

## QUESTIONNAIRE CONCERNING THE PRACTICAL OPERATION OF THE 1980 CONVENTION

Wherever your replies to this Questionnaire make reference to domestic legislation, rules, guidance or case law relating to the practical operation of the 1980 Convention, **please provide a copy of the referenced documentation** in (a) the original language and, (b) wherever possible, accompanied by a translation into English and / or French.

<b>Name of State or territorial unit:</b> <sup>1</sup>	Germany
<i>For follow-up purposes</i>	
Name of contact person:	Dr. Matthias Heger
Name of Authority / Office:	Federal Ministry of Justice and Consumer Protection
Telephone number:	
E-mail address:	heger-ma@bmjv.bund.de

### PART I: RECENT DEVELOPMENTS<sup>2</sup>

#### 1. Recent developments in your State

1.1 Since the 2011 / 2012 Special Commission, have there been any significant developments in your State regarding the legislation or procedural rules applicable in cases of international child abduction. Where possible, please state the reason for the development in the legislation / rules, and, where possible, the results achieved in practice (e.g., reducing the time required to decide cases).

- No  
 Yes, please specify:  
[Please insert text here](#)

1.2 Please provide a brief summary of any significant decisions concerning the interpretation and application of the 1980 Convention rendered since the 2011 / 2012 Special Commission by the relevant authorities<sup>3</sup> in your State including in the context of the 20 November 1989 United Nations Convention on the Rights of the Child and relevant regional instruments.

The decisions referred to below do not represent the relevant case law as a whole but rather serve as mere examples to illustrate the questions German courts have been dealing with since the 2011/2012 Special Commission. To that effect, the decisions enlisted below cannot be seen to represent prevailing opinion either.

There is some relevant case law pertaining to the application of Art. 3 and 4 of the 1980 Convention. In particular, the term "habitual residence" has been frequently discussed by the courts in the context of Art. 3 and Art 4. It has been argued that a certain duration (usually after 6 month even though a consideration case-by-case remains necessary), frequency and a certain degree of social integration is required to establish habitual residence in the meaning of Art. 3; furthermore a mere inner reservation by one of the holders of parental responsibility may not hinder the establishment of a new habitual residence (Kammergericht Berlin, 12 Aug 2013, 16 UF 122/13; see also OLG Hamm 12 Jun 2012 II-11 UF 117/12, OLG Hamm 15 Dec 2011 II-11 UF 240/11).

<sup>1</sup> The term "State" in this Questionnaire includes a territorial unit, where relevant.

<sup>2</sup> This Part of the Questionnaire is intended to deal primarily with the developments in law and practice relating to international child abduction and international child protection which have occurred in your State since the Sixth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (1-10 June 2011 and 25-31 January 2012) (hereinafter "the 2011 / 2012 Special Commission"). However, if there are important matters which you consider should be raised from *prior* to the 2011 / 2012 Special Commission, please provide such information here.

<sup>3</sup> The term "relevant authorities" is used in this Questionnaire to refer to the judicial or administrative authorities with decision-making responsibility under the 1980 Convention. Whilst in the majority of States Parties such "authorities" will be courts (*i.e.*, judicial), in some States Parties administrative authorities remain responsible for decision-making in Convention cases.

There is considerable case law dealing with the exception contained in Art. 13 (1) b) 1980 Convention. However, as pointed out in the introduction above, this questionnaire does not deal with the exceptions to return under Art. 13 (1) b) 1980 Convention, thus these decisions are not discussed here.

A growing corpus of case law is dealing with the German legislation which serves to implement (among other instruments) the 1980 Hague Convention, the Act to Implement Certain Legal Instruments in the Field of International Family Law (International Family Law Procedure Act - IFLPA). As the IFLPA in particular deals with procedural matters, the courts have been dealing with such issues as the time limit for appeal (OLG Bamberg, 18 Nov 2015 - 2 UF 228/15, OLG Koblenzm 21 Jun 2016 - 13 UF 289/16).

1.3 Please provide a brief summary of any other significant developments in your State since the 2011 / 2012 Special Commission relating to international child abduction.

Generally speaking, the application practice of the 1980 Convention cannot be assessed without consideration of the Brussels II bis regulation and the application of its provisions on international child abduction. Accordingly, the current revision of the Brussels II bis Regulation has been a development of paramount significance for Germany as it has been for other EU Member states. As the consultations are still ongoing, the impact of the revised Regulation on international child abduction cases cannot be assessed yet, but is likely to be considerable.

## 2. Issues of compliance

2.1 Are there any States Parties to the 1980 Convention with whom you are having particular challenges in achieving successful co-operation? Please specify the challenges you have encountered and, in particular, whether the problems appear to be systemic.

No

Yes, please specify:

In some Contracting States the duration of the return proceedings is not in conformity with the 1980 Convention as the proceedings take too much time, sometimes years. The delays occur as early as concerning filing of the application before the competent court as well as the duration of the actual court proceedings. Also the fact that various stages of appeal with numerous possibilities of cassation and/or of referral to a lower instance by a higher court are possible enhance this problem. Furthermore, there is no swift enforcement procedure in some states. Most of these problems seem to be systemic and allegedly mainly originate from a lacking coherent implementing legislation and a lacking acceptance of the ideas and aims of the 1980 Convention among judges and other institutions in those countries.

2.2 Are you aware of situations / circumstances in which there has been avoidance / evasion of the 1980 Convention?

No

Yes, please specify:

Please insert text here

## PART II: THE PRACTICAL OPERATION OF THE 1980 CONVENTION

### 3. The role and functions of Central Authorities designated under the 1980 Convention<sup>4</sup>

*In general*

3.1 Have any challenges arisen in practice in achieving effective communication or co-operation with other Central Authorities?

<sup>4</sup> See also Section 5 below on "Ensuring the safe return of children" which involves the role and functions of Central Authorities.

- No  
 Yes, please specify:

In general terms, the communication of the German CA with CA's of other Convention States has been effective and smooth. However, some Central Authorities reply with a certain delay. This is at times caused by the means of communication employed, i.e. using regular mail instead of faxes and/or e-mails.

As for communication via e-mail, it has proven quite effective if Central Authorities provide a collective e-mail adress that can be used instead of individual adresses linked to a specific employee in order to avoid difficulties in determining the right contact data that are otherwise often caused by turnover of staff. Similarly, it has also proven effective to provide a central phone and fax adress.

Also the language barrier is an issue with some states.

For instance, in many Latin American countries, communication with the Central Authority is still very slow. Status updates are often only provided with a considerable delay. English has not been fully established as working language. Also the German translation of documents as required in return proceedings before the German judiciary are often inadequate. In some outgoing cases, the one year time period as set out in Art. 12 1980 Convention has expired simply due to the slowness of communication.

3.2 Have any of the duties of Central Authorities, as set out in **Article 7** of the 1980 Convention, raised any particular problems in practice either in your State, or in States Parties with whom you have co-operated?

- No  
 Yes, please specify:

With respect to the initiation of return proceedings pursuant to Art. 7 (2) f) 1980 Convention, the time between forwarding the applications in outgoing cases to the respective CA and the actual commencement of court proceedings is still considerable, which may even lead to the expiration of the one year time limit as set out in Art. 12 1980 Convention.

3.3 Has your Central Authority encountered any challenges with the application of any of the 1980 Convention provisions? If so, please specify.

- No  
 Yes, please specify:

One Contracting State in Asia which has not made a reservation under Article 26 (3) in accordance with Article 42 holds the view - despite the lack of a reservation - that the principle of freedom of costs of Hague proceedings is only valid unless the requesting Contracting State also guarantees freedom of costs, thus if it also did not make the above mentioned reservation. Germany, however, takes the view that there is a structural difference between those states that declared a reservation (e.g. Germany) and those that did not. In the first case the state shall not be bound to assume any costs referred to in Article 26 (2) resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice. In the latter case the state may not require any payment from the applicant regarding these costs. This problem is reinforced by the fact that there is no reliable information on the system and the prerequisites of legal aid in that country (see also answer under 3.5 last paragraph).

Some Contracting States ask the German Central Authority to officially serve an applicant in Germany with a foreign decision. From our point of view such a service of documents has to be effected through the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial documents in Civil or Commercial Matters or for EU Members States (except Denmark) through the regulation No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. The 1980 Convention does not contain a legal basis for the formal service of decisions.

It would be helpful if these issues could be clarified at the Special Commission 2017.

#### *Legal aid and representation*

3.4 Do the measures your Central Authority takes to provide or facilitate the provision of legal aid, legal advice and representation in return proceedings under the 1980 Convention

(Art. 7(2)-(g)) result in delays in proceedings either in your own State, or, where cases originate in your State, in any of the requested States you have dealt with?

- No  
 Yes, please specify:

Legal aid for incoming Hague return cases is subject to a means-and-merits test in Germany. The same court competent for Hague proceedings is also responsible for deciding whether legal aid will be granted. The application form and an instruction leaflet are available in German and English. Often it takes significant time until the applicant has completed the form and submitted the necessary documentary evidence. This can subsequently lead to a delay of the application as a whole.

As concerns outgoing cases, there are sometimes delays in States where there is no State-funded legal aid system and an attorney needs to be found who is willing to work on a pro bono basis.

In one Contracting State the applicant will get legal aid only if he/she is entitled to legal aid in his or her State of habitual residence. This is disadvantageous for applicants residing, e.g., in Germany because even though their income might be too high for them to be entitled to legal aid in Germany, they are unable to afford the much higher attorney's fees in that Contracting State.

3.5 Are you aware of any other challenges in your State, or, where cases originate in your State, in any of the requested States you have dealt with, regarding the obtaining of legal aid, advice and / or representation for either left-behind parents or taking parents?<sup>5</sup>

- No  
 Yes, please specify:

In the vast majority of Contracting States the CA or other public institution do not represent the applicant in court proceedings. This makes it often more expensive and more difficult for the applicant to have his or her case heard in court because the applicant has to hire an attorney on his or her own.

From one Contracting State we do not get information on the proceedings, legal and factual requirements for legal aid despite several inquiries. This is even more difficult against the background that in this state an applicant has to bear the costs of the proceedings although this state did not make a reservation under Article 26 (3) in accordance with Article 42 (see also under 3.3).

#### *Locating the child*

3.6 Has your Central Authority encountered any challenges with locating children in cases involving the 1980 Convention, either as a requesting or requested State?

- No  
 Yes, please specify the challenges encountered and what steps were taken or are considered to be taken to overcome these challenges:

In some Contracting States it may take a long time to locate a child if there are no criminal proceedings pending at the same time. Sometimes the institution of criminal proceedings helps because it makes other police and criminal instruments and methods available for locating a child. Later on, however, criminal proceedings against the abducting parent in the requesting State might lead to a refusal to return the child because of an Article 13 exception. They may also be an obstacle to amicable settlements.

---

<sup>5</sup> See paras 1.1.4 to 1.1.6 of the "Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006) (hereinafter referred to as the "[Conclusions and Recommendations of the 2006 Special Commission](#)") and paragraphs 32 to 34 of the [Conclusions and Recommendations of the Special Commission to review the operation of the Hague Convention of 19 October 1980 on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children \(1-10 June 2011 and 25-31 January 2012\)](#) (hereinafter the "C&R of the 2011/2012 Special Commission") (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Special Commission meetings").

If Germany is the requested State, German law offers the following tools to the German CA for locating a child:

In Germany, residents must generally register with the municipality. The German CA can do a check with the decentralized population register which often leads to a hit in case the taking parent (and child) is actually registered there. For that purpose the left behind parent shall provide information as to in which city the abducting parent and the child are supposed to be. If the check does not lead to a hit, the measures described under No 3.7 will be applied.

3.7 Has your Central Authority worked with any external agencies to discover the whereabouts of a child wrongfully removed to or retained within your State (e.g., the police, Interpol, private location services)?

No

Yes, please share any good practice on this matter:

All legal competences described for the German CA to discover the whereabouts of the child are regulated in Article 7 of the IFLPA.

In cases in which other measures have been ineffective, the German CA may involve the police to check possible whereabouts. Police checks may be open or covered, depending on whether there is a risk that the abducting parent might flee again with the child if he or she becomes aware that the police is tracing him/her.

The Central Authority is also authorised to collect vehicle keeper data at the Federal Motor Transport Authority, and to request the providers of social benefits (such as the German Pension insurance, the Employment agency or the employer) for notification of a person's current whereabouts. The Central Authority can request the Federal Criminal Police Office to issue a notice for ascertainment of a person's whereabouts, and it can initiate the storage of a search notice in the Federal Central Criminal Register.

#### *Information exchange, training and networking of Central Authorities*

3.8 Has your Central Authority shared its expertise with another Central Authority or benefited from another Central Authority sharing its expertise with your Central Authority, in accordance with the Guide to Good Practice – Part I on Central Authority Practice?<sup>6</sup>

No

Yes, please specify:

Since the last Special Commission in 2011, the German CA has received visits from several CAs, i.a., the CAs of the Netherlands, Japan, Turkey and the United States of America. Staff of the German CA have visited the CAs of Switzerland, Morocco, Ukraine, Armenia, the United States of America, Japan and Brasil to exchange experiences and discuss cases.

The European Commission has begun, in 2010, to organize bilateral meetings between CAs of EU Member States under the Brussels II bis Regulation which is being held once a year within the framework of the European Judicial Network (EJN).

3.9 Has your Central Authority organised or participated in any other networking initiatives between Central Authorities such as regional meetings via conference call or videoconference?

No

Yes, please specify:

The German CA is regularly consulted, and consults regularly, other CAs on general issues of common interest as well as on individual cases. Meetings via conference call or videoconference took place, i.a., with the CAs of Brasil, Ukraine, Ireland and Australia.

Furthermore the German CA participated at a number of conferences on international and EU level which could be used to discuss pending cases where necessary and exchange experiences with other CAs.

<sup>6</sup> Available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Guides to Good Practice". See, in particular, Chapter 6.5 on twinning arrangements.

### Statistics<sup>7</sup>

3.10 If your Central Authority does not submit statistics through the web-based INCASTAT database, please explain why.

The German Central Authority kept its own extensive statistics on a different technical basis even before implementation of INCASTAT. These statistics are updated continually and are required regularly on short notice for evaluations. Our statistics are adopted by content to the statistics as provided in INCASTAT, hence the data is almost identical. Accordingly, the Hague Conference could be provided on short notice with the requested data.

### Prompt handling of cases

3.11 Does your Central Authority have mechanisms in place to ensure the prompt handling of cases?

- No  
 Yes, please specify:

Every case worker in the German CA is responsible for certain specific countries. This expedites the handling of the case as the case worker is more familiar with the relevant national provisions in particular with regard to custody rights and procedural law of the requesting state and often knows the competent person of the requesting Central Authority because of phone calls and exchange of emails.

Everytime the German CA receives an application under the 1980 Hague Convention the competent case-worker immediately sends a confirmation of receipt and requires further information and documents where necessary whilst continuing with the handling of the case (locating the child, information on mediation, initiating of the proceedings...).

3.12 If your Central Authority is experiencing delays in handling cases please specify the main reasons for these delays:

In the majority of cases the information and documents provided by the requesting CA and the applicants are not complete. This is particularly the case with regard to the form and documentary evidence for an application for legal aid (see also under 3.4.) In case a legal aid application to the German court is not complete and coherent there is a great risk that the legal aid application is not successful and the applicant is not represented in the court hearing.

## 4. Court proceedings & promptness

4.1 Has your State limited the number of judicial or administrative authorities who can hear return applications under the 1980 Convention (*i.e.*, concentration of jurisdiction)?<sup>8</sup>

- Yes  
 No, please indicate if such arrangements are being contemplated:  
 Please insert text here

4.2 Does your State have mechanisms in place to handle return decisions within six weeks (*e.g.*, production of summary evidence, limitation of appeals, swift enforcement)?

- No  
 Yes, please explain:

In Germany only one appeal is possible against the first instance decision (Article 40 (2) IFLPA). To promote the swift enforcement, the enforcement has to take place *ex officio*, thus without a further application for enforcement to the court (Article 44 IFLPA). Also one has to mention the concentration of jurisdiction (4.1.) as well as the regular judges conferences twice a year (13.1.).

<sup>7</sup> See paras 1.1.16 to 1.1.21 of the Conclusions and Recommendations of the 2006 Special Commission (*supra*, note 5).

<sup>8</sup> See, *The Judges' Newsletter* on International Child Protection – [Vol. XX / Summer-Autumn 2013](#) the special focus of which was "Concentration of jurisdiction under the *Hague Convention of 25 October 1980 on the civil aspects of International Child Abduction* and other international child protection instruments".

4.3 If your response to the previous question is No, does your State contemplate implementing mechanisms to meet the requirement of prompt return under the 1980 Convention (e.g., procedures, bench-books, guidelines, protocols)?

- No, please explain:  
Please insert text here
- Yes, please explain:  
Please insert text here

4.4 If your State is experiencing delays in handling return decisions please specify the main reasons for these delays:

There are situations where the abducting parent goes into hiding with the child after a return decision.

4.5 Do your courts regularly order immediate protective measures when initiating the return procedure, so as to prevent a new removal and minimize the harm to the child (e.g., prohibit removal of the child from the jurisdiction, retain documentation, grant provisional access rights to the left-behind parent)?

- No, please explain:  
German courts can make provisional measures upon application or proprio motu. However, this does not occur automatically upon filing a return application. Instead, an applicant requesting protective measures has to additionally demonstrate the need for such measures to the satisfaction of the court, i.e. substantiate the risk of (further) abduction by the taking parent or other potential harm to the child's well being. Apart from this, the competent court in Hague return proceedings may make such provisional measures as it deems fit to ensure the child's well being pursuant to sec. 15 IFLPA. In particular, the competent Youth Welfare Office and the guardian ad litem - who is usually assigned in return proceedings - may inform the court of facts that constitute ground for provisional measures and suggest such measures to be taken.

Some courts ask applicant and respondent as to the proposed access arrangements immediately prior to and after the court hearing is taking place. The Hague network judges strongly recommend to address the question of granting provisional access during on-going Hague return proceedings. It also is one of the recommendations of the training courses for specialized Hague return judges that take place on a regular basis (twice a year) under the auspices of the German Central Authority and the Hague Network Judges.

The guardian ad litem is particularly helpful in making the necessary preparation to realize such provisional access rights. The Hague Network Judges consider it advisable to have the first access before the return hearing takes place. The respective attorneys may also assist in the realization of access. If an arrangement on a voluntary basis does not come into existence, the competent court may make a provisional order aimed at facilitating access.

- Yes, please explain:  
Please insert text here

4.6 Do your courts make use of direct judicial communications to ensure prompt proceedings?

- Yes
- No, please explain:  
See Question 4.8

4.7 If your State has not designated a sitting judge to the International Hague Network of Judges does your State intend to do so in the near future?

- Yes
- No, please explain:  
Please insert text here

4.8 Please comment upon any cases (whether your State was the requesting or requested State), in which the judge (or decision-maker) has, before determining an application for return, communicated with a judge or other authority in the requesting State regarding the issue of the child's safe return. What was the specific purpose of the communication? What was the outcome?

Direct judicial communication is usually facilitated by the Hague Network Judges. The requests addressed towards the Network Judges encompass such diverse topics as:

- Protective measures upon return for the taking parent, e.g. arrangements for the taking parent to be admitted to a women's shelter.
- Investigation as to whether an arrest warrant is in place in the State of habitual residence.
- Questions regarding custody rights in the context of Art. 3 1980 Hague Convention and more specifically regarding existing orders transferring custody rights to one parent.
- Clarification as to whether custody proceedings have already been instituted in the State of habitual residence.
- Enquiry if a mirror order is necessary and comes into question.

The requested information was often delivered within days. The communication in most cases is conducted via e-mail. In Germany the aforementioned requests are handled in close cooperation between the courts and the Central Authority. In particular, the German Central Authority and the Hague Network Judges coordinate whether the specific request is better handled via the Judges' Network or via the network of Central Authorities or if a simultaneous approach is more expedient in order to obtain the necessary information prior to the court hearing.

The German Hague Network Judges have submitted the following case: The parties had entered into an agreement before a higher regional (appeal) court in Germany. The agreement - among other things - included a provision according to which the respondent taking parent was allowed to use the former family home as accommodation for the taking parent and the children upon return. However, the return was at risk as the respondent was concerned whether the agreement was legally binding in the State of habitual residence. In this situation, direct judicial communication was utilized and the competent court in the State of habitual residence took a measure of protection pursuant to Art. 11 1996 Hague Convention according to which the taking parent was allowed to stay at the family home free of charge with the children. The taking parent then returned the children to the State of habitual residence in accordance with the agreement which had been reached before the German court.

## 5. **Ensuring the safe return of children**<sup>9</sup>

*Methods for ensuring the safe return of children*<sup>10</sup>

5.1 What measures has your Central Authority taken to ensure that the recommendations of the 2006 and 2011 / 2012 Special Commission meetings<sup>11</sup> regarding the safe return of children are implemented?

There is a variety of options to ensure the safe return of children, such as provisional orders by the competent 1980 Hague Convention court pursuant to sec. 15 IFLPA (see above Question 4.5), direct judicial communication (see Question 4.8) or protective measures pursuant to Art. 11 (4) Brussels II bis Regulation (see Question 5.3 and 5.6).

5.2 In particular, in a case where the safety of a child is in issue and where a return order has been made in your State, how does your Central Authority ensure that the appropriate child protection bodies in the *requesting* State are alerted so that they may act to protect the welfare of a child upon return (until the appropriate court in the requesting State has been effectively seised)?

The German Central Authority would inform the Central Authority of the requesting state in order to make the competent authorities aware of the respective need of protection and enable them to take the required precautions. Alternatively, or simultaneously, the Hague Network Judges may get involved (see Question 4.5-4.8).

<sup>9</sup> See **Art. 7(2) h)** of the 1980 Convention.

<sup>10</sup> Where relevant, please make reference to the use of undertakings, mirror orders and safe harbour orders and other such measures in your State.

<sup>11</sup> See the [Conclusions and Recommendations](#) of the Special Commission of 2006 (*supra*. note 5) at paras 1.1.12 and 1.8.1 to 1.8.2 and 1.8.4 to 1.8.5 and the Appendix to the Conclusions and Recommendations and the Conclusions and Recommendations of the 2011 / 2012 Special Commission (*supra*. note 5).at paras 39-43.

5.3 Where there are concerns in the requested State regarding possible risks for a child following a return, what conditions or requirements can the relevant authority in your State put in place to minimise or eliminate those concerns?

In Germany, due to Article 11 (4) Brussels II bis Regulation, Hague courts are obliged to ensure such adequate arrangements. Direct judicial communication with or without the support of the Hague Network Judges may be used to facilitate the return (see Question 4.8 supra), in particular if custody proceedings are already pending in the state of habitual residence or if protective measures are considered by the courts of habitual residence. However, the use of undertakings, mirror orders and safe harbour orders still seems to be more common in the Anglo-American legal sphere. In particular undertakings are rather uncommon in Germany, due to their uncertain enforceability in the state of habitual residence. Also, at least within Europe, due to the jurisprudence of the ECJ, provisional measures by Hague courts may not be enforceable in other Member States.

*Use of the 1996 Convention to ensure a safe return*

5.4 If your State is not Party to the 1996 Convention, is consideration being given to the possible advantages of the 1996 Convention in providing a jurisdictional basis for urgent protective measures associated with return orders (**Arts 7 and 11**), in providing for their recognition by operation of law (**Art. 23**), and in communicating information relevant to the protection of the child (**Art. 34**)?

- No  
 Yes, please explain:  
 Please insert text here

*Protection of primary carer*

5.5 Are you aware of cases in your State where a primary carer taking parent, for reasons of personal security (e.g., domestic or family violence, intimidation, harassment, etc.) or others, has refused or has not been in a position to return with the child to the requesting State? How are such cases dealt with in your State? Please explain and provide case examples where possible.

Domestic violence or other threats to the personal security are often raised by the taking parent in return cases in the context of Art. 13 (1) b) 1980 Convention. However, as this questionnaire - according to the introduction - does not deal with the exceptions to return under Art. 13 (1) b) 1980 Convention, it should suffice to note that the Hague return courts apply the provision in a very restrictive manner. Furthermore, a court may not refuse to return a child if it is established that protective measures are in place in the State of habitual residence pursuant to Art. 11 (4) Brussels II bis Regulation (See Question 5.6).

If the return is ordered (as Art. 13 (1) b) 1980 Convention is not applicable), the return order is to be enforced proprio motu by the competent court, see sec. 44 IFLPA.

5.6 In particular, would your authorities consider putting in place measures to protect the primary carer upon return in the requesting State as a mean to secure the safe return of the child? Please explain and provide case examples where possible.

Pursuant to Art. 11 (4) Brussels II bis Regulation, courts will have to consider whether protective measures are in place upon return before refusing the return based upon Art. 13 (1) b) 1980 Convention. For example the higher regional court Naumburg did not apply Art. 13 (1) b) 1980 Convention as it had been established that oversight by the Dutch guardianship authority was in place and the child could therefore be safely returned to the Netherlands (OLG Naumburg, 25 Oct 2006 - 8 WF 153/06).

However, these kinds of protective measures will have to be established by the competent authorities in the respective country of habitual residence to which the children are to be returned.

*Post-return information*

5.7 In cases where measures are put in place in your State to ensure the safety of a child upon return, does your State (through the Central Authority, or otherwise) attempt to monitor the effectiveness of those measures upon the child's return? Would you support a recommendation that States Parties should co-operate to provide each other with follow-up information on such matters, insofar as is possible?

As for the German Central Authority, the legal mandate encompasses ensuring the safe return of the child. According to sec. 6 (2) IFLPA the German Central Authority is deemed to be authorised to take action in or out of court on behalf of the applicant "for the purpose of returning the child". Thus, once the child has returned this task has been accomplished and measures aimed at monitoring the safe return will have to be conducted not by the Central Authority but instead by the competent family court and/or competent Youth Welfare Office.

Should there be concerns regarding the well-being of the child after returning to the country of habitual residence, the competent authorities may choose to further cooperate under Art. 55 Brussels II bis Regulation or under Chapter V of the 1996 Hague Convention.

A general recommendation is not supported, due to the fact that the 1980 Convention merely concerns abduction and return, whereas the situation in the state of habitual residence is primarily a custody issue, for which the authorities in the state of abduction are not competent. If so required in specific cases, cooperation may continue on the basis of the 1996 Hague Convention.

5.8 If your State is not Party to the 1996 Convention, is consideration being given to the possible advantages of the 1996 Convention in providing a jurisdictional basis for requesting a report on the situation of the child upon return to the State of habitual residence (**Art. 32-(a)**)?

- No  
 Yes, please explain:

## 6. **Voluntary agreements and mediation**

6.1 How does your Central Authority (either directly or through any intermediary) take, or is it considering taking, appropriate steps under **Article 7-(c)** to secure the voluntary return of the child or to bring about an amicable resolution of the issues? Please explain:

In the context of Art. 7 (2) (c) of the 1980 Convention and Art. 55 (e) Brussels II bis Regulation, mediation is offered by the German Central Authority to applicants on a regular basis. If applicant and respondent both show an interest in mediation, the German Central Authority is supported by third party mediators and cooperates closely with MiKK e.V., a non profit organization, that helps to facilitate the mediation. The German Central Authority liaises directly with the competent court in 1980 Hague Convention proceedings in order to ensure that no undue delay is caused by mediation and that the results achieved can be incorporated directly into the court order where appropriate.

Furthermore a voluntary return letter is sent to the taking parent, where desired by the left behind parent.

6.2 In what ways have you used the "Guide to Good Practice on Mediation"<sup>12</sup> for the purpose of implementing the 1980 Convention in your State? Please explain:

The "Guide to Good Practice in Mediation" is an important tool for all Convention States to promote amicable dispute resolution in Hague abduction cases. In this regard, the Guide to Good Practice serves to learn about other mediation models and methods. As for Germany, it has proven an effective solution to cooperate with a specialized Non-Governmental Organization in mediation cases (see Question 6.1).

6.3 Has your State considered or is it in the process of considering the establishment of a Central Contact Point for international family mediation to facilitate access to information on

<sup>12</sup> Available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" then "Guides to Good Practice".

available mediation services and related issues for cross-border family disputes involving children, or has this task been entrusted to the Central Authority?<sup>13</sup>

- No, please explain:  
Please insert text here

- Yes, please explain:

In proceedings instituted by the German Central Authority, it closely cooperates with MiKK e. V. (see supra Question 6.1) which helps to find suitable mediators, organise rooms for mediation and set up mediation as such in practical terms. All this happens in close co-ordination with the German Central Authority which in turn liaises directly with the competent court. The Central Contact Point for Cross-border Family Conflicts based at the German Branch of International Social Service within the "Deutscher Verein" exercises the function of Central Contact Point for International Family Mediation (see Question 12 b)).

## 7. Preventive measures

7.1 Has your State taken steps to advance the development of a travel form under the auspices of the International Civil Aviation Organisation?<sup>14</sup>

- No  
 Yes, please describe:  
Please insert text here

7.2 Regardless of whether the International Civil Aviation Organisation adds the development of a travel form to its work programme, would your State support the development of a non-mandatory model travel form under the auspices of the Hague Conference?

- Yes  
 No, please explain:  
Please insert text here

## 8. The Guide to Good Practice under the 1980 Convention

8.1 In what ways have you used the Parts of the Guide to Good Practice<sup>15</sup> to assist in implementing for the first time, or improving the practical operation of, the 1980 Convention in your State?

- a. Part I on Central Authority Practice. Please explain:

Part I is addressed to legislators and Central Authorities. The part addressed to Central Authorities is known to the Central Authority, and most of the recommendations made have already been implemented by the German Central Authority. A description in detail would go beyond the scope of this Questionnaire. As an example, practices have been implemented to avoid any delay by efforts on voluntary return or mediation which are carried out simultaneously to preparation of court proceedings.

- b. Part II on Implementing Measures. Please explain:

Part II is addressed to the legislator. The German implementing legislation in our view complies with recommendations of the Guide. In particular there is concentrated jurisdiction and limitation to one appeal.

- c. Part III on Preventive Measures. Please explain:

Part III has been translated into German by the German Central Authority and made available to the Hague Conference in order to post it on the HCCH website. The German CA is continuously developing together with the Hague liaison judges and other authorities involved a form for the judicial decision on prohibition for the abducting party from removal of the child from the jurisdiction and then issuing a travel ban.

- d. Part IV on Enforcement. Please explain:

<sup>13</sup> As it has been encouraged in the Guide to Good Practice on Mediation, Chapter 4, on "Access to Mediation". par. 114-117. See also Conclusions and Recommendations of the 2011 / 2012 Special Commission (*supra*. note 5) at par. 61.

<sup>14</sup> See the Conclusions and Recommendations of the 2011 / 2012 Special Commission (*supra*. note 5) at par. 92.

<sup>15</sup> All Parts of the Guide to Good Practice under the 1980 Convention are available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice".

Part IV on enforcement has been fully implemented by legislation and practice in Germany. Judges do however retain some discretion in applying the relevant domestic enforcement provisions to the individual case. Enforcement was a key topic at the two 2016 judicial conferences for specialised Hague judges in Germany which are organised twice a year by the German Central Authority. At these conferences bailiffs and judges reported on their experiences and needs concerning the enforcement of Hague return orders. Legislatively, in difference to domestic law, Hague decisions by higher courts are enforced by these courts instead of lower enforcement courts. Enforcement is carried out ex officio.

8.2 How have you ensured that the relevant authorities in your State have been made aware of, and have had access to, the Guide to Good Practice?

see 8.1.

8.3 Do you have any other comments about any Part of the Guide to Good Practice?

-

## 9. **Publicity and debate concerning the 1980 Convention**

9.1 Has the 1980 Convention given rise to (a) any publicity (positive or negative) in your State, or (b) any debate or discussion in your national parliament or its equivalent?

No

Yes, please indicate the outcome of this debate or discussion, if any:

In very few outgoing cases from Germany the applicants addressed the media which subsequently led to publications in print media or TV.

In some of these cases the German Central Authority also received inquiries of members of the Bundestag (German parliament on federal level) or members of a Landtag (German parliaments on regional state level) who have been engaged by the applicants.

Nevertheless, any debates focused on individuals cases and neither the Convention nor its intentions in general.

9.2 By what methods does your State disseminate information to the public about the 1980 Convention?

Website of the Federal Office of Justice (in German and English, [www.bundesjustizamt.de/sorgerecht](http://www.bundesjustizamt.de/sorgerecht) and [www.bundesjustizamt.de/custody-conflicts](http://www.bundesjustizamt.de/custody-conflicts))  
 - brochure (currently available in German and English)  
 - co-operation with NGOs operating helplines  
 - seminars/training sessions/exchange of information with/for judges, attorneys, youth welfare officers, the police, NGOs, mediators (training of the trainers)

<b>PART IV: TRANSFRONTIER ACCESS / CONTACT AND INTERNATIONAL FAMILY RELOCATION</b>
--

## 10. **Transfrontier access / contact**<sup>16</sup>

10.1 Since the 2011 / 2012 Special Commission, have there been any significant developments in your State regarding Central Authority practices, legislation, procedural rules or case law applicable in cases of transfrontier contact / access?

No

Yes, please explain:

[Please insert text here](#)

10.2 Please indicate any important developments in your State, since the 2011 / 2012 Special Commission, in the interpretation of **Article 21** of the 1980 Convention.

<sup>16</sup> See the [Conclusions and Recommendations](#) of the 2006 Special Commission (*supra*. note 5) at paras 1.7.1 to 1.7.3.

Please insert text here

10.3 What problems have you experienced, if any, as regards co-operation with other States in respect of:

- a. the granting or maintaining of access rights;  
Please insert text here
- b. the effective exercise of rights of access; and  
Please insert text here
- c. the restriction or termination of access rights.  
Please insert text here

Please provide case examples where possible.

In general terms, the interpretation of Art. 21 1980 Convention still seems to be inconsistent among Convention States. From a German perspective, comprehensive support is provided in cross-border access cases on the basis of Art. 21, that is applicants may seek the assistance of the German Central Authority in order to either first establish access rights or - if such rights have already been granted by the competent (judicial) authority - have these rights enforced. In either cases, a wrongful removal/retention pursuant to Art. 3 is not required. However, some Convention states interpret Art. 21 differently and provide support only when the child has been wrongfully removed/retained beforehand.

The German Central Authority may also commence court proceedings in access cases albeit subject to prior authorization by the applicant pursuant to sec. 6 (2) IFLPA. In this regard, the German implementing legislation differentiates between return cases (where the German Central Authority is deemed authorised by operation of law) and access cases (where an authorization by the applicant is required).

Other Central Authorities on the contrary, provide assistance and information but are not entitled to commence court proceedings.

10.4 In what ways have you used the "General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children"<sup>17</sup> to assist in transfrontier contact / access cases in your State? Can you suggest any further principles of good practice?

Perhaps an interesting example, are the local Youth Welfare Offices that provide comprehensive assistance in access cases (see sec. 18 of Part VIII of the Social Code). In particular, the Youth Welfare Offices may assist by facilitating accompanied contact sessions.

## **11. International family relocation<sup>18</sup>**

11.1 Since the 2011 / 2012 Special Commission, have there been any significant developments in your State regarding the legislation, procedural rules or case law applicable to international family relocation? Where possible, please explain these developments in the legislation, procedural rules or case law:

Under German law a parent may only relocate with the child if this parent has either sole custody or the sole right to determine the child's place of habitual residence. Hence, if the parents have joint custody, the parent intending to relocate requires the consent of the other parent. Elsewise, this parent would require the right to determine the child's place of residence to be transferred to her/him by means of a court decision. As regards the courts decision to transfer the right to determine the child's place of residence due to a planned relocation, it has become broadly recognized in recent case law that the motive of the parent

<sup>17</sup> Available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice".

<sup>18</sup> See the Conclusions and Recommendations of the 2006 Special Commission meeting at paras 1.7.4 to 1.7.5: "1.7.4 The Special Commission concludes that parents, before they move with their children from one country to another, should be encouraged not to take unilateral action by unlawfully removing a child but to make appropriate arrangements for access and contact preferably by agreement, particularly where one parent intends to remain behind after the move. 1.7.5 The Special Commission encourages all attempts to seek to resolve differences among the legal systems so as to arrive as far as possible at a common approach and common standards as regards relocation."

intending to relocate may not be taken into consideration by the court but instead the effect of relocation on the child's well being is the only decisive factor (see Federal Court of Justice, 28 Apr 2010 - XII ZB 81/09, Federal Court of Justice, 16 Mar 2011 - XII ZB 407/10, OLG Frankfurt, 18 Jun 2013 - 7 UF 67/12).

<b>PART V: NON-CONVENTION CASES AND NON-CONVENTION STATES</b>
---

## 12. Non-Convention cases and non-Convention States

12.1 Are there any States that you would particularly like to see become a State Party to the 1980 Convention? If so, what steps would you suggest could be taken to promote the Convention and encourage ratification of, or accession to, the Convention in those States? Please explain:

[Please insert text here](#)

12.2 Are there any States which are not Parties to the 1980 Convention or not Members of the Hague Conference that you would like to see invited to the Special Commission meeting in 2017?

[Please insert text here](#)

*The "Malta Process"*<sup>19</sup>

12.2 In relation to the "Malta Process":

a. Do you have any comment to make on the "Principles for the Establishment of Mediation Structures in the context of the Malta Process" and the accompanying Explanatory Memorandum?<sup>20</sup>

b. Have any steps been taken towards the implementation of the Malta Principles in your State and the designation of a Central Contact Point, in order to better address cross-border family disputes over children involving States that are not a Party to the 1980 and 1996 Hague Conventions?

No

Yes, please explain:

[The Central Contact Point for Cross-border Family Conflicts based at the German Branch of International Social Service within the "Deutscher Verein" exercises the function of Central Contact Point for International Family Mediation in the context of the Malta Process.](#)

c. What is your view as to the future of the "Malta Process"?

[Please insert text here](#)

<b>PART VI: TRAINING AND EDUCATION AND THE TOOLS, SERVICES AND SUPPORT PROVIDED BY THE PERMANENT BUREAU</b>
---

## 13. Training and education

<sup>19</sup> The "Malta Process" is a dialogue between certain States Parties to the 1980 and 1996 Conventions and certain States which are not Parties to either Convention, with a view to securing better protection for cross-border rights of contact of parents and their children and addressing the problems posed by international abduction between the States concerned. For further information see the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Judicial Seminars on the International Protection of Children".

<sup>20</sup> The Principles and Explanatory Memorandum were circulated to all Hague Conference Member States and all States participating in the Malta Process in November 2010. They are available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Judicial Seminars on the International Protection of Children".

13.1 Can you give details of any training sessions / conferences organised in your State to support the effective functioning of the 1980 Convention, and the influence that such sessions / conferences have had?

In Germany, since 2001 two judicial training sessions per year are being held for the judges having specialised jurisdiction for Hague return cases (22 courts of first instance and 22 courts of appeal). In addition, 1-2 judges or persons working for Central Authorities from other countries are invited as well. Since the last Special Commission, guest speakers from France, Switzerland, Romania, England, Spain, Poland, Hungary, Italy, Slovakia, Luxemburg, Austria, The Netherlands and the Czech Republic have participated. In spring 2017 Portugal and in autumn 2017 Croatia will be present.

Under the chairmanship of the German Hague liaison judge (who is also a liaison judge in the European Judicial Network and has jurisdiction for Hague cases herself), the German judges discuss legal issues concerning the 1980 Hague Convention, the Brussels II bis Regulation, the 1996 Child Protection Convention (since 2010) and the corresponding German implementing legislation. Practical issues are equally addressed (judicial networking, information sources, cooperation with other institutions when applying these instruments). They contribute to an enhanced networking between German judges having jurisdiction for Hague cases, the development of model forms and decisions, considerable decrease of the average length of proceedings and increased cross-border judicial communications and co-operation. International networking of judges has also been favoured by the presence of the foreign judges who were often Hague liaison judges or liaison judges in the European Judicial Network (or obtained this function after the conference).

#### **14. The tools, services and support provided by the Permanent Bureau**

*In general*

14.1 Please comment or state your reflections on the specific tools, services and support provided by the Permanent Bureau to assist with the practical operation of the 1980 and 1996 Conventions, including:

- a. The Country Profile available under the Child Abduction Section.

The Country Profiles are extremely helpful in taking into account the specificities of the respective Convention State in return/access proceedings under the 1980 Hague Convention. For example, the Country Profiles provide for an easy way to determine if it is possible in a Convention State for a decision or other determination to be made pursuant to Art. 15 1980 Convention, that the removal / retention was wrongful within the meaning of Art. 3 1980 Convention. It would also be beneficial to have a similar tool specifically for the 1996 Hague Convention which provides more detailed information on that Convention than it is the case under the current Country Profile which focuses on the 1980 Convention.

- b. INCADAT (the international child abduction database, available at < [www.incadat.com](http://www.incadat.com) >).

While INCADAT has a considerable potential, it seems there is still room for its practical potential to be fully utilized. In particular, from a German perspective, the number of decisions of German courts is still limited and most of the incorporated decisions date from some time back.

- c. *The Judges' Newsletter* on International Child Protection - the publication of the Hague Conference on Private International Law which is available online for free;<sup>21</sup>

Whilst being a useful tool in general, it would appear favorable if the Newsletter was released more frequently so that it can be utilized to include announcements on upcoming publications, seminars etc.

- d. The specialised "Child Abduction Section" of the Hague Conference website (< [www.hcch.net](http://www.hcch.net) >);

---

<sup>21</sup> Available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under "Child Abduction Section" and "Judges' Newsletter on International Child Protection". For some volumes of *The Judges' Newsletter*, it is possible to download individual articles as required.

This topic-centered approach serves a complementary function to the general approach via instruments / Conventions. In this regard, it is quite useful to access the required information more quickly.

- e. INCASTAT (the database for the electronic collection and analysis of statistics on the 1980 Convention);<sup>22</sup>  
No practical experience due to lack of resources and compatibility/streamlining issues with software used within the Federal Office of Justice and other German authorities (see also under 3.10)
- f. Providing technical assistance and training to States Parties regarding the practical operation of the 1980 and 1996 Conventions.<sup>23</sup> Such technical assistance and training may involve persons visiting the Permanent Bureau or, alternatively, may involve the Permanent Bureau organising, or providing assistance with organising, national and international judicial and other seminars and conferences concerning the Convention(s) and participating in such conferences;  
Please insert text here
- g. Encouraging wider ratification of, or accession to, the Convention(s), including educating those unfamiliar with the Convention(s);<sup>24</sup>  
Please insert text here
- h. Supporting communications between Central Authorities, including maintaining their contact details updated on the HCCH website;  
Please insert text here
- i. Supporting communications among Hague Network Judges and between Hague Network Judges and Central Authorities, including maintaining a confidential database of up-to-date contact details of Hague Network Judges  
Please insert text here

#### *Other*

14.2 What other measures or mechanisms would you recommend:

- a. To improve the monitoring of the operation of the Conventions;  
Please insert text here
- b. To assist States in meeting their Convention obligations; and  
Trainings of the relevant stakeholders involved, particularly the judges hearing Hague cases as well as staff from Central Authorities, Youth Welfare Offices, Police, Lawyers, etc. have been proven to be an effective tool not only in Germany but also in other states to foster the meeting of Convention obligations. Those trainings were implemented in the past in the framework of projects of e.g. the EU or the German Foundation for International Legal Cooperation
- c. To evaluate whether serious violations of Convention obligations have occurred?  
Although the Permanent Bureau has no mandate to monitor compliance it may serve as a central collecting point for individual complaints and may consider to attempt to resolve eventual disputes.

**PART VII: PRIORITIES AND RECOMMENDATIONS FOR THE SPECIAL COMMISSION  
AND ANY OTHER MATTERS**

### **15. Views on priorities and recommendations for the Special Commission**

<sup>22</sup> Further information is available via the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "INCASTAT".

<sup>23</sup> Such technical assistance may be provided to judges, Central Authority personnel and / or other professionals involved with the practical operation of the Convention(s).

<sup>24</sup> Which again may involve State delegates and others visiting the Permanent Bureau or, alternatively, may involve the Permanent Bureau organising, or providing assistance with organising, national and international judicial and other seminars and conferences concerning the Convention(s) and participating in such conferences.

15.1 Which matters does your State think ought to be accorded particular priority on the agenda for the Special Commission? Please provide a brief explanation supporting your response.

[Please insert text here](#)

15.2 States are invited to make proposals concerning any particular recommendations they think ought to be made by the Special Commission.

[Please insert text here](#)

**16. Any other matters**

16.1 States are invited to comment on any other matters which they may wish to raise concerning the practical operation of the 1980 Convention.

The following topics are inter alia considered to be worth discussing in more detail:

- Implementing measures such as limitation of remedies and concentrated jurisdiction
- Legal aid and the role of the CAs
- Agreements and arrangements
- Separation of the child from primary care taker