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Processing incoming return cases by courts



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European Judicial Network
(in civil and commercial matters)

1 Concentration of jurisdiction

1.1 Which authority is competent to hear requests for return under the 1980 Hague Convention/Article 22 of the Brussels IIb Regulation ("requests for return")?

For requests under the 1980 Hague Convention/Article 22 of the Brussels IIb Regulation, the district court located at the seat of the regional court has jurisdiction (Section 109a Jurisdiction Rule - JR). There are 20 regional courts in Austria. In Vienna only the Innere Stadt Wien District Court, and in Graz only the Graz-Ost District Court, have jurisdiction. There are therefore seven district courts in Austria that have jurisdiction over requests under the 1980 Hague Convention/Article 22 of the Brussels IIb Regulation.

1.2 Is the jurisdiction to hear requests for return confined to specialist courts? - If yes, to what courts is it restricted? How many judges within the specialist court exercise the jurisdiction? - If no, are the judges hearing return requests specialised?

Judges with family law departments at district courts have jurisdiction to hear requests for return. As a rule, one or two judges are responsible for requests for return at each court.

1.3 By which method are the requests for return allocated to a judge?

Requests for return are allocated to judges according to the distribution of business at the district courts (usually depending on the name of the child).

1.4 What specialist training is provided for the specialist judges? In particular do they have the opportunity to attend multi-national conferences specialising on International Family Law? Is there a regular conference within your jurisdiction to which all judges dealing with requests for return are invited?

Judges also have the opportunity to attend further training events (e.g. international conferences) abroad. Relevant further training events are also offered domestically, in particular for judges dealing with child abduction cases.

2 Practice and procedure for requests for return in first instance court

2.1 Are there special rules of practice and procedure for requests for return? If yes, please provide a brief summary of the procedure and if relevant, provide a link

The court must take into account the special urgency of the proceedings when seeking an amicable settlement

in the best interests of the child (Section 13 of the Non-Contentious Proceedings Act [*Außerstreitgesetz*, *AußStrG*]), during which both parents should, if possible, appear before the court. The request must be decided without delay, unless a judicial decision becomes unnecessary due to the immediate voluntary return of the child or the withdrawal of the request.

For legal aid and other procedural particularities in the handling of requests from abroad before first instance courts, please refer to points 2.8, 2.9, 2.11, 3.1 and 6.1 above (Sections 111c to 111f of the Non-Contentious Proceedings Act), as well as the following link [in German]:

<https://www.bmj.gv.at/themen/Zivilrecht/Verfahren-bei-Internationalen-Kindesentf%C3%BChrungen.html>.

2.2 What steps are taken to meet the 6 weeks target described in Article 24(2) of the Brussels IIb Regulation?

The competent judges handle requests with the necessary urgency, exercising their own discretion (Section 111c(1) of the Non-Contentious Proceedings Act)

If a court has not made a decision within six weeks of receiving a request, it must report the reasons for the delay to the Federal Ministry of Justice without delay (Section 111c(8) of the Non-Contentious Proceedings Act).

2.3 If mediation is used, what steps are taken to ensure that the referral to mediation does not risk a breach of the 6 weeks target? How does the court examine whether contact should be ensured, in accordance with Article 27(2) of the Brussels IIb Regulation? Does the court examine whether contact should be ensured only on the basis of a request from one of the parties or can do so on its own motion?

The competent judges handle requests with the necessary urgency, exercising their own discretion (Section 111c(1) of the Non-Contentious Proceedings Act)

To safeguard the objectives of the Hague Convention, the first instance court must take measures at every stage of the return proceedings to ensure the right of the left-behind parent to personal contact with the child until the final decision on the return of the child and its enforcement, provided this is not contrary to the best interests of the child (Section 111c(6) of the Non-Contentious Proceedings Act). The court may instruct the family court assistance service to examine whether contact should be ensured.

2.4 How is the child given an opportunity to express his or her views in return proceedings? Please describe who hears the child's views and at which stage of the proceedings are their views heard

In proceedings concerning care and upbringing or personal contact, the court must hear minors personally. The minor may also be heard by the child and youth welfare authority, the family court assistance service, youth court assistance institutions or in another suitable manner, such as by experts, if they have not yet reached the age of ten, if this is required for their development or health, or if otherwise a serious and uninfluenced expression of the minor's opinion is not to be expected. Questioning must be refrained from insofar as it or any associated delay in the order would endanger the welfare of the minor, or if, in view of the minor's capacity to understand, a considered expression of opinion in respect of the subject matter of the proceedings is clearly not to be expected (Section 105 of the Non-Contentious Proceedings Act).

2.5 Is the number of court hearings for requests for return subject to judicial discretion, or does your legal system establish a minimum/maximum number? If so, please indicate

The number of court hearings is subject to judicial discretion.

2.6 Is oral evidence admitted at the hearing? If it is, are oral submissions admitted to supplement written argument?

Both oral evidence and written submissions are admissible (Section 31 of the Non-Contentious Proceedings Act).

2.7 Is the applicant required to attend the hearing? Are there any procedural consequences if the applicant does not attend the hearing?

The applicant may be represented at the hearing. The court must, in principle, endeavour to reach an amicable settlement in the best interests of the child, during which both parents should, if possible, appear before the court (Section 111c(5) of the Non-Contentious Proceedings Act). However, the applicant cannot be compelled to attend. The court may take a lack of participation in the proceedings into account when assessing the evidence.

2.8 Are the courts equipped with videoconferencing facilities to allow for remote participation through videoconferencing? What is the legal framework for using videoconferencing at the hearing? Is there a specific legal framework for hearings in return proceedings?

The court may hold a hearing for oral proceedings without the presence in person of the parties, their representatives, or other persons involved in the proceedings by using suitable technical means of communication for audio and video transmission, and may also take evidence in this way. It is a prerequisite for this that, inter alia, no party objects to the announced procedure within a reasonable period laid down by the court, or that the parties have given their explicit consent to it.

The parties may only propose such a procedure to the court (Section 132a of the Austrian Code of Civil Procedure [*Zivilprozessordnung*, ZPO], read in conjunction with Section 35 of the Non-Contentious Proceedings Act). All courts are equipped with suitable videoconferencing systems (including for Zoom/from abroad?). There is no specific legal framework for hearings in return proceedings.

2.9 What type of measures, including provisional or protective measures (safeguards), can be taken to ensure the safe return of the child?

The court must order such measures as are necessary to safeguard the best interests of the child, provided that this does not jeopardise the interests of a party whom the proceedings are intended to protect or unreasonably impair the concerns of the other parties. Such measures may include, in particular:

1. mandatory attendance at family, parental or educational counselling;
2. participation in an initial consultation on mediation or on an arbitration process;
3. participation in counselling or training on dealing with violence and aggression;
4. prohibition of travel abroad with the child; and
5. confiscation of the child's travel documents (Section 107(3) of the Non-Contentious Proceedings Act).

The court also has further procedural measures at its disposal under the Non-Contentious Proceedings Act. The court may request the child and youth welfare authority to assist, in the interests of the child, during the implementation of a return of the child or of a court order regulating the right of contact (Section 111c(7) of the Non-Contentious Proceedings Act).

3 Appeals

3.1 Is there an appeal from the first instance court?

First instance decisions (orders) may be appealed to the court of second instance (appeal court) (Section 45 of the Non-Contentious Proceedings Act).

3.2 If there is a right of appeal, is it absolute or is permission to appeal required? Or is it on points of law alone?

The legal remedy of an appeal against a court decision or order [*Rekurs*] is subject to the following restrictions in particular: Unless their independent challenge is permitted, procedural orders may only be challenged together with the appeal against the decision on the merits (Section 45 of the Non-Contentious Proceedings Act). New developments (new facts and evidence) are only admissible to a limited extent in appeal proceedings against

court decisions or orders (Section 49 of the Non-Contentious Proceedings Act).

In certain cases, the first instance court is also able to issue a decision on an appeal against a court decision or order (Section 50 of the Non-Contentious Proceedings Act).

3.3 In the event of an appeal is the return order automatically suspended or may it nevertheless be enforced?

The district court must combine the order for return with an order for its enforcement, setting a deadline for compliance, provided that enforcement is not still subject to proof not yet provided of compliance with certain prerequisites. This decision is binding and enforceable unless this is specifically precluded by the court on the grounds that the best interests of the child would otherwise be jeopardised under the specific circumstances of the individual case in question (Section 111c(5) of the Non-Contentious Proceedings Act). The provisional effects of the order come into force as soon as the order granting them has been served, and remain in effect until the decision on the merits becomes final, even if the order has since been revoked or replaced by another order. The decision to grant provisional effects may be amended, particularly if an appellant is at risk of more significant adverse consequences that it would not be possible to remedy even if their appeal were successful (Section 44(1) of the Non-Contentious Proceedings Act).

3.4 Is there a second appeal? If yes, is permission required?

An appeal on a point of law [*Revisionsrekurs*] against an order of the appellate court issued in the course of the appeal proceedings is only admissible if the order depends on the resolution of a question of substantive or procedural law that is of significant importance for the preservation of legal unity, legal certainty or the development of the law, for example because the appellate court deviates from the case-law of Austria's Supreme Court or such case-law is lacking or inconsistent (Section 62 of the Non-Contentious Proceedings Act). In certain cases, an appeal on a point of law is in any event inadmissible (Section 62(2) to (4) of the Non-Contentious Proceedings Act). If the appellate court has ruled under Section 59(1)(2) of the Non-Contentious Proceedings Act that the ordinary appeal on a point of law is not admissible under subsection 1, an appeal on a point of law may nevertheless be lodged (extraordinary appeal on a point of law; Section 62(5) of the Non-Contentious Proceedings Act).

3.5 What specialist experience and expertise is there in the appellate courts?

There are also professional development events for judges of the appellate courts.

3.6 What is the time scale for the determination of an appeal and, if applicable, a second appeal? If expedited, is priority given by statute, rules of court or practice?

The decision at each instance must be made within six weeks (Article 24(3) of the Brussels IIb Regulation). The competent courts handle appeals with the necessary urgency, exercising their own discretion.

3.7 In accordance with Article 24(3) of the Brussels IIb Regulation, what are the procedural steps that need to have been taken for the 6-week target to start running for the higher instance court to be able to examine the appeal?

Unless it upholds the appeal itself, the first instance court must, as applicable, submit the appeal together with all case-related files to the appellate court after receiving the appeal response or after the expiry of the deadline for such a response without reply (Section 51 of the Non-Contentious Proceedings Act).

4 Enforcement of the return order delivered by the court

4.1 Which authority is competent for the enforcement of return orders?

The district courts, specifically the judicial enforcement officers therein, are responsible for the enforcement of return orders.

4.2 Are return orders provisionally enforceable? If so, is it decided automatically by the court or does the applicant have to request it? When a return order is challenged, how is the provisional enforceability affected?

The district court must combine the order for return with an order for its enforcement, setting a deadline for compliance, provided that enforcement is not still subject to proof not yet provided of compliance with certain prerequisites. This decision is binding and enforceable unless this is specifically precluded by the court on the grounds that the best interests of the child would otherwise be jeopardised under the specific circumstances of the individual case in question (Section 111c(5) of the Non-Contentious Proceedings Act).

4.3 What is the procedure of the enforcement of return orders? Are there any legal measures (for example, some penalties) that may help to ensure the enforcement of the return order?

Enforcement is the responsibility of the bailiff. The court may apply coercive measures (Section 79(2) of the Non-Contentious Proceedings Act) such as fines and coercive detention.

4.4 Please describe the procedure for requesting suspension and refusal of enforcement of return orders?

For suspension and refusal of enforcement, an application is required. No special procedure is provided. The decision to grant this may be amended, particularly if an appellant is at risk of more significant adverse consequences that it would not be possible to remedy even if their appeal were successful. The appellate court is competent for such decisions once the appeal has been submitted (Section 44 of the Non-Contentious Proceedings Act). When deciding on the revocation of provisional binding effect and enforceability, it must in principle be borne in mind that this runs counter to the procedural acceleration intended by the legislator, so that the specific circumstances of the individual case must be decisive.

If an independent order for the enforcement of the return has been issued, it should be noted that objections to the enforcement of the order will only be considered insofar as the circumstances now raised have not yet been examined in the return order proceedings or insofar as circumstances have subsequently arisen that endanger the best interests of the child (Section 111d(2) of the Non-Contentious Proceedings Act).

5 Enforcement of the privileged decision delivered by a foreign court

5.1 Which authority would be responsible for the enforcement of a foreign so-called overriding decision i.e. return order mentioned in Article 11(8) of the Brussels Ia Regulation or a foreign privileged decision pursuant to Article 29(6) of the Brussels IIb Regulation entailing the return of a child following a refusal in the requested state under Article 13(1)(b) or 13(2) of the 1980 Hague Convention

The district courts, specifically the bailiffs, are responsible for enforcement in this connection. Such decisions are enforced in the same manner as domestic decisions.

6 Judicial Liaison

6.1 Has your jurisdiction officially/unofficially nominated a specialist judge to the European Judicial Network in civil and commercial matters (EJN-civil) / International Hague Network of Judges (IHNJ)?

Yes.

6.2 If yes, is the judge nominated a sitting judge? Was the nomination official or unofficial?

The nominated individuals are serving judges and have been officially appointed.

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