



EXECUTIVE SUMMARY

of the

GERMANY

BEST PRACTICE TOOL

for the Recognition and Enforceability
of Mediated Agreements in the EU
(Relocation Agreement)



This project was funded by the European Union's Justice Program (2014-2020)

Germany - Best Practice Tool for the Recognition and Enforceability of Family Law Agreements Involving Children within the European Union

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The AMICABLE Project is an EU co-funded project conceived by the project co-ordinator MiKK - International Mediation Centre for Family Conflict and Child Abduction. The project is conducted by a Consortium of Partners from four different EU countries: the University of Milano-Bicocca (Italy), the University of Wrocław (Poland), the University of Alicante (Spain) and MiKK (Germany). The Consortium Partners have developed four country-specific Best Practice Tools for their respective countries. For further details on the AMICABLE project please refer to the project website: <https://www.amicable-eu.org/>



Project Consortium:

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Executive summary



Step 1

Germany

Executive summary - International Relocation Agreement

(For details please consult the German National Best Practice Tool)

International relocation case inside the EU: The unmarried parents of a child (age: 10 years) who habitually reside in Germany split up. The parents, who have joint custody of their child, agree that child and mother will relocate together from Germany to EU State B; the father, who will remain in Germany, will have personal contact with the child every fourth weekend and during school holidays; the father will pay a monthly child maintenance of 200 EUR to the mother. They set up a detailed agreement in writing. No legal proceedings are yet pending between the parents.

Step I: EU / international legal framework needs to be analysed to identify in which country the family agreement should first be rendered legally binding and enforceable to make best use of the mechanism of cross-border recognition and enforcement of EU / international law.

For relocation agreements such as the agreement in the above case, dealing with matters of parental responsibility the best “starting point jurisdiction” is the **State of habitual residence of the child** at the moment the agreement is rendered legally binding and enforceable. Hence, where the parents want to render the agreement legally binding before the relocation, the best “starting point jurisdiction” would be the State where the child currently lives (Germany).



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Step 2

Step 2: Using the national law options of Germany to render the family agreement legally binding in Germany

In Germany, no straightforward way exists to render a package agreement dealing with a number of different family law matters (including custody and maintenance) legally binding and enforceable. Where the parties come to such an agreement outside of pending court proceedings, no option exists to give binding force to the package agreement *at once*. In other words, the German procedural law does not foresee the possibility to seize a court in order to render the package agreement legally binding by embodying it into a decision or otherwise approve the agreement, neither does the law grant such a competency to other bodies such as notaries. German national law offers only piecemeal solutions.

Here it is briefly summarised what other possible ways exist for rendering an agreement on the above subject matters legally binding and enforceable in Germany.

Option 1

Here is explained a combination of how to use a court decision and an authentic instrument (Method A and B according to the European and German Best Practice Tool):

1) Family court proceedings are started for parental responsibility/ contact.

2) Maintenance is documented as authentic instrument before the Youth Welfare Office or a notary public.

a. *Which local court or other authority is competent?*

1) The Family court in the district of which the child has his place of habitual residence has jurisdiction, Section 152 (2) FamFG (Act on

Proceedings in Family Matters and in Matters of Non- contentious Jurisdiction). Only during the pendency of a marital matter the court before which the marriage issue is or was pending in the first instance has exclusive jurisdiction for parent and child matters among German courts insofar as the matter concerns common children of the spouses, Section 152 (1) FamFG.

2) The youth Welfare Office where the child is registered or a notary

b. *Representation by attorneys mandatory?*

1)+2)No.

c. *Are there other participants obligatory?*

1)The German Youth Welfare Office (Jugendamt) has to be heard, Section 162 FamFG.

2)No.

d. *Time required*

1) It is difficult to predict the approximate time for obtaining an enforceable court decision, but it may be possible to obtain a court order within ca. 1 – 2 months. Parental responsibility proceedings in general have to be led by the judge very swiftly. Parent and child matters concerning the right of contact shall have priority and the proceedings should be handled in an expedited manner, Section 155 (1) FamFG. They should be heard within one month, Section 155 (2) FamFG.

2) By appointment with the Youth Welfare Office or the notary, approx. 1-4 weeks.

e. *Costs incurred (for rendering the agreement binding not for arriving at an agreement using mediation etc.)*

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1) Court fee 54 €¹, if the value is set by the court 3000€, if it is set 6000 € (this may be because the agreement is not only about contact but as well on custody matters) the court fee is 82,50 €.

2) Setting up an authentic document concerning child maintenance is for free.

Option 2

Here will be explained an alternative, if only court decisions shall be used (only Method A):

Two separate family court proceedings are started for 1) parental responsibility/contact and 2) maintenance.

a. Which local court or other authority is competent?

1) The court in the district of which the child has his place of habitual residence has jurisdiction, Section 152 (2) FamFG (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction). Only during the pendency of a marital matter the court before which the marriage issue is or was pending in the first instance has exclusive jurisdiction for parent and child matters among German courts insofar as the matter concerns common children of the spouses, Section 152 (1) FamFG.

2) Jurisdiction lies with the family court in the district in which the child or the parent with the authority to act on behalf of the child has his/her place of habitual residence. As in parental responsibility matters, during the pendency of a marital matter the court will be competent, before which the marital matter was or is pending in the first instance, Section 232 FamFG.

b. Representation by attorneys mandatory?

1) No.

2) Yes.

But, theoretically, the child can be represented by a Youth Welfare Officer, which is for free²

c. Are there other participants obligatory?

1) The German Youth Welfare Office (Jugendamt) has to be heard, Section 162 FamFG.

2) No.

d. Time required

1) It is difficult to predict the approximate time for obtaining an enforceable court decision, but it may be possible to obtain a court order within ca. 1 – 2 months. Parental responsibility proceedings in general have to be led by the judge very swiftly. Parent and child matters concerning the right of contact shall have priority and the proceedings should be handled in an expedited manner, Section 155 (1) FamFG. They should be heard within one month, Section 155 (2) FamFG.

2) It seems nearly impossible to obtain a decision in a maintenance case before one month after the application, unless the defendant recognises the claim or a default judgment is given. On average 3-4 months may be realistic, but it may easily take nine months. The time required depends very much on the workload of the judge in question or the family court in general. In maintenance proceedings the court fee has to be paid before the application is served on the defendant. The court fee has to be paid by the applicant. It can be paid at the same time the application is brought to court.

¹ Section 28 (1) 3 FamGKG, KV Nr. 1310, (Kostenverzeichnis gemäß Anlage 2 FamGKG).

² This is unlikely where a mediation has been taken place beforehand.

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e. *Costs incurred (for rendering the agreement binding not for arriving at an agreement using mediation etc.)*

1) Court fee 54 €³, if the value is set by the court 3000€, if it is set 6000 € (this may be because the agreement is not only about contact but as well on custody matters) the court fee is 82,50 €

2) The basis is the value to be fixed by the court. Relevant for the value on which all fees depend is the amount of maintenance paid in the first year after the application, Section 51 FamGKG; in case of 200 € per month= 2400 €/ year. The value will be higher when there are arrears.

Court fee: In the event a final decision has to be given by the court, KV Nr. 1220 : 3 x 108 = 324 €. Where the proceedings are concluded by a documented agreement the fee is only **108 €** (KV. Nr. 1221).

Fees for two lawyers in case of ending the proceedings by a documented agreement: 860,97 € x 2= **1721,94 €**⁴⁵.

Option 3

Another option, that may fit if, for example the parents reach an agreement in the ongoing parental responsibility proceedings concerning contact or the relocation abroad, the contact of the father and child support. Here a court settlement/ court decision can be used for rendering the entire agreement legally binding Germany and then let it travel cross- border. The realization of this idea will depend on the single situation and is at the discretion of the judge

³ Section 28 (1) 3 FamGKG, KV Nr. 1310, (Kostenverzeichnis gemäß Anlage 2 FamGKG).

⁴ In detail in German: 3,5 Gebühren: 1,3 Verfahrensgebühr VV Nr. 1300 (Vergütungsverzeichnis) , 1,2 Terminsgebühr VV Nr. 3104, 1,0 gerichtliche Vergleichsgebühr VV Nr. 1000, 1003, 1004 zzgl. Auslagen und Umsatzsteuer).

⁵ The legal basis for the fees for lawyers is the RVG (Rechtsanwältvergütungsgesetz; Act on the remuneration of Attorneys) and the VV (Vergütungsverzeichnis; Remuneration schedule incl. Annex 1 Remuneration schedule).

a. *Which local court or other authority is competent?*

The court in the district of which the child has his/her place of habitual residence has jurisdiction, Section 152 (2) FamFG (Act on Proceedings in Family Matters and in Matters of Non- contentious Jurisdiction). Only during the pendency of a marital matter the court before which the marriage issue is or was pending in the first instance has exclusive jurisdiction for parent and child matters among German courts insofar as the matter concerns common children of the spouses, Section 152 (1) FamFG.

b. *Representation by attorneys mandatory?*

Yes (regarding the maintenance issues, not necessarily for parental responsibility issues).

c. *Are there other participants obligatory?*

The German Youth Welfare Office (Jugendamt) has to be heard, Section 162 FamFG (regarding all parental responsibility issues).

d. *Time required*

It is difficult to predict the approximate time for obtaining an enforceable court decision, but it may be possible to obtain a court order within ca. 1 – 2 months, if the agreement can be documented as a court settlement during the first court hearing. Parental responsibility proceedings in general have to be led by the judge very swiftly.

e. *Costs incurred (for rendering the agreement binding not for arriving at an agreement using mediation etc.)*

In this situation the court will probably set a value for the original access proceedings of 3000 € and for the agreement of 8400 € (in detail: 3000 € access, 3000€ for parental re-

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sponsibility or surrender of the child, 2400 € maintenance). The court fee for the originally started proceedings will be 54 €, for the documentation of the agreement 41,25 €, court fee at all 95,25 €.

Each lawyer will charge in this alternative 2080,60 €, calculated on the basis of RVG and VV (Remuneration schedule incl. Annex 1 Remuneration schedule) ⁶, for two lawyers this will be 4121,20° €. Adding the court fee of 95,25 € there are total costs of **4.216, 45 €** plus possible costs for interpretation or a guardian ad litem.

⁶ 1,3 Verfahrensgebühr nach einem Wert von 3000€: § 13 RVG, 3100 VV= 245, 70 €
+ 0, 8 Gebühr für Mehrvergleich nach § 13 RVG, 30101 Nr. 2 und 3100, da nach §15 RVG eine Obergrenze zu beachten ist = 270,40 €
+ Terminsgebühr nach einem Wert von 8400€: 1,2 Gebühr § 13 RVG, VV 3104 = 538,80 €
+ Einigungsgebühr nach 3000€, § 13 RVG Nr. 1003, 1000 = 189 €
+ außergerichtliche Einigungsgebühr nach einem Wert von 5400€, § 13 RVG 1000 VV: 1,5 Gebühr =484,50°€ (hier ist die Obergrenze nach § 15 RVG schon berücksichtigt)
+ 20€ Auslagenpauschale nach VV 7002 sind insgesamt 1748,40€
+ 19 % USt. auf alles, Nr. 7008 VV = 332,20 €



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Step 3

Step 3: Making (the content of) the agreement, which is now enforceable in Germany travel cross-border with the assistance of EU law and guaranteeing enforceability in EU State B (not Denmark)

Reference is made to the options listed above in step 2

Option 1

a. *Characterisation as “decision” or “authentic instrument” or “enforceable agreement” in the sense of the Brussels IIa Regulation and the Maintenance Regulation:*

- 1) The court documented agreement concerning contact has been approved by a Family Court decision and by this way becomes legally binding and enforceable in Germany (Method A can be used to let the agreement travel cross border as a court decision)
- 2) The agreement about child maintenance as the obligation of the father to pay maintenance for his child has been documented as authentic instrument before the Youth Welfare Office or a notary public and becomes by that way legally binding and enforceable in Germany (Method B can be used to let the agreement travel cross border according to Article 48 Maintenance Regulation).

b. *Which authority would fill in which form / annex of the relevant EU Regulations?*

- 1) The family Court which has rendered the decision will fill in the Article 41 Brussels IIa Regulation / Annex III certificate.
- 2) The Youth Welfare Office or the notary having authenticated the maintenance obligation will have to fill in the Annex III form of the Maintenance Regulation.

Option 2

a. *Characterisation as “decision” or “authentic instrument” or “enforceable agreement” in the sense of the Brussels IIa Regulation and the Maintenance Regulation:*

- 1) The court documented agreement concerning contact has been approved by a Family Court decision and by this way become legally binding and enforceable in Germany (Method A can be used to let the agreement travel cross border as a court decision)
- 2) Court proceedings have ended with a court documented settlement. The agreement becomes legally binding and enforceable by the act of documentation before a family court, Section 794 ZPO (Code of Civil Procedure). Article 48 Maintenance Regulation is applicable.

b. *Which authority would fill in which form / annex of the relevant EU Regulations?*

- 1) The Family Court which has rendered the decision will fill in the Article 41 Brussels IIa Regulation / Annex III certificate.
- 2) The Family Court which has documented the maintenance obligation as court settlement will have to fill in the Annex I form of the Maintenance Regulation.

Option 3

a. *Characterisation as “decision” or “authentic instrument” or “enforceable agreement” in the sense of the Brussels IIa Regulation:*

The court documented agreement concerning contact has been approved by a Family Court decision and by this way become legally binding and enforceable in Germany.

The part concerning child maintenance is a court

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documented settlement/ enforceable agreement according to Article 48 Maintenance Regulation.

b. Which authority would fill in which form / annex of the relevant EU Regulation?

The Family Court which has rendered the decision concerning access will fill in the Article 41 Brussels IIa Regulation / Annex III certificate.

The same Family Court has documented the maintenance obligation as court settlement and will have to fill in the Annex I form of the Maintenance Regulation.



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Executive summary

Step 1

Germany

Executive summary - International Abduction Case – return agreement

(For details please consult the German National Best Practice Tool)

International child abduction inside the EU: The unmarried parents of a child (age: 10 years) who habitually reside in State B split up. They have joint custody of their child. Against the wish of the father, the mother takes the child to her home-country, Germany, with the intention to settle there. Since the mother does not return the child voluntarily, the father applies for the return of the child under the 1980 Hague Child Abduction Convention to the competent court in Germany .

In parallel to the Hague return proceedings, the parents follow specialised mediation and come to a return agreement, which regulates the following main aspects:

- Mother and child will return to State B (details given, including the modalities of the return and cost payment)
- The parents will continue to exercise the rights of custody jointly.
- The child will live with the mother in State B; father and child will maintain regular contact (details given).
- The father will pay a fixed amount of child maintenance on a monthly basis (details given).

Step I: EU / international legal framework needs to be analysed to identify in which country the family agreement should first be rendered legally binding and enforceable to make best use of the mechanism of cross-border recognition and enforcement of EU / international law.

In international child abduction cases **special rules on international jurisdiction apply for matters of parental responsibility** in accordance with Art. 10 Brussels IIa Regulation (equivalent to Art. 7 of the 1996 Hague Child Protection Convention). These rules preserve the international jurisdiction of the authorities in the State of the child's habitual residence *ante* abduction (= State B). In addition, Art. 16 of the 1980 Hague Child Abduction Convention blocks jurisdiction for custody proceedings in the State to which the child has been taken (=State A)

as soon as a judicial or administrative authority in this State informed of the abduction and until it has been determined that the child is not to be returned or no return application is lodged within a responsible time. This ensemble of rules aims to protect the children affected by international child abduction. The provisions are premised on the notion that the most appropriate forum to determine the long-term merits of custody is usually the State of the habitual residence of the child (=State B) (see Art 8 Brussels IIa Regulation) and that the child's removal or retention by one parent in breach of the other parent's custody rights should not bring about a change of jurisdiction and provide procedural advantages for the taking parent.

Consequently, one might be tempted to simply refer the parties to the authorities of State B in order to render their return-agreement enforceable, since the

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authorities in State A (here: Germany) lack international jurisdiction on the merits of custody. However, this can cause **major inconveniences in practice**: Time is of the essence in international child abduction cases, therefore the court seized with Hague return proceedings in State A is under the legal obligation to decide swiftly (six-weeks-timeframe imposed by Art. 11(3) Brussels IIa Regulation). The authorities in State B are under no such obligation when being asked to render the parental agreement enforceable. For the parties who have negotiated a return agreement it will be **crucial to avoid partial binding force of the agreement**. Where the Hague return proceedings end with a return order while the agreed conditions to the return and the agreed custody and contact arrangement following the return are not yet binding, we have a de facto partial validity of the agreement which is likely to be a source for new conflicts. Even where the authorities in State B are ready to act swiftly and render the return agreement legally binding within the time frame the Hague court has to act, difficulties may arise, where the authorities of State B request the presence of the abducting parent and / or wish to interview the child.

Specialised judges have over the past decades developed **good practices and tools (such as direct judicial communications)** to assist the parties in upholding the amicable solution of their dispute. In practice, it is often thanks to personal engagement of Hague judges and the efforts undertaken by specialised judges in the Hague International Network of Judges as well as the European Judicial Network, that practical solutions can be found to bring about a binding force of agreed solutions despite challenges imposed by the legal systems involved. The promoted way forward is twofold and can be summarised as follows: (1) Giving the return agreement in front of the Hague court (State A) binding force to the maximum extent feasible and (2) doing everything feasible to obtain binding force for the remainder of the agreement as speedily as possible in the State B, ideally before the Hague proceedings are terminated in State A.

For proceedings commenced on or after 1 August 2022, the new Brussels IIa (recast) Regulation will remedy the above described dilemma: In cases of wrongful removal or retention the international jurisdiction can be prorogated in line with Article 10 of the new Regulation, see Article 9 of the Brussels IIa (recast) Regulation. In its Recital 22 the new Regulation furthermore

encourages Member States with concentrated jurisdiction to “consider enabling the court seized with the return application under the 1980 Hague Convention to exercise also the jurisdiction agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility where agreement of the parties was reached in the course of the return proceedings. Such agreements should include agreements both on the return and the non-return of the child. If non-return is agreed, the child should remain in the Member State of the new habitual residence and jurisdiction for any future custody proceedings there should be determined on the basis of the new habitual residence of the child.”

The following summary of national law will address the legal situation under the current Brussel IIa Regulation but will also be most useful to assist in cases under the new Brussels IIa (recast) Regulation since it will highlight what competencies the court seized with Hague return proceedings has under national law to render agreements on matters usually contained in typical return agreements legally binding and enforceable.

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Step 2

Step 2: How can the court seized with Hague return proceedings in Germany assist with rendering the return agreement legally binding and enforceable? Can the judge seized with Hague return proceedings render all parts of the return agreement for which international jurisdiction is given in State A legally binding? What can the judge seized with Hague return proceedings do to assist with rendering the remainder of the agreement binding in State B?

(1) Which local court has jurisdiction for Hague return proceedings and is there specialised / concentrated jurisdiction for Hague cases?

Specialised jurisdiction lies with the Family Court in whose district the Higher Regional Court for the district is situated, and this depends on where the child was residing upon receipt of the return application at the Central Authority, or where the need for care exists, Section 11, 12 (1) IntFamRVG (International Family Law Procedure Act). Accordingly, jurisdiction for Hague child abduction cases in Germany lies with 22 specialised first instance family courts¹. A link to a detailed list can be found via the website of the German Central Authority².

(2) Does national German procedural law allow the Hague judge to render all parts for which international jurisdiction could be assumed in State A (return & modalities of return etc & possibly maintenance matters) legally binding and also enforceable?

Yes. During pendency of a Hague return case the Hague court has competence for all matters concerning the return of the child. In general (if international jurisdiction is given) it is possible in Hague proceedings as in other family proceedings to make arrangements beyond the pending case and conclude them as court documented settlement.

a. Is representation by lawyers mandatory?

Representation by lawyers is required in family dispute matters, i.e. maintenance.

b. Are there other participants obligatory?

The Youth Welfare Office (Jugendamt) has to be heard. A guardian ad litem will normally be appointed for the child during Hague return proceedings.

c. How about hearing the child?

The child generally has to be heard by the judge before a court decision is rendered, usually as of the age of three years.

(3) What options has the judge seized with Hague return proceedings in line with national procedural law to assist the parties in obtaining binding legal force to the remainder of their agreement in State B (direct judicial communications etc.)?

The judge competent for the Hague return proceedings can contact a German Network Judge either in the Hague Network of Judges or in the European Judicial Network; she/he will forward any questions concerning foreign law to her/ his counterpart in the State of habitual residence of the child. The Network Judges can also liaise direct judicial communication between the judges in both States involved, if parental responsibility proceedings are already pending in the foreign State. Names and places where the German Network Judges are situated are known by all specialised German Hague Judges, but can also be found online³. Central Authorities⁴ may be able to support, too.

¹ In Germany exist at all 24 courts of appeal, but in the Bundesland Niedersachsen is determined that the Local Court in Celle is competent for the districts of all 3 courts of appeal. In Berlin, where 4 family courts exist at the place of the Court of Appeal, competence lies with the Amtsgericht Pankow/Weißensee.

² Bundesjustizamt.de/sorgerecht.

³ available online: https://www.bundesjustizamt.de/DE/Themen/Gerichte_Behoerden/EJNZH/Verbindungsrichter/Kontaktdaten_Verbindungsrichter.html?nn=3620232 (last consulted 13 May 2020).

Another data sheet is existing for the international Hague Network of Judges (IHNJ)

<https://assets.hcch.net/docs/665b2d56-6236-4125-9352-c22bb65bc375.pdf> (last consulted 13 May 2020).

⁴ The website of the German Central Authority can be found here: [bundesjustizamt.de/sorgerecht](https://www.bundesjustizamt.de/sorgerecht)



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Change of perspective – Assuming the child had been taken to State B and Germany would be the State of return

Hague return proceedings are ongoing in State B, how can the parts of the return agreement on custody and contact, for which international jurisdiction remains in Germany be rendered legally binding and enforceable in the swiftest way possible, ideally before the Hague proceedings are concluded?

In Germany exists only one way for rendering the return agreement on custody and contact legally binding and enforceable and this is by way of a family court decision.

a. *Which local court or other authority is competent?*
Competency lies with the court in the district where the child has had her/his habitual residence before, Section 152 (2) FamFG (Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction). Only during the pendency of a marital matter in Germany the court before which the marriage issue is or was pending in the first instance has exclusive jurisdiction for parent and child matters among German courts (for common children of the spouses), Section 152 (1) FamFG. This is not the specialised “Hague court” which would be competent if return proceedings would be led in Germany.

b. *Is representation by attorneys mandatory?*

Not for parental responsibility proceedings.

c. *Are there other participants obligatory?*

The German Youth Welfare Office (Jugendamt) has to be heard, Section 162 FamFG.

d. *How about hearing the child? Is it necessary? If so, can this be done via long-distance communication?*

The child generally has to be heard by the judge before a court decision is rendered, usually as of the age of three years. A hearing of the child via

videoconference does not seem appropriate for this type of hearing. To be heard by a judge is a difficult situation for children, especially when they are very young and in this highly emotional situation of child abduction. When using means of a videoconference the hearing judge can't influence the circumstances of the hearing, i. e. presence of the abducting parent, location in a court that is not suitable for children, and so on. Moreover, a videoconference under the Council Regulation (EC) No. 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters has to be prepared, takes time (at least 4- 6 weeks) and seems at all not feasible in the narrow timeframe of the Hague proceedings in the foreign State.

e. *Time required*

A decision concerning parental responsibility may be possible in due time (within 1- 3 weeks), if

-proceedings are already pending in Germany when the return proceedings are ongoing in State B

- the child is younger than three years, so it must not be interviewed in Germany

- the abducting parent can in any way be heard by the German judge

- the Youth Welfare Office and/ or the appointed guardian ad litem do not point out reasonable obstacles against the agreement

- the judge does not see such obstacles concerning the best interests of the child and is willing to see the difficulties, to act swiftly and fix a date for a hearing at once.

Collaboration with a lawyer as representative of the abducting parent and as willing as the judge can possibly help to speed up.

Network judges in State B and in Germany may also help to explain the urgency.

When proceedings are not yet pending in Germa-

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ny or one or more of the above-mentioned conditions are not met, it seems to be unrealistic to render an agreement concerning parental responsibility matters binding while Hague return proceedings are ongoing in State B.

f. Costs incurred

Court fee 54 €⁵, if the value is set by the court 3000€, if it is set 6000 € (this may be in case the agreement is not only about contact but as well on custody matters) the court fee is 82,50 €. Should there have been a guardian ad litem appointed there will have been added 550 € per child. If one or both parents are represented by lawyers their fee has to be added.

⁵ Section 28 (1) 3 FamGKG, KV Nr. 1310, (Kostenverzeichnis gemäß Anlage 2 FamGKG).





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Step 1

Germany

Executive summary - International Abduction Case – Non-return agreement

in cases where international jurisdiction on matters of parental responsibility has shifted to the State to which the child had been taken

(Cases where the international jurisdiction has not shifted will have to be solved as described under International Abduction Case – return agreement)

(For details please consult the German National Best Practice Tool)

International child abduction inside the EU: The unmarried parents of a child (age: 10 years) who habitually reside in State B split up. They have joint custody of their child. Against the wish of the father, the mother takes the child to her home-country, Germany, with the intention to settle there. Since the mother does not return the child voluntarily, the father applies for the return of the child under the 1980 Hague Child Abduction Convention to the competent court in Germany.

In parallel to the Hague return proceedings, the parents follow specialised mediation and come to a return agreement, which regulates the following main aspects:

- Mother and child will not return, they will from now on live in Germany
- The parents will continue to exercise the rights of custody jointly.
- The father and child will maintain regular contact (details given including payment of travel costs).
- The father will pay a fixed amount of child maintenance on a monthly basis (details given).

Step 1: EU / international legal framework needs to be analysed to identify in which country the family agreement should first be rendered legally binding and enforceable to make best use of the mechanism of cross-border recognition and enforcement of EU / international law.

Since we focus here on those cases of international child abduction, where **international jurisdiction for matters of parental responsibility** has shifted in accordance with Art. 10 Brussels IIa Regulation (equivalent to Art. 7 of the 1996 Hague Child Protection Convention), the ideal starting point jurisdiction to render the

non-return agreement legally binding and enforceable is Germany, i.e. the State to which the child has been taken.

These cases are much easier to handle than those where the international jurisdiction has not shifted. However, the settings of national law may nonetheless make it difficult to render the agreement with the above ingredients binding at once by the judge seized with the Hague proceedings or another authority within the remainder of the six-weeks-timeframe imposed by Art. 11(3) Brussels IIa Regulation. For the parties who have negotiated a non-return agreement it will be **crucial to**



Executive summary

Step 2

avoid partial binding force of the agreement. Where the Hague return proceedings end with a non-return order while the agreed conditions to the non-return and the agreed custody and contact arrangement are not yet binding, we have a de facto partial validity of the agreement which is likely to be a source for new conflicts.

For proceedings commenced on or after 1 August 2022, the new Brussels IIa (recast) Regulation will allow for a prorogation of international jurisdiction in line with Article 10 of the new Regulation, see Article 9 of the Brussels IIa (recast) Regulation. In its Recital 22 the new Regulation furthermore encourages Member States with concentrated jurisdiction to “consider enabling the court seized with the return application under the 1980 Hague Convention to exercise also the jurisdiction agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility where agreement of the parties was reached in the course of the return proceedings. Such agreements should include agreements both on the return and the non-return of the child. If non-return is agreed, the child should remain in the Member State of the new habitual residence and jurisdiction for any future custody proceedings there should be determined on the basis of the new habitual residence of the child.”

The following summary of national law addresses the legal situation under the current Brussel IIa Regulation. However, since the focus is here on cases where the international jurisdiction has shifted, the analysis will be most useful for cases under the new Brussels IIa (recast) Regulation since it will highlight what competencies the court seized with Hague return proceedings has under national law to render agreements on matters usually contained in typical return agreements legally binding and enforceable.

Step 2: How can the court seized with Hague return proceedings in Germany assist with rendering the return agreement legally binding and enforceable? Can the judge seized with Hague return proceedings render the entire non-return agreement legally binding and enforceable simultaneously with ending the Hague proceedings? If not, what can the judge seized with Hague return proceedings do to assist with rendering the remainder of the agreement binding in State A most swiftly?

(1) Which local court has jurisdiction for Hague return proceedings and is there specialised / concentrated jurisdiction for Hague cases?

Specialised jurisdiction lies with the Family Court in whose district the Higher Regional Court for the district is situated, and this depends on where the child was residing upon receipt of the return application at the Central Authority, or where the need for care exists, Section 11, 12 (1) IntFamRVG (International Family Law Procedure Act). Accordingly, jurisdiction for Hague child abduction cases in Germany lies with 22 specialised first instance family courts¹. A link to a detailed list can be found via the website of the German Central Authority².

(2) Does national German procedural law allow the Hague judge (assuming international jurisdiction has shifted) to render all parts (non-return, custody and contact arrangement, & possibly maintenance matters) legally binding and also enforceable?

Yes. During pendency of a Hague return case the Hague court has according to Section 13 (1) IntFamRVG explicit competence (if international jurisdiction is given) for all matters of custody, contact or surrender of the child. In general it is possible in Hague proceedings as in other family proceedings to make arrangements beyond the pending case and conclude them as court recorded settlement. The Hague return proceedings will end with a court settlement which has to be approved by a (Hague) court decision concerning the access of the child with his/ her father.

¹ In Germany exist at all 24 courts of appeal, but in the Bundesland Niedersachsen is determined that the Local Court in Celle is competent for the districts of all 3 courts of appeal. In Berlin, where 4 family courts exist at the place of the Court of Appeal, competence lies with the Amtsgericht Pankow/Weißensee.

² Bundesjustizamt.de/sorgerecht.

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- a. *Is representation by lawyers mandatory?*
Representation by lawyers is required in family dispute matters, i.e. maintenance.
- b. *Are there other participants obligatory?*
The Youth Welfare Office (Jugendamt) has to be heard. A guardian ad litem will normally be appointed for the child during Hague return proceedings.
- c. *How about hearing the child?*
The child generally has to be heard by the judge before a court decision is rendered, usually as of the age of three years.