerichte*) and similarly restricted the number of higher regional courts (*Oberlandesgerichte*) competent to hear appeals to 24. Indeed the *Amtsgerichte* were selected upon the basis that they are situated in the district in which the *Oberlandesgericht* has jurisdiction for the whole district. All the designated *Amstgerichte* have specialist Family Courts attached to them.[17]

As Weitzel (a former Referent of the Central Authority) has explained[18]

> "It was intended that this concentration of jurisdiction make it easier for the courts dealing with international child abduction cases to obtain a deeper knowledge of the field and gather greater experience. In contrast to Great Britain, where jurisdiction for Hague Convention cases has been reduced to one single court, the new arrangement constitutes a compromise which also takes into consideration the interests of citizens concerned in having proceedings conducted at a court which is as local as possible."[19]

Clearly, the number of judges competent to hear return applications was substantially reduced following the 1999 reform. Even so, it is thought that currently some 200 judges are now competent[20] though consideration is being given to reducing even this number. It has been suggested,[21] for instance, that, at any rate in the larger courts, special units that exclusively hear abduction cases might be created.

At this stage it is still too early to determine what impact, if any, these changes have had, particularly as other more recent changes in practice (see below) have also been made. Nevertheless it is to be noted that Germany is the first Convention State to change its court system for handling Convention cases and is likely to act as a catalyst for other Contracting States to follow suit.[22]

---

[15] Indeed the right to bring a constitutional complaint is guaranteed by Art 93 (1), para. 4 (a) of the *Grundgesetz*. For a discussion of the Constitutional Court's decisions affecting the Convention see Coester-Waltjen "The Future of the Hague Child Abduction Convention: The Rise of Domestic and International Tensions – The European Perspective" (2000) 33 NYU J Int'L & Pol. 59, p. 60-74.

[16] *Viz Gesetz zur Änderung von Zuständligkeiten nach dem Sorgerechtsübereinkommens-Ausführungsgetsz* which amended s 5 of the 1990 Act.

[17] A full list of competent courts can be found in Appendix 2.

[18] In a paper entitled 'Description of the Procedure in Proceedings to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction' German Central Authority, August 2000. (Hereafter 'Description of Procedure').

[19] Jurisdiction is determined at the date when the request for return was received by the Central Authority. It is not affected by subsequent moves by the abducting parent.

[20] See Germany's Response to the Hague Questionnaire, op. cit., n. 7.

[21] See Siehr "The 1980 Hague Convention on the Civil Aspects of International Child Abduction: Failures and Successes in the German Practice" (2000) 33 NYU J Int'l L & Pol. 207, p. 211.

[22] France passed legislation in March 2002 restricting the number of *Tribunaux* empowered to hear Convention applications. Additionally it is understood that Austria is currently thinking of limiting jurisdiction to handle Convention applications to fewer courts. Denmark and Portugal are similarly actively considering concentrating jurisdiction, see the Report of the Meeting No. 5 of the Fourth Special Commission at The Hague, March 2001.

3. OPERATING THE CONVENTION – INCOMING APPLICATIONS FOR RETURN

3.1 Locating the Child

Following an amendment to an Act on the Federal Criminal Police Office and Co-operation between Federation and *Länder* in Criminal Police Matters (the *BKA-Gesetz*), the Federal Prosecutor General, acting as the Central Authority, can, in respect of Hague Convention applications, obtain information as to the whereabouts of a wrongfully removed or retained child either from the Federal Criminal Police Office (INTERPOL Germany) or from local police stations. German law facilitates tracing an abductor by requiring everyone to register their change of residence within three weeks.[23] However, according to Hutchinson, et al.,[24] "non-registration is a minor offence and fuller investigation may be required." According to Lowe and Perry "[it] is generally accepted that the German Central Authority's means of locating abducted children is effective".[25]

3.2 Central Authority Procedure

Upon its receipt the application is checked to see that the basic requirements for a Convention application, particularly those under Articles 12 and 3, have been fulfilled. It is also sometimes necessary to seek further clarification of the facts or to obtain further documents. In the past this checking process took a few days[26] but in an attempt to speed up the process, following changes introduced in October 2000, the inquiries made by the Central Authority at this stage have become limited to the most essential issues. In particular no further investigation is made even in the face of objections made by the abductor.[27]

If, after due inquiry, the Central Authority considers that the conditions for becoming active are considered not to have been fulfilled, it can, pursuant to Article 27, reject the application. Unusually, s 4 of the 1990 implementing legislation permits such a rejection (which ranks as an administrative decision – "*Verwaltungsakt*") to be challenged in the *Oberlandesgericht at Karlsruhe* (which is the higher regional court in whose district the Federal Prosecutor General's main office is located).

---

[23] Registration requirements are regulated and implemented by the States, on the basis of the Federal Framework Act on Registration, *Melderechtsrahmengesetz*, reenacted 24 June 1994, BGBl. I at 1430, as amended. See A Report to the Committee on Foreign Relations United States Senate, op. cit., n. 9.

[24] Hutchinson, A; Roberts, R and Setright, H. *International Parental Child Abduction*, Family Law 1998, p. 100.

[25] Lowe and Perry, op. cit., n. 12, p. 53.

[26] See ibid.

[27] Prior to October 2000 where the abductor was resident in Germany and objected to a return the Central Authority undertook further enquiries of the Requested State, but now these enquiries are left to the court. See e.g. the German team's presentation in the International Centre for Missing & Exploited Children's Report and Recommendations to the Fourth Special Commission on The Hague Convention on the Civil Aspects of International Child Abduction, The Hague, March 2001, p. 7. (Hereafter 'The ICMEC Report').

Until 1996/7 rejections were unusual.[28] However in 1999, out of 70 return applications 10 (14%) were rejected, which in fact was slightly higher than the global average of 11%.[29] However, in 2000 there were 6 rejections out of 80 cases received, a proportion of 8%.[30] If an application is not rejected, steps are taken to locate the child. In this regard, as has been said, the Central Authority works closely with the police.

Once the child has been located and provided the documentation is complete with translations (s 2 of the 1990 implementing legislation requires in accordance with Article 24 of the Convention that save in exceptional circumstances all documents should be accompanied by a German translation[31]) and due advance on costs for an attorney has been made or documents filed in respect of legal aid (see post at p. 9), the Central Authority will now (that is, from October 2000) *both* institute court proceedings and in appropriate cases (see the next paragraph) write to the abductor seeking a voluntary return. Before October 2000 the practice was to write to the abductor first and only institute court proceedings after a two-week period had elapsed.[32] However, in a further attempt to speed up the process the two actions are now run in parallel.[33]

So far as writing to the abductor is concerned, the letter explains that court proceedings under the 1980 Convention (the underlying principles of which are also set out) have been initiated and to avoid costs, the recipient should either return together with the child to the child's place of habitual residence or surrender the child to the parent filing the return application. Such a letter is not sent where the left-behind parent expressly asks that it should not be sent, or if there are serious reasons to fear that the abductor might disappear or flee[34] or might otherwise cause the child harm upon learning of the application for return.[35] If the abductor agrees to a voluntary settlement then the court proceedings are halted and no costs are incurred. There are no official statistics kept on the success rate of such letters of request but, according to the German response to the questionnaire in preparation for the Fourth Review, it was

[28] According to Lowe and Perry, op. cit., n. 12, p. 56, n. 7, there had only been two such rejections. Lowe and Perry also state that up to 1996/7 no appeal against a rejection had been successful.
[29] See Preliminary Document No. 3 *A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* drawn up by Professor Nigel Lowe, Sarah Armstrong and Anest Mathias. Available at: *http://www.hcch.netle/reports.28e.html*. (Hereafter 'Preliminary Document No. 3.'). In 1998 8 out of 89 return applications, 9%, were rejected.
[30] Data received from the German Central Authority, June 2002.
[31] Although it made no official reservation to Article 24, it is assumed by the German authorities that it is implicit in the first paragraph to the Article that applications be accompanied by German translations, see Wolfe, op. cit., n. 2, p. 320.
[32] See e.g. Lowe and Perry, op. cit., n.12, p. 53.
[33] See Germany's Response to the Hague Questionnaire, op. cit., n 7. See also a paper prepared by Weitzel "*Massnahmen der deutschen Zentralen Behörde zur Beschleunigung von eingehenden Verfahren nach, dem Haager Übereinkommen von 25, October 1980 über die zivilrechtlichen Aspekte internationaler Kindesentführung*" (August 2000). This is one of a number of procedural reforms prompted by US-German negotiations.
[34] To prevent further removal, applications can be made for an exit ban.
[35] See Germany's Response to the Hague Questionnaire, op. cit., n. 7, and Weitzel, op. cit., n. 33.

thought to be low,[36] though it was felt that the new practice of also instituting court proceedings could mean that the letter now has a greater impact.[37] However, it is too early to say how this change of practice is actually working.

3.3 Legal Representation[38]

In most cases the Central Authority institutes judicial proceedings in the competent *Amtsgericht* on behalf of applicants. Under s 3 (3) of the 1990 Implementing Act in the case of return applications[39] the Central Authority is authorised to act on the applicant's behalf without his written consent. However, if an applicant has already instructed a lawyer in Germany to conduct the proceedings, the Central Authority will not then be directly involved. In such cases it will be left to the applicant's lawyer to file all the necessary applications with the court having first consulted the Central Authority, if necessary. In these circumstances the applicant will have to pay the lawyer's and court fees directly to the lawyer involved and to the court.

Where the Central Authority does institute proceedings it will commission a lawyer of its own choosing (usually an experienced lawyer drawn from a list of 400 such lawyers) to file the application and to present the case in court (the Central Authority itself not having the personnel to provide representation for applicants). In effect the applicant is represented by the Federal Prosecutor-General (as the Central Authority) who in turn is (sub-) represented by the chosen lawyer.

The Central Authority will give the lawyer all the necessary information and documents and also any indications and court decisions which may be useful for the proceedings. In turn the lawyer keeps the Central Authority informed as to the course and outcome of the proceedings.

The conduct of court proceedings is left to the relevant court. However, it is the court that formally serves the return application under the Hague Convention on the party opposing the return.

3.4 Costs and Legal Aid

As permitted by Article 42 of the Convention, Germany has made a reservation to Article 26 with regard to bearing the costs of applications.[40] However, both applicants and defendants are entitled to seek legal aid on the same basis as any domestic litigant (s 13 of the 1990 Implementing Legislation). Eligibility for legal

[36] Ibid. Lowe and Perry, op. cit., n. 12, p. 53, considered that under the former system the letter prompted a voluntary return in about 10% of cases. It might be noted that in 1999 16% of return applications made to Germany, ended in a voluntary return though by no means all of these will have been prompted by the letter.

[37] If the Scottish experience, where a similar system to that newly established in Germany is operated, is anything to go by, then this hypotheses seems well founded.

[38] The following is based in part upon Weitzel, op. cit., n. 33.

[39] Cf for access applications. See post at 4.1/4.2.

[40] In fact the 1990 Implementing Legislation expressly allowed a court to levy the costs of litigation from the applicant insofar as this is not prohibited by the Convention itself. See Wolfe, op. cit., n. 2, p. 321.

aid (known in Germany as *Prozesskostenhilfe*) depends upon standard criteria of financial means (revised annually by the Federal Ministry of Justice)[41] and is merits tested in that the person seeking legal aid must have a good arguable case.[42] Unlike the English system, for example, eligibility for legal aid is determined by the court.[43] However, the Central Authority will forward duly completed application forms and supporting documentation which must be accompanied by German translations to the relevant court. Printed forms, which are available both in English and German, together with explanatory notes can be obtained from the German Central Authority if not from the applicant's own Central Authority (they are certainly available, for example, in the USA Central Authority).[44]

In the past the German Authority would not start court proceedings in cases where the applicant claims not to be able to provide the costs for a lawyer until the court had determined the issue of eligibility for legal aid, a process which itself could take weeks if not months.[45] However, following changes introduced in October 2000, again aimed at speeding up the process, the Central Authority no longer requires the legal aid issue to be settled first but will institute proceedings for return in cases of urgency, e.g. where the Article-12-deadline is looming, simultaneously with forwarding the application for legal aid.[46] It is, however, essential before the Central Authority will take action before the courts either for a properly completed legal application to be submitted or for an advance on costs for a lawyer to be paid.

For those opting not to seek legal aid the practice has long been for the Central Authority to request payment of €1,100 (formerly DM 2,000) as an advance[47] against the lawyer's fees.[48] In case of an appeal a further advance of usually not more than €500 (formerly DM 1,000) is levied. In the event of an overpayment, the surplus money will be returned. It has been pointed out[49] that it would greatly assist the speed of the process if the requesting Central Authority could either transfer the advance or submit the documents for applying for legal aid at the same time as sending the documents instituting proceedings.

---

[41] For 1999 the Statutory threshold was set at a net monthly income of DM 672 (approx. US $420) for each party. See *Prozesskostenhilfebekanntmachung* 1999, 6 June 1999,. BGBl. I, p. 1268. See A Report to the Committee on Foreign Relations United States Senate, op. cit., n. 9.

[42] Although at first sight this might seem to put the respondent under a disadvantage, as a matter of practice in making decisions upon legal aid the court only takes the arguments of the person applying for legal aid into account. In other words no premature decision upon the matter itself is made.

[43] Legal aid for court costs is governed by s 114 – 127 of the Code of Civil Procedure – *Zivilprozessordnung* [ZPO], reenacted 12 September 1950, BGBl. I, p. 533, as amended. Taken from A Report to the Committee on Foreign Relations United States Senate, op. cit., n. 9.

[44] See Weitzel, op. cit., n. 33.

[45] See Lowe and Perry, op cit, n. 12, p. 53.

[46] See Germany's Response to the Hague Questionnaire, op. cit., n. 7.

[47] On the face of it this requirement to pay an advance is hard to square with Article 22 which expressly forbids a Contracting State requiring an applicant to pay a bond or deposit to initiate proceedings. See Wolfe, op. cit., n. 2, p. 321. The Germans, however, take the view that Article 22 only forbids *court* costs being claimed.

[48] As Hutchinson, et al., op. cit., n. 24, p. 101, point out, legal costs in Germany are in fact cheaper than in some other countries. The standard advance charge assumes that the lawyer will normally expect €300 (formerly DM 600) for counselling and €300 (formerly DM 600) for advocacy. Privately appointed lawyers are, however, likely to charge more. See Wolfe, op. cit., n. 2, pp. 322-323. Fees are also higher for appellate proceedings. See Weitzel, op. cit., n. 33.

[49] See Weitzel, op. cit., n. 33.

3.5 Legal Proceedings

Once the application is before the court the progress and conduct of the case is the court's responsibility.[50] Hutchinson, et al., observe,[51] "it is *Amtsgericht* policy to act promptly, usually within a few days to two weeks". However, where legal aid is in issue that will have first to be settled before the Convention application will be heard. Once the request has been filed by the court, the party opposing the application will be served with a copy of the application for return and be asked to respond within a short time. It is at this stage that the defendant should apply, if at all, for legal aid. The court will set a hearing date.

As Hutchinson, et al., observe[52] the investigation and hearing procedure is inquisitorial[53] with the judge preparing his case "using his discretion to make relevant directions to the police and social services, request documentation and call witnesses." Although in principle an application can be determined upon documentation alone provided an opportunity to be heard in writing has been given in accordance with law,[54] it is normal practice for there to be an oral hearing at which counsel are heard in person and which it is open to the party opposing the application, the child, if old enough, and the applicant, if he chooses and at his own expense, to attend. Although it is not mandatory, it is advisable for applicants to attend in person[55] (we gathered anecdotal evidence that failure to attend could be interpreted as lacking commitment). The drawback of this of course is that personal attendance adds to the cost and time involved in making an application. It is also common for the child in question to attend. In this latter respect Convention applications are treated no differently to domestic legal proceedings. Under the 1898 Act on Non-Contentious Matters (*Gesetz über die Freiwillige Gerichtsbarkeit-FGG*) as amended, children's views are required to be taken into account and it is normal for children, even quite young children to appear in court.[56]

The decision whether the child should attend the court hearing lies at the court's discretion. Hearing a child can, for example, be ordered for evidential purposes to clarify matters in general, but where a determination is required as to whether the child objects to being returned, and thus justifying a refusal to return under Article 13, it will normally be made on the basis of a personal hearing of the child before the judge.[57] In many cases, however, the youth welfare officer will be asked to provide a report or alternatively the court will appoint a curator for the child.[58] In exceptional cases an expert opinion of a child psychologist can

[50] It is understood that the courts now (that is from October 2000) exercise closer supervision on the management of the case.
[51] Hutchinson, et al., op. cit., n. 24, p. 101.
[52] Ibid.
[53] Pursuant to s 12 FGG (Non-Contentious Matters Act), which governs the procedure in Hague and domestic child cases.
[54] See Germany's Response to the Hague Questionnaire, op. cit., n. 7.
[55] This is the express advice of Hutchinson, et al., op. cit., n. 24, p. 101.
[56] See Lowe and Perry, op. cit., n. 12, p. 54.
[57] See Germany's Response to the Hague Questionnaire, op. cit., n. 7.
[58] I.e. pursuant to s 50 of the Non-Contentious Matters Act.

be asked for by the court. Although Germany has been criticised in the past[59] for too readily refusing returns based on children's objections, the "official policy"[60] is that:

> "the will of the child can only be taken into account if the child's judgement is sufficiently sound and if the court has come to the conclusion that the child's will has been formed without undue influence. If, on taking these criteria into account, the child objects very strongly to being returned, a return can be ruled out …. The principle guiding the judicial decision is, however, the restitution of the former situation regarding rights of custody".

This position seems well supported by analysis undertaken on the outcome of return applications made to Germany in 1999[61] which shows that only one out of a total of 13 refusals was based on a child's (in this case aged between 13 and 16 years) objections.

There are no formal restrictions on the nature of the evidence that may be taken (for example, affidavits by witnesses, information by authorities, particularly the youth welfare office) nor are there formal provisions to shorten time-limits.[62] Nevertheless, in practice oral hearings are generally brief.[63] However, delays can occur when Article 13 defences are raised (which they frequently are). These defences have to be raised by the defendant. If the hearing is well prepared, a decision can be reached after one hearing date but it may be that the judge will require further evidence to be submitted or an expert report obtained. In that case a further hearing may have to be fixed.[64]

Decisions can be given at the end of the oral hearing or at a later hearing which the parties do not have to attend or can be later issued in writing. At all events the decision is formally served on the parties' counsel.[65]

3.6 APPEALS

It is open to either party to appeal against a decision of the *Amtsgericht*. In the case of an order for return an appeal can only be made by the party opposing the return, by the child himself, if aged 14 or more, or by the competent youth welfare service. As has been explained, appeals lie to the *Oberlandesgericht* of the regional district in which the *Amtsgericht* is situated (see Appendix 2). This right of appeal is subject to strict time-limits, namely, a written complaint must be received by the *Oberlandesgericht* within two weeks of service of the first instance court order (see s 8 (2) of the 1990 Implementing Act). Time begins to run for the applicant upon service of the written decision or, if he is represented by a lawyer, from service on his counsel, or, where the Central Authority is involved, from service on the lawyer to whom authority has been delegated.

---

[59] See e.g. the US Central Authority's "Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction" presented to Congress in November 2000, available at *http://www.travel.state.gov/2000_Hague_Compliance_Report.html* See also Lowe and Perry, op. cit., n. 12, p. 55.

[60] See Germany's Response to the Hague Questionnaire, op. cit., n. 7.

[61] See Preliminary Document No. 3, op. cit., n. 29, and post at 7.

[62] See Germany's Response to the Hague Questionnaire, op. cit., n. 7.

[63] See Hutchinson, et al., op. cit., n. 24, p. 101.

[64] See Germany's Response to the Hague Questionnaire, op. cit., n. 7.

[65] See Weitzel, op. cit., n. 33.

These strict time-limits are to be noted and have been known to present problems in relation to the payment of a fresh advance of • 500 (formerly DM 1,000) which will be required of paying litigants.[66] There are no explicit limitations on the grounds for an appeal. Furthermore new facts and evidence are admissible. In the past, appeals have been said to be frequent[67] (and we have anecdotal evidence that the Central Authority will generally err on the side of the applicant and will appeal if the applicant so desires), but according to the analysis of 1999 applications only 4 of the 26 court decisions were appealed.[68]

3.7 ENFORCEMENT OF ORDERS

In common with other continental European systems, enforcement of decisions in Germany can be problematic. As Weitzel has put it:[69]

> "Enforcement is always difficult and can be quite a drawn out procedure. The imposition of any enforcement measure, can, in turn, be contested with appellate remedies, which can in some cases significantly delay the proceedings".

The enforcement of a return order is governed by s 33 of the Act on Non-Contentious Matters. There is some confusion about which courts are entitled to enforce orders, some courts are of the opinion that enforcement powers vest exclusively in the court of first instance (which means an order for return made by an *Oberlandesgericht* can only be enforced by the *Amtsgericht* judge who first heard the case). Alternatively, some *Oberlandesgericht* argue that it is up to them to enforce orders made by them and not the *Amtsgericht*. Unfortunately, the wording of s 33 leaves the question unanswered.

S 8 (1) sentence 1 of the 1990 Implementation Act states that enforcement measures can only be put in place where the decision is final. However, *Amtsgerichte* can order the immediate enforcement of a return decision, even where an appeal has been lodged, s 8 (2) sentence 2 (the normal practice, however, is for orders to be stayed pending an appeal). However, an appeal lies against such immediate enforcement of orders.[70]

[66] See Lowe and Perry, op. cit., n. 12, p. 53 who referred to an Australian case where the money was not released in time.

[67] See ibid., p. 54.

[68] See Preliminary Document No. 3, op. cit., n. 29.

[69] Description of Procedure, op. cit., n. 18. For an account of some difficulties faced by lawyers when seeking to enforce return orders see a paper entitled 'Difficulties Encountered in Practice With Enforcing Return Orders' given by Werner Martens at the Anglo-German Judicial Conference held in Dartington, Devon, England in May 1997.

[70] See Germany's Response to the Hague Questionnaire, op. cit., n. 7, and Weitzel, op. cit., n. 33. We were told of one recent case where, notwithstanding that an appeal against the return order had been lodged, an appeal against an immediate enforcement order was refused – which effectively decided the case.

The sanctions that can be imposed[71] for non compliance are the imposition of a coercive fine provided it has been preceded by a formal warning;[72] the imposition of coercive detention for up to six months, provided it has been preceded by a formal warning (s 33 (1), (3) of the Non-Contentious Matters Act); the assistance of the court bailiff to assert with force, if necessary, the entitlement to have the child returned[73] and in the event of the bailiff being resisted, the assistance of the police (s 33 (2)).

It is important to appreciate that the imposition of fines or detentions will not in themselves bring the child back to the applicant and after six months' detention the defendant must be released and by that time the child may have become resident in Germany.[74] Although it is understood that there is currently a chronic shortage of bailiffs in Germany, we have not found any evidence that in fact an enforcement of a Convention decision has thereby been prevented or delayed.

4. OPERATING THE CONVENTION – INCOMING APPLICATIONS FOR ACCESS

4.1/4.2 CENTRAL AUTHORITY PROCEDURE AND LEGAL PROCEEDINGS

For the most part the system just described applies equally to access applications. Applications should be made to the Central Authority in Bonn and the same conditions for making advance payments or to file an application for legal aid, apply. However, in cases where the applicant claims not to be able to pay the lawyers fees, when initiating the court proceedings, the German Central Authority will ask the court only to proceed if legal aid is granted for the applicant.

According to the German Response to the Hague Questionnaire,[75] the Central Authority asks the applicant to state his or her ideas of what form the access should take. This idea or proposal is then conveyed to the respondent via the competent youth welfare office. An attempt is then made to reach a settlement between the parties. If the attempt proves futile, the Central Authority can arrange for a lawyer to be appointed for the applicant (though unlike for return applications the applicant's written consent is required).[76] If recourse is had to legal aid, the Central Authority itself institutes court proceedings and applies for the assignment of counsel to conduct the proceedings. The lawyer is required to keep the Central Authority informed on the progress of the proceedings.

In cases where it is thought appropriate for a child and parent cautiously to be brought closer together or for there to be supervised access, support will be given by the youth welfare service and, if necessary, by a psychological counselling service.

---

[71] These enforcement measures have nothing in common with the contempt of court system in some Common Law countries and are not to be confused with this different approach to enforcing court orders.

[72] The fine is to be commensurate with the income of the party to be coerced but may not exceed • 26,565 (formerly DM 50,000). The fine can be imposed repeatedly, but must always be proceeded by a warning. See A Report to the Committee on Foreign Relations United States Senate, op. cit., n. 9.

[73] The use of force cannot be used to enforce an access order. See post at 4.3.

[74] See the German Team's Presentation in The ICMEC Report, op. cit., n. 27.

[75] Ibid.

[76] See Lowe and Perry, op. cit., n. 12, p. 54.

4.3 Enforcement of Orders

The enforcement powers are broadly the same in respect of access orders as they are in respect of return orders, save, that unlike for the latter, the court may not use physical force against a child to enforce an access order.[77] In access cases non-coercive means of enforcement are preferred such as the involvement of youth welfare officers, or the appointment of special counsel for the child, or mediation.[78]

5. OPERATING THE CONVENTION – OUTGOING APPLICATIONS FOR RETURN

5.1 Preventing the Removal of the Child from the Jurisdiction

5.1.1 Civil Law

Prima facie the German authorities will not issue a child's passport unless both parents have authorised it. But a child's passport can be issued to a parent with sole custody. (Under German law married parents have joint custody and continue to do so after divorce or separation unless the court orders otherwise). In contrast, unmarried mothers have sole custody (see Article 6 of the Basic law and, inter alia, ss 1601, 1626, 1627 and 1671 and 1672 of the German Civil Code), but after an amendment of the relevant provisions it is possible that unmarried couples may be granted joint custody.

To counter the threat of a child's removal, a contact parent or a parent with joint custody may petition the *Amtsgericht* for the limitation of or transferral of rights of custody and at the same time seek an exit ban prohibiting the child's removal abroad. An exit ban can quickly be put in place by a provisional order.

5.1.2 Criminal Law

Wrongful removal of a child is under certain circumstances a criminal offence punishable by up to five years' imprisonment or a fine imposed by a criminal court.[79] Generally, child abduction will only be prosecuted if the left-behind parent applies to prosecute within three months. However, the Public Prosecutor can prosecute proprio motu if he considers that the circumstances of the individual case warrant prosecution. Although German INTERPOL can be involved in the search for a child, foreign requests for arrest have to be transmitted through the authorities responsible for co-operation in criminal matters and not the German Central Authority to ensure that they will be recognised and enforced.

[77] S 33 (2) sentence 2 FGG. If, therefore, a child refuses to see a parent there is little in practice that can be done about it.
[78] See the 1998 reform of family law, FGG, as amended, Sec. 50, 52 and 52 (a). In A Report to the Committee on Foreign Relations United States Senate, op. cit., n. 9.
[79] Hutchinson, et al., op. cit., n. 24, p. 99.

5.2 CENTRAL AUTHORITY PROCEDURE

Under s 1 of the 1990 Implementing Act, the Central Authority has been given the right to enter into direct legal relations with domestic and foreign official agencies. Accordingly, upon application being made in respect of abductions abroad, the Central Authority is authorised to approach foreign official agencies directly. The German Central Authority acts mainly as a communicator between the applicant and the foreign Central Authority. In the past, there have been some outgoing applications rejected by the German Central Authority on the basis of Article 27.

6. AWARENESS OF THE CONVENTION

6.1 EDUCATION OF CENTRAL AUTHORITIES, THE JUDICIARY AND PRACTITIONERS

There are Academies for Judicial Training – one at *Trier* and the other at *Wustrau* at which from time to time seminars are held on the Hague Abduction Convention.

German representatives participated in an Anglo-German Judicial Conference on Family Law and the question of International Conventions Affecting Children held in Dartington, Devon, England in May 1997, which was specifically arranged to discuss matters of mutual interest concerning the operation of the 1980 Convention. This was the first judicial conference ever held on international child abduction. Since then Germany has been a key participating country in conferences held in De Ruwenberg.

Since the Spring of 2000 there have been several meetings between representatives of the German and the USA Central Authorities and the German Federal Ministry of Justice and these are to be continued on a regular basis. There have also been experts meetings between the German and the French and the German and the Italian Central Authorities.

6.2 INFORMATION AND SUPPORT PROVIDED TO THE GENERAL PUBLIC

The German Central Authority has drawn up an information booklet on the Convention available to anyone on request. The booklet contains the relevant application forms and is available in German. The web site for the FPG's Bonn office is currently under construction. It will contain all the information on the Convention which is currently available in printed form and it will also be possible to download the application forms. There is a useful web site from a missing children's organisation which can be found at:

http://www.vaeterfuerkinder.org

A support group operating in Germany which is of interest is[80] *Interessengemeinschaft der mit Auslandern verheirateteten Frauen* (*IAF*) which is a national organisation for bi-national marriages, families and partnerships. Based in Frankfurt, it has 45 regional groups. It can be contacted at the following address:

[80] See ibid., p. 102.

IAF – Verband bi-nationaler Familien und Partnerschaften
Ludofusstrasse 2-4
60487 Frankfurt
GERMANY
Tel: +49 69 707 5087 / 5088
Fax: +49 69 707 5092

6.3 THE FRANCO-GERMAN PARLIAMENTARY MEDIATION COMMISSION

The Franco-German Parliamentary Mediation Commission is a temporary structure created to intervene in cases between the two States. There have, for a number of years, been some tensions between Germany and France in relation to child abduction and the Mediation Commission was set up in 1998 in response to these tensions. The Commission comprises six members, three from each State. In Germany, the three Parliamentarians are all representatives of the majority ruling party, one of whom is a Member of the European Parliament. On the French side there is a Minister representing the majority, a Minister representing the opposition and a Member of the European Parliament. Additionally, a Magistrate has been appointed to act as a general secretary to the French Parliamentarians.

The Mediation Commission has convened several ad hoc meetings, the first of which took place in Luxembourg in October 1999. Between October 1999 and November 2000, six meetings were held and a decision was made that the Commission should meet on a regular basis.[81] The German side of the Commission currently only deals with mediation.[82] However, the French Parliamentarians see their role as twofold, firstly, the solving of pending cases through attempts at mediation, and secondly, drawing conclusions from the individual cases studied, with a view to preventing further abductions and mitigating the increasing phenomenon of abducting children between the two States.[83]

Both countries have produced detailed reports on the work of the Commission available in German and French.[84] A common report is also being drafted.[85] The German and French reports make a number of proposals and recommendations.

To date, the Commission has handled 39 cases, 24% of which have resulted in a positive outcome. Two of the 39 cases were brought by Germany and the remaining 37 by France. In 32 cases the left-behind parent was the father, and in three cases the left-behind parent was the mother. In the remaining two cases children were abducted from grandparents.[86]

---

[81] Intermediate Report from the German Parliamentary Members of the Mediation Commission, Mme Gebrardt, Mme Schwall-Duren and M Stockel, 8 March 2001. (Hereafter 'German Intermediate Report').
[82] Ibid.
[83] Intermediate Report from the French Parliamentary Members of the Mediation Commission, Mme Beres, Mme Dinah Dericke and M Cardo, 22 November 2000.
[84] See German Intermediate Report, op. cit., n. 81, and ibid.
[85] Meeting with M Mancini, General Secretary of the French Mediation Commission and Magistrate in charge of the *Mission d'Aide à la Mediation pour les Familles*, November 2001.
[86] Ibid.

7. THE CONVENTION IN PRACTICE – A STATISTICAL ANALYSIS OF APPLICATIONS IN 1999[87]

According to research on all cases received in 1999, Germany was the third busiest jurisdiction in terms of the number of applications handled by the Central Authority.[88]

Incoming return applications	70
Outgoing return applications	103
Incoming access applications	24
Outgoing access applications	13
Total number of applications	**210**

7.1 INCOMING APPLICATIONS FOR RETURN

Before embarking on this analysis, it should be pointed out that applications in which court proceedings were instituted before July 1999, pre-date the reform concentrating jurisdiction in just 24 courts at first instance and may therefore have been dealt with by inexperienced judges which might well be relevant to the outcome. Furthermore, all of these applications pre-date the October 2000 procedural reforms referred to earlier, which are largely aimed at speeding up the process.

7.1.1 THE CONTRACTING STATES WHICH MADE THE APPLICATIONS

Requesting States		
	Number of Applications	Percent
USA	24	34
UK-England and Wales	11	16
France	6	9
Italy	4	6
Portugal	3	4
South Africa	3	4
Australia	2	3
Canada	2	3
Israel	2	3
Norway	2	3
Austria	1	1
Czech Republic	1	1
Denmark	1	1
Netherlands	1	1
Spain	1	1
Venezuela	1	1
Hungary	1	1
Malta	1	1
Monaco	1	1
Poland	1	1
Uruguay	1	1
Total	**70**	**~100**

[87] Preliminary Document No. 3, op. cit., n. 29. The total of 210 new cases handled by the German Central Authority was slightly less than the 222 handled in 1998.

[88] Only the USA and England and Wales received more cases in that year. The 1998 figures were similar with Germany receiving 89 incoming return and 31 incoming access applications and making 84 outgoing return and 18 outgoing access applications.

Half of the applications for return were made by the two busiest Central Authorities, namely the USA and England and Wales, but with the former alone making a strikingly high proportion, 34%. It seems likely that these numbers are in part accounted for by the presence of American and British forces being stationed in Germany. The next highest number of applications were received from other European States, namely, France and Italy.[89]

7.1.2 The Outcomes of the Applications

Outcome of Application		
	Number	Percent
Rejection	10	14
Voluntary Return	11	16
Judicial Return	13	19
Judicial Refusal	13	19
Withdrawn	14	20
Pending	3	4
Other	6	9
Total	**70**	**~100**

What is immediately striking about these outcomes is that overall only 35% of applications resulted in the child's return either voluntarily or by court order (though in a further 4% access was either ordered or agreed). This is substantially lower than the global average of 50% for that year. When court outcome is analysed it can be seen that 50% resulted in a judicial return and 50% in a judicial refusal which again compares unfavourably with a global average of 74% judicial returns and 26% judicial refusals. Expressed as a proportion of overall outcomes 19% of the 1999 applications ended in a judicial refusal compared with a global average of 11%. In other words, no matter which way it is analysed the judicial refusal rate in Germany seems high compared with global averages. Furthermore, this high refusal rate is in line with similar findings for 1995 and 1996.[90]

While the foregoing analysis is bound to add fuel for those who have been critical of the German performance under the Convention[91] it is worth re-emphasising that the 1999 cases largely predate the reforms. Indeed, an examination of cases received in 2000 shows that there were 8 judicial refusals as against 20 judicial return orders and 16 voluntary returns.[92]

Returning to the 1999 outcomes it might be observed that a high proportion of applications, 20% as against a global average of 14% were withdrawn with a further 14%, as against a global average of 11%, being rejected.[93]

[89] Applications were received from Malta and Uruguay despite the fact that the Convention was not in force between Germany and these States in 1999.

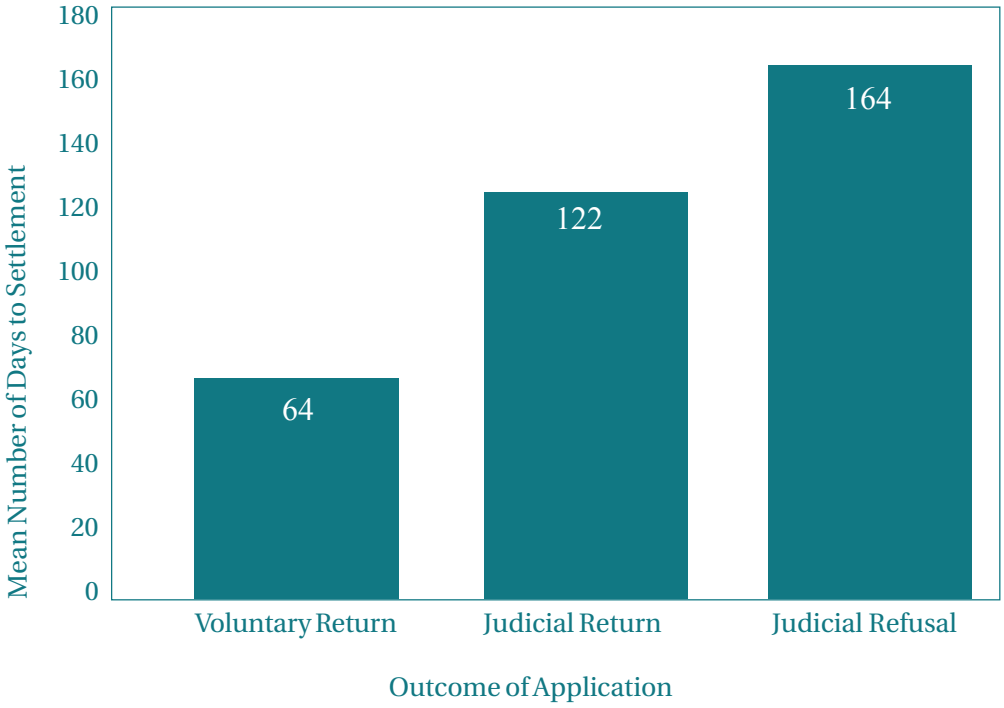
[90] See Lowe and Perry, op. cit., n. 12, pp. 52 and 53. According to the 1998 figures notified to the Permanent Bureau by the German Central Authority, 14 of the 89 return applications, 16%, ended in a judicial refusal. However, 23, 26%, ended in a judicial return. When analysed by court outcome, 62% ended in a return and 38% in a refusal. Overall 39, 44%, applications ended in the child's return either voluntarily or by court order. In other words the 1998 cases present a more optimistic picture than the 1999 cases.

[91] See the reports referred to in the conclusions, post at 8.

[92] Data received from the German Central Authority, June 2002.

[93] According to the 1998 figures only 8% of applications were withdrawn and 9% rejected (though with a further 6% in which the children were not traced). In 2000 13 applications, 16%, had been withdrawn.

7.1.3 THE TIME BETWEEN APPLICATION AND FINAL CONCLUSION



Overall the time in which outcomes were reached compare favourably with global averages. Voluntary returns were resolved in an average of 64 days which was faster than the global average of 84 days while judicial resolution took slightly longer, 122 days for a judicial return and 164 days for a judicial refusal compared with global averages of 107 and 147 days respectively.[94] It might, however, be reasonably anticipated that following the procedural reforms introduced in October 2000, the disposal of applications will be faster.

The table below shows the minimum and maximum number of days to reach conclusion in each of the three outcomes. Additionally, it shows the median and mean average number of days.

Number of Days Taken to Reach Final Outcome

	Outcome of Application		
	Voluntary Return	Judicial Return	Judicial Refusal
Mean	64	122	164
Median	24	46	144
Minimum	7	1	31
Maximum	305	547	445
Number of Cases	**11**	**13**	**10**

[94] These timings include cases that went on appeal. In Germany 4 decisions were finally made on appeal, 2 resulting in a return order and taking on average 110 days (as against a global average of 208 days) and 2 in a refusal taking on average 397 days (as against a global average of 176 days).

7.2 INCOMING APPLICATIONS FOR ACCESS

7.2.1 THE CONTRACTING STATES WHICH MADE THE APPLICATIONS

Requesting States		
	Number of Applications	Percent
Italy	4	17
France	3	13
Spain	3	13
UK-England and Wales	3	13
Denmark	2	8
Portugal	2	8
USA	2	8
Czech Republic	1	4
Luxembourg	1	4
Switzerland	1	4
Hungary	1	4
Poland	1	4
Total	**24**	**100**

Twenty one percent of all applications received by Germany were for access, compared with 17% globally.

Germany received the highest number of access applications from Italy from which incidentally, it received the same number of applications for return. Although the USA made the greatest number of return applications, they made relatively few access applications, 2, or 8%, of all those received.

7.2.2 THE OUTCOMES OF THE APPLICATIONS

Outcome of Application		
	Number	Percent
Rejection by the Central Authority	2	8
Access Voluntarily Agreed	2	8
Access Judicially Granted	4	17
Access Judicially Refused	2	8
Other	1	4
Pending	2	8
Withdrawn	11	46
Total	**24**	**~100**

Reflecting the general pattern of return applications only 6 of the 24 (25%) applications for access concluded with the applicant gaining access to the child either as a result of a voluntary agreement or a court order which was considerably below the global average of 43%. In large measure this is accounted for by few cases, 2 out of the 24, 8%, being agreed voluntarily as against a global average of 18%, rather than a significant proportion being refused by a court. However, two out of six cases (33%) that went to court were refused which compares with a global average of 9% of access applications being refused by a court order.[95]

The high number, 11 out of 24 applications (46%), of withdrawals is to be noted. This compared with a global average of 26%.

[95] According to the 1998 figures supplied to the Permanent Bureau by the German Central Authority 10 out of 31 applications (32%) concluded with access either being agreed voluntarily or ordered judicially with 4 applications still pending.

7.2.3 THE TIME BETWEEN APPLICATION AND FINAL CONCLUSION

Timing to Judicial Decision		
	Number	Percent
0-6 weeks	1	17
6-12 weeks	0	0
3-6 months	0	0
Over 6 months	5	83
Total	**6**	**100**

Timing to Voluntary Settlement		
	Number	Percent
0-6 weeks	0	0
6-12 weeks	0	0
3-6 months	1	50
Over 6 months	1	50
Total	**2**	**100**

The number of cases to have reached a voluntary settlement, as shown in the second table, are too small from which to draw conclusions. Globally, 42% of the voluntary settlements took over six months.

The first table shows that five out of the six cases to have reached a judicial conclusion took over six months. This reflects the general difficulty that courts have in dispensing of access applications quickly. Globally, 71% of judicial dispositions took over six months.

8. CONCLUSIONS

In the past Germany has been heavily criticised for the way it has operated the Hague Convention[96] and, indeed, there have been a number of high profile notorious decisions.[97] Two recent reviews of the German performance remain critical. In their 2000 Review of the working of the Convention, the Australian Commonwealth Central Authority comment[98] that in the past i.e. prior to the 1999 amending legislation, the German legal system had been slow with delays of 6 to 12 months being common. Moreover, they point out that between 1994 and 1999 only 2 out of 13 applications resulted in an immediate court order for return with the courts too readily entering into the merits of the custody case and giving "undue weight to whether the child has settled into the German community following the removal or retention."[99] However, as the Australians acknowledge no case at that time had been dealt with under the new court structure.

[96] See e.g. Lowe and Perry "The Operation of the Hague and European Conventions on International Child Abduction between England and Germany, Parts I and II" [1998] IFL 8 and 52.
[97] E.g. *Laylle-Volkman OLG Celle* decision of 20 October 1994 – 19 UF 134/94, *Nusair* Amts G Köln, decision of 15 December 1995 – 25 WF 202/95; *OLG Köln*, decision 21 October 1994-25 UF 240/93 (discussed e.g. by Lowe and Perry, ibid., p. 8).
[98] "International Child Abduction – A guide for parents and practitioners" (Commonwealth Attorney-General's Department, June 2000).
[99] Cf the English experience where 10 of the 33 applications made to Germany between 1996 and 1999 ended in a judicial return, but took a considerable time to resolve – on average 23 ½ weeks compared with 4 ½ weeks for judicial returns to be made from England and Germany (statistics compiled by the authorities).

The lack of understanding among the German judiciary with "an unconscionably broad use of the Convention's exceptions to return" was also a complaint made in the USA Central Authority's "Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction" presented to Congress in November 2000. Complaint was also made of the "wishes of the children as young as five years old [being] given excessive consideration in German courts". The report also refers to the difficulties of left-behind parents obtaining effective legal counsel.

The Congressional Report for 2000 makes reference to a bi-national working group of experts established between the USA and Germany to identify a specific list of actions to be taken and comments that these developments appear "to be promising". However, the report classified Germany "not fully compliant" pending concrete progress. The most recent Congressional Report, given to Congress in 2001, in fact promoted Germany to a "countr[y] of concern", stating that "good progress had been made".[100]

It must be acknowledged that more than any other Contracting State, Germany has made considerable efforts to improve the systems and procedures for handling Convention applications. The staffing of the Central Authority has been expanded which can only have improved the capacity for dealing with applications.[101] The concentration of jurisdiction into 24 courts together with improved judicial training should now mean that there is greater familiarity with the Convention among the judiciary, though this might further be enhanced if, as is currently being considered, the number of judges empowered to hear Convention applications is further limited. The procedural reforms of October 2000 (viz the ending of the practice of the Central Authority making investigations into the case where the abductor objects to a return; the institution of court proceedings at the same time both as the filing of the application for legal aid and as writing to the abductor to explore the possibility of a voluntary resolution) should significantly speed up the process. Together these reforms have the potential for making a dramatic change to the German performance under the Convention though time is needed to assess their impact.

Of course no system is perfect and even with the reforms there remain other areas that need improving. Principal among these is the enforcement process which is generally acknowledged to be weak. One improvement would be to vest the enforcement power in the court that made the order sought to be enforced and to make the process an ancillary one. In other words it should not be necessary to have initially an entirely new action for enforcement and certainly not one in which the "merits" of the original order can be reopened. Another issue is speed. As one commentator has pointed out,[102] the implementation Acts of 1990 and 1999 do not create a special procedure for return proceedings and in particular do not fix special deadlines or time-limits. It would clearly be helpful if specific deadlines for trial, court decisions, appeal and execution of a return order were fixed.

[100] Available at *http://www.travel.state.gov/2001_Hague_Compliance_Report.html*

[101] Though as noted above at 2.1, it is thought that about half of the time of the staff in the Central Authority is spent on child maintenance issues.

[102] Siehr, op. cit., n. 21, p. 209. See also Bach "The Hague Child Abduction Convention in the practical dimension" – a paper given at the Anglo-German judicial conference held in Dartington in May 1997 and Lowe and Perry, op. cit., n. 96, p. 54.

9. SUMMARY OF CONCERNS

- Germany made a reservation to Article 26 and therefore applicants seeking legal aid are required to apply through domestic procedures.
- It is assumed that in accordance with Article 24 all applications must be translated into German.
- It is suggested that where the applicant is not present at court proceedings this may be taken as indication of a lack of commitment.
- Strict time-limits on appeals may cause difficulties for applicants who need to make advance payment to their lawyers.
- There are some difficulties with enforcing orders.
- There is some confusion over which courts are able to enforce orders, the matter is not clarified by s 33 of the Non-Contentious Matters Act.
- Research on cases in 1999 showed that there were a high proportion of judicial refusals in applications to Germany.
- Access applications tend to be handled slowly.
- There are no particular time-limits in place to expedite court proceedings.

10. SUMMARY OF GOOD PRACTICES

- Germany has responded to criticisms and difficulties and has implemented two major reforms of its system, the first in July 1999 and the second in October 2000. This has acted as a catalyst for other States.
- New legislation which came into effect on 1 July 1999 limits jurisdiction in Convention cases to 24 courts of first instance all with a specialist family court and 24 appeal courts.
- A new procedure established in October 2000 aims to expedite the system.
- Court proceedings are instituted at the same time as applications for legal aid are forwarded to the relevant authority in an attempt to expedite procedures.
- Court proceedings can be instituted simultaneously with letters sent to the respondent seeking voluntary return.
- There is active judicial training in the Hague Convention, jurisdiction has been limited to around 200 judges and further limitations are being considered.
- Germany takes an active role in accepting accessions.
- There is a Franco-German Commission set up to consider difficult cases between the two States.
- There have been a series of USA-German meetings to discuss improvements and difficult cases. These have been significant in leading to recent legislative reforms.
- The Central Authority is in the process of constructing a web site.
- The Central Authority is well staffed and well resourced, although it is not purely devoted to Convention matters.

APPENDIX 1

As at 1 January 2002, the Convention is in force between the following 58 Contracting States and Germany.

Contracting State	Entry into Force
ARGENTINA	1 JUNE 1991
AUSTRALIA	1 DECEMBER 1990
AUSTRIA	1 DECEMBER 1990
BAHAMAS	1 MAY 1994
BELARUS	1 FEBRUARY 1999
BELGIUM	1 MAY 1999
BELIZE	1 DECEMBER 1990
BOSNIA AND HERZEGOVINA	1 DECEMBER 1991
BURKINA FASO	1 JANUARY 1993
CANADA	1 DECEMBER 1983
CHILE	1 JUNE 1995
CHINA-HONG KONG SPECIAL ADMINISTRATIVE REGION	1 SEPTEMBER 1997
CHINA-MACAU SPECIAL ADMINISTRATIVE REGION	1 MARCH 1999
COLOMBIA	1 NOVEMBER 1996
CROATIA	1 DECEMBER 1991
CYPRUS	1 MAY 1995
CZECH REPUBLIC	1 MARCH 1998
DENMARK	1 JULY 1991
ECUADOR	1 SEPTEMBER 1992
ESTONIA	1 DECEMBER 2001
FINLAND	1 AUGUST 1994
FORMER YUGOSLAV REPUBLIC OF MACEDONIA	1 DECEMBER 1991
FRANCE	1 DECEMBER 1990
GEORGIA	1 MARCH 1998
GREECE	1 JUNE 1993
HONDURAS	1 AUGUST 1994
HUNGARY	1 DECEMBER 1990
ICELAND	1 APRIL 1997
IRELAND	1 OCTOBER 1991
ISRAEL	1 DECEMBER 1991
ITALY	1 MAY 1995
LUXEMBOURG	1 DECEMBER 1990
MAURITIUS	1 DECEMBER 1993
MEXICO	1 FEBRUARY 1992
REPUBLIC OF MOLDOVA	1 MAY 2000
MONACO	1 JULY 1993
NETHERLANDS	1 DECEMBER 1990
NEW ZEALAND	1 FEBRUARY 1992
NORWAY	1 DECEMBER 1990
PANAMA	1 JUNE 1995
PARAGUAY	1 DECEMBER 2001
POLAND	1 FEBRUARY 1993
PORTUGAL	1 DECEMBER 1990
ROMANIA	1 JULY 1993
SAINT KITTS AND NEVIS	1 MAY 1995
SLOVAKIA	1 FEBRUARY 2001

SLOVENIA	1 JUNE 1995
SOUTH AFRICA	1 FEBRUARY 1998
SPAIN	1 DECEMBER 1990
SWEDEN	1 DECEMBER 1990
SWITZERLAND	1 DECEMBER 1990
TURKEY	1 AUGUST 2000
TURKMENISTAN	1 AUGUST 1998
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND	1 DECEMBER 1990
UNITED KINGDOM-BERMUDA	1 MARCH 1999
UNITED KINGDOM-CAYMAN ISLANDS	1 AUGUST 1998
UNITED KINGDOM-FALKLAND ISLANDS	1 JUNE 1998
UNITED KINGDOM-ISLE OF MAN	1 SEPTEMBER 1991
UNITED KINGDOM-MONTSERRAT	1 MARCH 1999
UNITED STATES OF AMERICA	1 DECEMBER 1990
URUGUAY	1 OCTOBER 2001
VENEZUELA	1 JANUARY 1997
YUGOSLAVIA	1 DECEMBER 1991
ZIMBABWE	1 FEBRUARY 1997

APPENDIX 2

Courts competent to hear Convention applications following the 1999 Reforms.

Bundesland **(Region)**	***Amtsgericht*** **(Court of First Instance)**	***Oberlandesgericht*** **(Appeal Court)**
Baden-Württemberg	*Amtsgericht Karlsruhe - Familiengericht -*	*OLG Karlsruhe*
	Amtsgericht Stuttgart - Familiengericht -	*OLG Stuttgart*
Bayern	*Amtsgericht Bamberg - Familiengericht -*	*OLG Bamberg*
	Amtsgericht München - Familiengericht -	*OLG München*
	Amtsgericht Nürnberg - Familiengericht -	*OLG Nürnberg*
Berlin	*Amtsgericht Pankow/Weißensee - Familiengericht -*	*KG Berlin*
Brandenburg	*Amtsgericht Brandenburgh a. d. H. - Familiengericht -*	*Brandenburgisches OLG*
Bremen	*Amtsgericht Bremen - Familiengericht -*	*Hanseatisches OLG in Bremen*

Bundesland **(Region)**	***Amtsgericht*** **(Court of First Instance)**	***Oberlandesgericht*** **(Appeal Court)**
Hamburg	*Amtsgericht Hamburg - Familiengericht -*	*Hanseatisches OLG Hamburg*
Hessen	*Amtsgericht Frankfurt a. M. - Familiengericht -*	*OLG Frankfurt a. M.*
Mecklenburg-Vorpommern	*Amtsgericht Rostock - Familiengericht -*	*OLG Rostock*
Niedersachsen	*Amtsgericht Braunschweig - Familiengericht –*	*OLG Braunschweig*
	Amtsgericht Celle - Familiengericht –	*OLG Celle*
	Amtsgericht Oldenburg - Familiengericht -	*OLG Oldenburg*
Nordrhein-Westfalen	*Amtsgericht Düsseldorf - Familiengericht -*	*OLG Düsseldorf*
	Amtsgericht Hamm - Familiengericht -	*OLG Hamm*
	Amtsgericht Köln - Familiengericht -	*OLG Köln*
Rheinland-Pfalz	*Amtsgericht Koblenz - Familiengericht -*	*OLG Koblenz*
	Amtsgericht Zweibrücken - Familiengericht -	*Pfälzisches OLG*
Saarland	*Amtsgericht Saarbrücken - Familiengericht -*	*Saarländisches OLG*
Sachsen	*Amtsgericht Dresden - Familiengericht -*	*OLG Dresden*
Sachsen-Anhalt	*Amtsgericht Naumburg - Familiengericht -*	*OLG Naumburg*
Schleswig-Holstein	*Amtsgericht Schleswig - Familiengericht -*	*Schleswig-Holsteinisches OLG*
Thüringen	*Amtsgericht Jena*	*Thüringer OLG*

NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN®

Charles B. Wang International Children's Building
699 Prince Street
Alexandria, Virginia 22314-3175
U.S.A.
Tel: +1 (703) 224 2150
Fax: +1 (703) 224 2122

OJJDP Office of Juvenile Justice and Delinquency Prevention
Office of Justice Programs ♦ U.S. Department of Justice