

Hague Conference on Private International Law - Child Abduction

Preliminary Document No. 2

SUMMARIES OF GERMAN DECISIONS ON THE HAGUE CONVENTION  
OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL  
CHILD ABDUCTION.  
[English Version Only]

Illustrative Document

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of the Hague Conference on Private International Law

Preliminary Document No. 2 of November 1992  
for the attention of the Special Commission of January 1993

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(1)

20 and 28 DECEMBER 1990

Amtsgericht DETMOLD, Beschlüsse vom 20.12.90 und 28.12.90, AZ 16F  
361/90

United States (Indiana)

Result:

Decision of 20 December 1990:

The father was allowed to exercise his visitation rights from 28 December 1990 till 28 January 1991 by taking the five-year-old girl to the United States.

Decision of 28 December 1990:

The court suspended the execution of the decision of 20 December 1990 because of a request of the mother for an oral hearing to present new evidence, under German procedural law and Section 6, paragraph 2 of the German implementing law, in order to prevent the girl from being harmed.

Facts:

The Italian father and the German mother divorced in an Indiana court in June 1988. The divorce settlement gave an elaborate determination of the visitation rights of the father. Nevertheless, the parents went through several court proceedings about the father's visitation rights in the family court of Detmold.

Upon complaint of the father, the parents agreed in the proceeding in the (German) appeals court of Hamm upon the former visitation rights determination and added one month to the visitation rights of Christmas 1990.

Nevertheless, in practice the agreement did not always work. Therefore, the father could not fully exercise his rights several times, i.e. summer vacation 1990. In consequence, the father started a new court proceeding in Detmold in August 1990.

In the meantime, the mother and the child had moved to Geneva in May 1990, which forced the German courts to declare themselves incompetent because of lack of territorial jurisdiction.

When the father asked for his visitation rights on Christmas 1990, the mother denied any by saying that she would spend Christmas with the child at her parents' home in Detmold. Therefore, the Detmold court had jurisdiction under Section 5 of the German law implementing the Hague Convention.

Decision of 20 DECEMBER 1990:

Holding:

The court stated that the Hague Convention was in force in Germany, Switzerland and the United States.

The court rendered an interim injunction because of Article 2.

The court considered the father's request only as a request under Article 21, as the visitation right itself had been determined by the German appeals court order before.

No oral hearing was ordered because of the urgency of the matter (Christmas time).

The court saw no reason for any exemption under Article 13, paragraph 1 b as previous stays of the girl with her father had passed without any problems. Nobody ever questioned that the father loved the child and provided her with perfect care.

In order to prevent another failure of surrender (like, for example, one in Frankfurt Airport in July 1990), it was ordered to

take place in the Detmold youth welfare office. In case of non-compliance, the father could use a bailiff to help him. In case of sickness of the child, an official doctor had to attest her travel capacity.

DECISION OF 28 DECEMBER 1990:

Holding:

The court suspended the execution of its 20 December 1990 decision under German procedural law and Section 6, paragraph 2 of the German law implementing the Hague Convention.

The father was ordered to comment within three days on the mother's allegations about:

- a a Swiss visitation rights proceeding pending since November 1990 in Geneva;
- b an oral hearing there;
- c a report of the Geneva youth welfare office;
- d contacts between himself and the child twice in December 1990 in Geneva in presence of a Geneva social worker;
- e the girl's declaration that she did not want to spend Christmas with her father or visit him alone;
- f the father's plan to pick up the girl in Geneva on 7 January 1991.

An oral hearing on these questions was ordered to be held.

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(2)

29 JANUARY 1991  
Amtsgericht BAD SCHWALBACH, Beschl. vom 29.1.91,  
AZ 1F55/91

- United States (Pennsylvania)
- Result:

The two children (20 years and 11 months old) had to be returned to their father in the United States under Articles 1, 3 and 12, paragraph 1 of the Hague Convention.

- Execution:
  - If necessary, with the help of a bailiff or police officers, but: The parents consented to an agreement on the terms of the return in order to save the children the negative impact of the execution procedure (see parties' agreement below).
  - The court reserved its right to order the surrender of the children's passports and the execution of the return order by force in the future without a new hearing.

- Costs:

No court fees.

- Facts:

- On 17 January 1991, the mother had taken the children from the family home in the United States to Germany, where she was staying with her brother.

- The father had filed a request for return under the Hague Convention with the German Central Authority. On 28 January 1991 the father had obtained the interim custody rights over the children by decision of a United States court.

- Holding:

- The removal of the children was considered wrongful under Article 3, as the father's custody rights had been breached.

- There were no reasons to grant any exemption under the Hague Convention, especially not Article 13, paragraph 1 b.

- In the court hearing, the parties agreed on avoiding the official execution of the return order in order to prevent the children from being harmed by such action. (See parties' agreement).

- Parties' agreement:

1 The parties agree that a return order will be issued under the Hague Convention.

2 The father waives the right of execution of the return order until 7 February 1991.

3 The mother agrees to return with the children to the United States on 7 February 1991.

4 The mother agrees to surrender the children's passports to the judge before 10.00 a.m. on 30 January 1991.

5 The mother surrenders her passport to the court immediately.

6 The father does the same with his passport. He also agrees to surrender the children's passports in his possession (two sets of children's passports, German and American?) to the court after the hearing.

7 The father's counsel will call the mother daily at 6.00 p.m. by phone at her brother's where she is staying.

8 The parties agree on a daily visitation right of the father; on 30 January 1991 from 2.00 till 6.00 pm and the following days from 9.00 am till 1.00 pm. The father will pick up the children and return them to the mother.

9 The agreement is under the reservation that both the local youth welfare office and the mother waive any appeals rights immediately after the end of the hearing.

- Interesting:

- The court also referred to the Luxembourg Convention.

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6 FEBRUARY 1991  
Oberlandesgericht KARLSRUHE, Beschlú vom 6.2.91,  
AZ 11W 3/91

- Spain

- RESULT:

The father's request to return the three children to him in Spain was denied because of Article 35, paragraph 1. The complaint against the German Central Authority was unsuccessful.

- FACTS:

When the parents, both German nationals, separated in June 1990, the mother took the three children from the family's home in Spain with her on a plane to Munich. All children had been, and still were at the time of the decision, under the age of 16.

- HOLDING:

- The court determined that the father's complaint against the German Central Authority was a request under Section 4 of the German implementing law and therefore admissible.

- But the complaint was not successful on the merits, as the German Central Authority rightfully refused to act under Article 27 of the Hague Convention.

- When the mother removed the children to Germany in June 1990, the Hague Convention had not been in force in Germany yet. Therefore, it did not apply (Article 35, paragraph 1).

- Concerning a probable retention still occurring after the entering into force of the Hague Convention, the court denied a similarity to the crime of retention in the German Penal Code and interpreted the term retention in Article 12 of the Hague Convention as a one-time event. The court argued that, with any permanent definition of "retention", the deadline of one year in Article 12 would not make any sense. The court referred to Nos. 12 and 57 of the Pérez-Vera Report.

- The court also cited to the Pérez-Vera report (No. 144) concerning the Hague Conference's decision against retroactivity of the Hague Convention by adopting Article 35, paragraph 1.

- INTERESTING:

Complaint against the German Central Authority's decision not to pursue the father's request (under Article 8, paragraph 1 of the Hague Convention) for return of the children, Section 4 of the German implementing law.

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8 MARCH 1991  
Amtsgericht HAMBURG, Beschlú vom 8.3.91,  
AZ 278F 49/91

- England

- RESULT:

The six-year-old boy had to be returned to his father in England according to German family law and Articles 1 and 2 of the Hague Convention.

- EXECUTION:

- By bailiff or police with, if necessary, use of force.
- Coercive detention up to one month for the mother, enforced by a bailiff, in case of non-compliance with the return order.
- German border officials had to assist in preventing the removal of the child by anybody except his father, and, in arresting the mother.

- FACTS:

- Since the separation of the parents in July 1990, the child had lived with his father in England. The parents had joint custody and an English court seemed to have decided that the boy should stay with his father. The mother took the boy away and most likely brought him to Hamburg.

- HOLDING:

- This was a combined (interim) custody and return decision. The father had requested the court to give him the custody rights over the boy and to order the mother to return the boy to him. The court granted both requests.
- The court also applied Articles 1, 2 and 4 of the Hague Convention on the Protection of Minors in its custody decision. This was based on the fact that the mother had removed the boy from his normal environment and that it was urgently important for the well-being of the boy to end this situation and return him to his father's care until a final custody decision.
- The mother and the child were not heard in court because of the urgency of the matter, but would be heard upon request in a final custody proceeding after return of the child and/or arrest of the mother.

- INTERESTING:

- The court declared the removal of the child wrongful under Article 15 of the Hague Convention, but made no further use of this determination.

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3 MAY 1991

Amtsgericht BERLIN-CHARLOTTENBURG, Beschl~~u~~ vom 3.5.91,  
AZ 168F 4379/91

- Netherlands

- RESULT:

- The two eleven- and nine-year-old children had to be returned to their father in the Netherlands immediately, under Articles 8 and 29 of the Hague Convention and Section 1632 of the German Civil Code.

- EXECUTION:

- The children had to be surrendered to any representative of the father, especially a social worker from the local Berlin youth welfare office.
- If the mother would not inform the father about the whereabouts of the children, she had to fear coercive enforcement penalty of up to DM 25,000.
- German border officials had to prevent that the children would leave the country with anybody unauthorized to do so.
- Execution with the help of a bailiff, if necessary by use of

force.

- Coercive detention of up to one month, if the mother would not return the children; to be enforced by the bailiff.

- COSTS:

The mother had to pay the court fees.

- FACTS:

- In November 1989, the father had obtained the custody rights in the Berlin divorce court. The mother's appeal against this decision had not yet been decided.

- While exercising her visitation rights in the Netherlands in April 1991, the mother had taken the children away from the father to Germany, and, since then, had refused to inform him about their whereabouts.

- Neither the court nor the local youth welfare office knew where she and the children were hiding.

- HOLDING:

- The mother wrongfully removed the children from their new environment in the Netherlands during a visit. Under the care of their father, who had the custody rights, and their grandmother, the children had been adapting well there.

- There was no room for an exemption under Article 13, paragraph 1 b.

- As the children had not attended their old school in Berlin after their removal to Berlin, the court held that this proved that the mother's alleged intent to bring them back to their old environment was not true.

- The father had been and still was willing to allow all visitation rights of the mother.

- The decision was appealed by the mother, but was AFFIRMED by: Kammergericht Berlin, Beschluss vom 2.8.91, AZ 3 UF 2703/91. (see No. 7)

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12 JULY 1991

Amtsgericht SAARBRÜCKEN, Beschluss vom 12.7.91,  
AZ 40F 177/91

- United States (Maryland)

- RESULT:

The father's request to return the two-year-old girl to him in the United States was denied, as the exemption of Article 13, paragraph 1 b applied.

- COSTS:

Court fees.

- FACTS

The girl had lived with her parents in the United States since her birth in December 1988 until the mother took her to Germany without consent of the father in April 1991.

- HOLDING

- The court held the removal wrongful under Article 3, as the parents had joint custody over the child under the applicable

Maryland law at the time of the removal and as the father did not agree with it.

- Aware of the Hague Convention's intention to provide for immediate return of abducted children and not to determine either parent's ability to give care and custody for a child, the court nevertheless opted for the exemption of Article 3, paragraph 1 b and refused to return the child.

- The court based its decision on the fact that the mother had been the main person in the girl's life since her birth providing her with care, talking German to her and spending the whole day with her, whereas the father had been working full-time, and, doing that in the future, he could only hire a third person unknown to the child to care for her upon a return to the United States.

- The court feared severe psychological damage if the child would be separated from her mother (who did not want to return to the United States) and returned to the United States, as at this age the child would not understand the change and nobody could replace the mother who cared for her ever since her birth. In addition, the father did not give any proof of how he would provide for adequate care of the girl while working full-time himself.

- The court held that the child's situation in Germany seemed to be positive and stable, as she was in her mother's care and communicated in German. The financial conditions of the mother were not impressive but satisfactory, even without support by the father.

- The court held that in the best interest of the well-being of the child, as laid out in the preamble of the Hague Convention, a return to the United States would harm the child much more than the admittedly wrongful removal had done so.

- Therefore, the child had to remain with her mother until a final custody decision was rendered.

- The mother had to allow the father to exercise visitation rights and had to promote these.

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2 AUGUST 1991

Kammergericht BERLIN, Beschl. vom 2.8.91,  
AZ 3 UF 2703/91

- Netherlands

- Appeal decision AFFIRMING:  
Amtsgericht Berlin Charlottenburg, Beschl. vom 3.5.91, AZ 168 F  
4379/91. (see No. 5)

- RESULT:  
The appeal decision affirmed the lower court's decision that the eleven- and nine-year-old children had to be returned to their father in the Netherlands.

- COSTS:

- If the father had incurred any costs in the appeals proceeding, the mother had to reimburse him.

- No court fees.

- FACTS:

- In November 1989, the father had obtained the custody rights



in the Berlin divorce court. The mother's appeal against this decision had not yet been decided.

- While exercising her visitation rights in the Netherlands in April 1991, the mother had taken the children away from the father to Germany, and, since then, had refused to inform him about their whereabouts.

- On 3 May 1991, the Amtsgericht Berlin-Charlottenburg granted the father's return request under the Hague Convention.

- The mother appealed against this return decision 10 weeks after it had been rendered.

- The children had been returned to their father in the meantime in Mid-june 1991 by way of execution.

- HOLDING:

- The mother's appeal was n o t a request under Section 8 of the German law implementing the Hague Convention, as the father's return request had never been filed with any Central Authority under the Hague Convention and as the Amtsgericht had not acted upon request of the German Central Authority.

- As the subject-matter of the case had been terminated when the children were returned in mid-June 1991, the case/appeal had to be closed under German Civil Procedure law.

INTERESTING:

The mother was not willing to accept the court's decision to return the children, but she had used up her remedies under the German law implementing the Hague Convention. Therefore she filed herself a request under the Hague Convention, an action that led to the complaint proceeding in the Oberlandesgericht Karlsruhe: Oberlandesgericht Karlsruhe, Beschl. vom 5.12.1991, AZ 11 W 161/91. (see No. 17)

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16 AUGUST 1991

Amtsgericht GÖTTINGEN, Beschl. vom 16.8.91,  
AZ 45F 292/91

- France

- RESULT:

- The father's request to return the eleven-year-old girl to him in Paris was denied, as he had failed to address his request with the competent Central Authority in his home country or with the Central Authority of the requested state by filing his request directly with the court, Article 8, paragraph 1 and Article 6.

- Secondly (and more importantly), the exemption of Article 13, paragraph 2 applied.

- FACTS:

The family had lived in Tunisia for nine years, when they decided to move to Paris in early 1991. In July 1991, the mother left the father and took the girl with her from Paris to Göttingen where she put her daughter in a German school.

- HOLDING:

- The court heard the eleven-year-old girl after her parents had left the room. She appeared to be old and mature enough in order for her views to be taken into account (under Article 13, paragraph 2). She did not seem to be influenced by anyone. She decisively refused to go to Paris with her father for several

reasons (such as, for example, his permanent shouting at her). She also seemed to have (nervous) stomach problems because of him.

- In the same decision, the court also gave the mother the right to determine the child's residence. The mother obtained as well the right to put the child into school in order not to disturb or interfere with her schooling. But apart from these two interim determinations the court did not want to interfere further with the father's still existing joint custody rights.

- The court stated that, under the 1961 Hague Convention on the Protection of Minors, German law was applicable, as the mother's will had determined Göttingen to be the child's residence.

- The decision was appealed by the father, but was AFFIRMED by: Oberlandesgericht Celle, Beschluss vom 13.11.91, AZ 18 UF 185/91. (see No. 15)

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20 AUGUST 1991  
Amtsgericht BESIGHEIM, Beschluss vom 20.8.91,  
AZ 3F 430/91

- Hungary

- RESULT:

The seven-year-old girl had to be returned immediately to her father in Hungary under Article 12 of the Hague Convention.

- EXECUTION:

- Surrender of the child to the father or a representative.

- In case of noncompliance, coercive enforcement penalty up to DM 50.000- or coercive detention for the mother.

- The court ordered immediate execution in order to prevent the situation where an appeals proceeding would create facts by passing of time, that would delay the return of the child, Section 8, paragraph 1, phrase 2 of the German implementing law.

- COSTS:

- The mother had to pay the court fees.

- The mother had to reimburse the father's expenses as she produced the court proceeding by her wrongful removal of the child.

- FACTS:

- The girl was taken to Germany by her mother one day after a Hungarian family court had given the custody rights to the father and visitation rights to the mother in the parents' divorce judgement. The child was living in Germany with her mother and her mother's new husband.

- The mother admitted that the father had obtained custody in Hungary, but claimed that this decision had not come into force yet as it had been appealed by her, and, as the Hungarian appeals court had decided to ask for a psychological expertise on the custody question one week before the German court's decision.

- The mother claimed it would be better for the well-being of the girl if she stayed in Germany. The court requested an opinion by the local youth welfare office which testified that the girl had settled down in Germany, but that she still did not speak much German at all.

- HOLDING:

- The court based its decision that the removal was wrongful on the certified translation of the Hungarian judgement giving the custody rights to the father after careful consideration and extensive investigation of the case.

- The German court took this decision into account under Article 14 of the Hague Convention. Therefore, the mother's removal of the child to Germany had been wrongful under Article 3.

- There were no reasons to grant the exemption of Article 13.

- The court emphasized that its decision was not a custody decision, but only "enforced" the Hungarian decision. Referring to the time factor, the court also favoured a return to Hungary because of the well-being of the girl who could attend school in Hungary but not in Germany because of her lack of knowledge of German.

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9 SEPTEMBER 1991

Amtsgericht BERLIN-CHARLOTTENBURG, Beschlu0 vom 9.9.91,  
AZ 178F 8464/91

- England

- RESULT:

The two boys (four and two years old) had to be returned to their father in England immediately under Article 12.

- EXECUTION:

- Surrender of the boys to a social worker of the local youth welfare office representing the father.

- If necessary, with the help of a bailiff under use of force.

- In case of non-compliance, the mother had to fear coercive enforcement penalty up to DM 5.000,-.

- COSTS:

The mother had to pay the legal fees.

- FACTS:

- After the parents' separation in October 1990, the father took the children with him to England. In December 1990, he obtained interim custody for them by order of the Exeter Family Court. The mother knew about this but was not present.

- In the Berlin divorce proceeding started by the mother, she obtained the right to determine the children's residence in February 1991.

- Meanwhile, she appealed the English interim custody decision in favour of the father. Her appeal was denied, but she was granted limited visitation rights, had to return the boys to England after each visit, had to stop any custody proceedings and not even start any other in Germany until a final English custody decision. She agreed to these conditions by affidavit.

- After an agreed upon visit in Germany, she retained the boys in her Berlin apartment in July 1991 instead of sending them back to England. In reaction to this retention, the Exeter High Court ordered a jail sentence of six weeks if she would not return the children and keep her promises. Furthermore, the court gave the custody rights to the father and forbade the mother to visit the children outside England and Wales.

- In August 1990, the father started a proceeding under Article 12 of the Hague Convention.

- The mother defended herself, that the habitual residence of

the children had been Berlin, that the father had abducted the boys to England and that their return to the father would put them in the severe danger of harm. A testimony by the Berlin youth welfare office agreed with the latter, but had not seen the children's English environment.

- HOLDING:

- The court heard both parents and the children. It took partially into account that the older boy opted for returning to England and that both boys spoke far better English than German.

- The court held that retention was wrongful under Article 3, paragraph 1, as the father had obtained interim custody by court order, including the right to determine the children's habitual residence (after their moving to England). As the children had evidently settled down there, the court held that England had been the habitual residence of the children prior to their retention by the mother.

- Under English law, the father had temporary sole custody since the December 1990 English court order. Even if this interim decision only had the effect of transferring the right to determine the children's residence to the father, it had to be considered as a custody decision, Article 5 a.

- The father had also exercised his custody rights, Article 3, paragraph 1 b.

- The court's impression that the mother, her new partner and the children appeared to be "an ideal family" did not change the fact that the children had to be returned.

- The exemption of Article 13, paragraph 1 b did not apply, as the mother could not fulfil her burden of proof that the return would cause the children harm.

- As the children had only been in Berlin for three months, as the father's education did not seem to be harmful to them, and, as alleged health risks for the children in England were unproven, the children had to be returned.

- The father's request did not constitute an abuse of rights although he himself had removed the boys from Germany to England in November 1990. The Hague Convention would not apply to this earlier removal of the children to England, as it was not in force in Germany at the time, Article 35, paragraph 1.

- Under Article 17, the German decision of February 1991 in favour of the mother's interim custody could not prevent the return.

- The decision was appealed by the mother, but was AFFIRMED by: Kammergericht Berlin, Beschlu  vom 23.9.1991, AZ 3 UF 5187/91. (see No. 12)

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(11)

11 SEPTEMBER 1991

Amtsgericht HAMBURG-ALTONA, Beschlu  vom 11.9.91,  
AZ 351F 128/91

- Spain

- RESULT:

The father's request to return the girl to him in Spain was denied, as the removal had not been wrongful under Article 3, paragraph 1 b of the Hague Convention.

- COSTS:

No court fees.

- FACTS:

- The girl was born out of wedlock in Spain and lived there under jointly exercised custody of both parents until October 1990. At this time, the parents agreed to separate and the father moved into a new apartment, whereas the mother and the girl stayed in the old one. From this moment on, the mother factually exercised the custody rights alone (in the opinion of the court).

- The father kept intensive contact with his daughter and even pretended towards her that he and the mother had not separated (i.e. by bringing his daughter to bed on week nights).

- HOLDING:

- The court held that this intensive contact constituted only the exercise of extensive visitation but not custody. The court said that the father did not exercise his custody rights (if he had any) under Article 3, paragraph 1 b.

- The court held this despite a certification by the Spanish Ministry of Justice under Article 15 of the Hague Convention determining the removal a wrongful one (under Spanish law).

- The court held that even if under Spanish law mother and father had joint custody rights over an illegitimate child, in this case the father did not actually exercise his, as only the mother provided the child with care and education after the separation in Spain and prior to the removal to Germany which occurred three months later.

- By taking the child to Germany the mother only made it harder for the father to exercise his visitation rights, but she did not deny these.

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23 SEPTEMBER 1991

Kammergericht BERLIN, Beschlu  vom 23.9.91,  
AZ 3UF 5187/91

- England

- Appeal decision AFFIRMING:

Amtsgericht Berlin-Charlottenburg, Beschlu  vom 9.9.91, AZ 178F 8464/91. (see No. 10)

- RESULT:

The appeal by the mother was denied. As decided by the Amtsgericht, the two boys (two and four years old) had to be returned to their father in England.

- COSTS:

- The decision that the mother had to pay the lower court's fees was not prohibited by Article 26, paragraph 2 because of the German reservation in Section 13 of the implementing law.

- The appeal was considered free of costs by the court.

- The court did not see the necessity of an order under Article 26, paragraph 4.

- The mother's request for legal aid had to be denied under German law, as she had no chances of success with her appeal, Article 26, paragraph 2.

- FACTS:

- After the parents' separation in October 1990, the father

took the children with him to England. In December 1990, he obtained interim custody for them by order of the Exeter Family Court. The mother knew about this but was not present.

- In the Berlin divorce proceeding started by the mother, she obtained the right to determine the children's residence in February 1991.

- Meanwhile, she appealed the English interim custody decision in favour of the father. Her appeal was denied, but she was granted limited visitation rights, had to return the boys to England after each visit, had to stop any custody proceedings and not even start any other in Germany until a final English custody decision. She agreed to these conditions by affidavit.

- After an agreed upon visit in Germany, she retained the boys in her Berlin apartment in July 1991 instead of sending them back to England. In reaction to this retention, the Exeter High Court ordered a jail sentence of six weeks if she would not return the children and keep her promises. Furthermore, the court gave the custody rights to the father and forbade the mother to visit the children outside England and Wales.

- In August 1990, the father started a proceeding under Article 12 of the Hague Convention.

- The mother defended herself, that the habitual residence of the children had been Berlin, that the father had abducted the boys to England and that their return to the father would put them in the severe danger of harm. A testimony by the Berlin youth welfare office agreed with the latter, but had not seen the children's English environment.

- The Amtsgericht Berlin-Charlottenburg granted the father's request to return the boys to him in England.

- The mother appealed the lower court's decision.

- HOLDING:

- The court agreed with the lower court that the retention had been wrongful under Article 3 and that the children had to be returned under Article 12, paragraph 1 of the Hague Convention.

- Even if the father's initial removal of the children to England had been unlawful, the children's habitual residence was established there (after six months) when they lived with him and his family.

- The fact that the mother had exercised her visitation rights for three months in the spring of 1991 while staying in England did not change that.

- Referring to No. 69 of the Pérez-Vera Report, the court declared the English interim custody decision as valid and decisive concerning the question who had had custody rights at the time of the retention.

- The court stressed that the Hague Convention wanted to prevent that the abductor obtained an advantage in the hope that the courts of the state to where the children were abducted decided in favour of the abductor in a custody decision. In this context the court referred to Article 19.

- From Article 14 the court drew the conclusion that courts of the requested State did not have to determine who would have custody under their own law.

- The exemption of Article 13, paragraph 1 b did not apply, as the mother could not fulfil her burden of proof that the return would cause the children harm. As the children had only been in Berlin for three months, as the father's education did not seem to be harmful to them, and, as alleged health risks for the children in England were unproven, the children had to be returned.

- The fact that the mother had to fear a jail detention in England and therefore seemed to have very poor chances to obtain custody in the final English custody decision had been provoked by her own proper conduct and actions. In addition, the English

courts could still decide in favour of the mother's custody instead of the father's if there would be proof that such a decision would be in the best interest of the boys.

- Contrary to the mother's claim that a return of the children would violate the human rights and fundamental freedoms valid in Germany, the court held that Article 20 of the Hague Convention did not apply.

- From Article 16 the court drew the conclusion that it was irrelevant whether there existed a custody decision in the requested state or whether another custody was recognized there.

- INTERESTING:

As the mother was not willing to accept the lower court's and the appeals court's rulings, she filed herself a request under the Hague Convention with the German Central Authority, which refused to act upon this request. The mother's complaint against this refusal of the German Central Authority under Section 4 of the German implementing law was unsuccessful:

Oberlandesgericht Karlsruhe, Beschl. vom 5.12.1991, AZ 11 W 161/91.

(see No. 17)

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(13)

27 SEPTEMBER 1991

Amtsgericht NEU-ULM, Beschl. vom 27.9.91,  
AZ 1F 0489/91

- United States (Texas)

- RESULT:

The mother had to return the three-year-old girl to the father in the United States, b u t not on the grounds of the Hague Convention which was not mentioned at all in the decision (although it could well have been applied).

- EXECUTION:

As voluntary surrender of the child by the mother seemed unlikely, with help of a bailiff and police officers; if necessary against third parties.

- COSTS:

The mother had to pay the court fees.

- FACTS:

- The father, the mother and the child were American citizens.

- The mother had left the United States with the child in August 1991 and supposedly lived with a German in Neu-Ulm at the time of the trial.

- The father had filed a motion for child abduction with the Texas District Court. In execution of the motion a warrant of arrest was rendered against the mother in the United States.

- Because of the mother's conduct, the Texas court rendered an interim injunction in favour of the father granting him sole custody rights and prohibiting any contact of the mother with the child until a final decision.

- HOLDING:

- The German court granted the father's motion for the surrender of child under German law, as the court had jurisdiction over the case, as the father solely had the custody rights, and,

as the well-being of the child seemed to be in jeopardy because of her abrupt removal from her Texan home and the completely uncertain living conditions in Germany.

- The mother was not heard in court because of the urgency of the case and the danger of a new removal.

- Proof of the facts had been given by affidavits of the father.

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(14)

1 OCTOBER 1991

Amtsgericht WIESBADEN, Beschl. vom 1.10.91,  
AZ 53F 1224/91

United States (New Hampshire)

- RESULT:

The three-year-old boy had to be returned to his father in the United States immediately. The parents settled on a compromise knowing that otherwise the court would order the official enforcement of its return order in favour of the boy's father.

- COSTS:

- No court fees.

- The mother received legal aid for her attorney's fees.

- Provisions of the COMPROMISE:

a) The mother returns with the almost four year old boy to the family home in New Hampshire.

b) The father will make his residence in New Hampshire available for the mother and child, will give her the key and will pay a weekly amount of 75 dollars for their support until a final decision in the New Hampshire custody proceeding will be rendered.

c) The parents agree upon the fact that, against the preliminary custody order in the State of New Hampshire, the child will reside in Andover, NH, but will be taken care of by his mother. In so far, the father waives his right of surrender of the child to him. This is only valid as long as the child stays in the aforementioned apartment, at the longest until the final decision in the custody proceeding.

d) The parties agree that the father has a visitation right. They declare that they can determine the visitation right and how to proceed with it among themselves in the United States.

e) The mother agrees not to leave the city of Andover, NH with the child without the consent of the father.

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(15)

13 NOVEMBER 1991

Oberlandesgericht CELLE, Beschl. vom 13.11.91,  
AZ 18 UF 185/91

- France

- Appeal decision AFFIRMING:

Amtsgericht Göttingen, Beschl. vom 16.8.91, AZ 45F 293/91. (see No. 8)



- RESULT:

The father's appeal against the Amtsgericht decision that his daughter could stay in Germany and had not to be returned under the Hague Convention was denied. The girl stayed in Germany with her mother.

- COSTS:

- No court fees for the appeal.
- The father had to reimburse the mother's legal fees.

- FACTS:

- As in the Amtsgericht decision, plus:

The family had lived in Tunisia for nine years, when they decided to move to Paris in early 1991. In July 1991 the mother left the father and took the girl with her from Paris to Göttingen, where she put her in a German school.

- The mother claimed the father was unable to educate the child and even produced psychosomatic problems on her by disgracing her permanently, watching television all night in the family's efficiency apartment in Paris, including pornographic movies. Therefore, the daughter had a deep resentment against him.

- The father said he had a normal father-child relationship with his daughter including occasional disputes, but that he cared for her as much as possible despite his professional engagement as variety artist well-known in France and Tunisia, a fact his daughter supposedly was proud of.

- HOLDING:

- The court reversed the lower court's decision to the extent that the father's request was inadmissible under Article 8, paragraph 1 and Article 6, because he filed his request directly with the Amtsgericht and not with the German Central Authority, as the latter would have transferred the request to the Amtsgericht Göttingen anyway.

- In addition, the court held that Article 29 allowed anybody claiming a wrongful removal under Article 3 could file his/her request directly with the courts of a Contracting State in case of a violation of custody rights.

- The court affirmed the Amtsgericht decision to deny the father's request for return by granting the exemptions of Article 13, paragraph 1 b and Article 13, paragraph 2.

- The court saw the severe risk of harm for the girl and held that the severe allegations against the father had to be investigated thoroughly in the custody proceeding.

- Decisive seemed to have been the girl's own testimony in favour of staying with her mother in Germany. Her testimony was considered convincing and not being influenced by the mother.

- The court upheld as well the interim custody decision in favour of the mother, referring to the 1961 Hague Convention on the Protection of Minors and German law, but indicated that in the final custody proceeding the question of jurisdiction could be decided differently.

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(16)

4 DECEMBER 1991  
Oberlandesgericht KARLSRUHE, Beschl. vom 4.12.92,  
AZ 11W 117/91

- United States

- RESULT:  
The father's complaint/request to order the German Central Authority to act towards a return of his two children (an eight-year-old boy and a six-year-old girl) from the United States was denied under Article 35, paragraph 1, as the Hague Convention was not in force in Germany at the time of the removal of the children.

- FACTS:  
- In the German divorce judgement the mother had obtained the custody for the children, but in July 1990 this was put under the condition not to remove the children from Germany. Despite her acceptance of this condition, the mother took the children with her to the United States in September 1990 where they remained.  
- In July 1991, the father filed a request under the Hague Convention with the German Central Authority asking them to act on his behalf for a return of the children from the United States. The German Central Authority refused to act for several reasons (see below).  
- The father then filed a complaint against the Central Authority under Section 4 of the German implementing law.

- HOLDING:  
- The court's main reason for the refusal to order the German Central Authority to proceed was the fact that the removal of the children occurred three months prior to the entry into force of the Hague Convention in Germany.  
- The fact that the children were still retained by the mother in the United States when the Hague Convention entered into force in Germany did not constitute a retention under the Hague Convention, as this would generally render the one-year-deadline of Article 12 useless with the retention being a permanent situation. Decisive had to be the action of the retaining person at the beginning of the retention, which occurred in this case before the entry into force.  
- In addition, the court held that the father's request would not be successful as in the court's view the removal of the children had not been wrongful under Article 3, paragraph 1 a of the Hague Convention. The court argued that the removal of the children to the United States by their mother had been correct, as she had had sole custody (by German court order) and, therefore, had not interfered with anybody else's custody rights.  
- The fact that, in July 1990, the father had obtained an injunction (in connection with his motion to obtain custody over the children) ordering the mother to stay with the children inside German territorial boundaries did not play any role. (Six months after the removal the father had obtained the custody rights by German court order (April 1991) and two months after that he had filed an application under the Hague Convention for the return of the children with the German Central Authority (June 1991), who refused to comply with it because of the reasons mentioned above.)

- INTERESTING:  
- Complaint against the German Central Authority's decision not to act upon the father's request for return of the children, Section 4 of the German implementing law.  
- The court elaborately defined what retention meant.  
- The court referred to the Pérez-Vera Report several times.

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(17)

- England

- Complaint decision related to:

- Amtsgericht Berlin-Charlottenburg, Beschl. vom 9.9.1991, AZ 178 F 8464/91 (see No. 10);

and (AFFIRMED by):

- Kammergericht Berlin, Beschl. vom 23.9.1991, AZ 3 UF 5187/91 (see No. 12).

- RESULT:

The mother's complain/request to order the German Central Authority to act under the Hague Convention was denied.

- COSTS:

None.

- FACTS:

- After her unsuccessful appeal against the Amtsgericht decision in favour of a return of the children to their father in England under Article 12, paragraph 1, the mother herself filed a request for return of the children to her with the German Central Authority in September 1991. Nevertheless, at that time the children were with their mother in Germany and, obviously, not retained by their father in England.

- Her request to act on her behalf under the Hague Convention was denied by the Central Authority. Therefore, she filed a complaint under Section 4 of the German implementing law asking the court to declare that:

a) the father had wrongfully removed and retained the boys in England under Article 3 at the time when the Hague Convention entered into force in Germany;

b) by this action the exercise of her joint custody rights had been rendered impossible and the human rights of the children had been violated;

c) the children who had been illegally removed and continuously, intentionally retained by the father had to be returned under Article 12;

d) the English interim custody decision in favour of the father had been invalid under Article 16;

e) Article 20 of the Hague Convention would be violated as the human rights and fundamental freedoms of the children were harmed by their return to England, to where they had been brought illegally and where they had not had time to establish social contacts and relationships.

- HOLDING:

- The Hague Convention did not apply to the father's removal or retention of the children under Article 35, paragraph 1, as the Hague Convention had not been in force at that time in Germany, and as the start of the retention was the only decisive date.

- In addition, the court held that the mother's request made no sense as the boys were with her in Germany at the time of her request and therefore no retention on behalf of the father was taking place.

- The question which custody decision was valid, English or German, had no significance for this determination.

- All the other requests filed by the mother were inadmissible in this court because of lack of jurisdiction (for custody, etc.).

- The Oberlandesgericht Karlsruhe had only to and could only decide on the mother's request to order the German Central Authority to act, Section 4 of the German implementing law.

INTERESTING:

- Complaint against the German Central Authority's decision not to act upon the mother's Hague Convention request, Section 4 of the German implementing law.
- Although it had to decide in a different matter (the mother's complaint against the Central Authority) than the Berlin courts, the court seemed to agree with the decisions of these courts.

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(18)

9 DECEMBER 1991  
Amtsgericht BIELEFELD, Beschl. vom 9.12.92,  
AZ 34F H1/91

- United States (Florida)

- RESULT:

CERTIFICATION under Article 15 of the Hague Convention, attesting that the removal of a Jamaican-American girl by her Jamaican-American mother to the United States from the girl's habitual residence with her Jamaican father in Germany was illegal both under the applicable Jamaican law as well as the alternatively applicable German family law.

- FACTS:

- The six-year-old girl was removed under armed threat by her mother to the United States from her father's home in Germany where she had lived since her parents' separation one year after her birth. The girl had not had contact with her mother ever since the separation in August 1986.
- The parents were divorced by a United States court in Miami a few months after the separation in October 1986. The same court gave the custody rights to the mother. The father gave an affidavit to the German court that he never saw or knew about the written applications of the divorce and custody proceedings or the divorce and custody judgments of the Miami court.
- For more than four years the mother had never tried to enforce the Miami court divorce and custody judgement.

- HOLDING:

- The German court certified that the removal of the child by the mother was wrongful under Article 3 of the Hague Convention.
- The court found that under German conflict law Jamaican law was the relevant law to determine who had the custody rights. Under Jamaican law, both parents had joint custody until a final court order in favour of one parent's custody. The father gave an affidavit that the United States custody decision in favour of the mother had not been recognized in Jamaica.
- The court held that, as the father also never officially received the United States court documents and judgments, the transfer of custody onto the mother alone had never become valid. Therefore, the parents still had joint custody.
- In Germany, the United States divorce and custody decisions from Miami had never been formally recognized as well. A recognition was impossible under German law, as the father had never been officially served with the written applications opening the proceedings in the Miami court. Therefore, under German law, both parents still had joint custody.
- Factually, the father had exercised his custody rights in the sense of the Hague Convention at the time of the removal by the

mother.

- Therefore the father's custody rights had been breached which rendered the child's removal to the United States by the mother wrongful under Article 3 of the Hague Convention, Article 15.

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(19)

13 DECEMBER 1991  
AMTSGERICHT LUDWIGSHAFEN, Beschlu  vom 13.12.92,  
AZ 5d F 223/91

- United States (New Mexico)
- RESULT:  
The father's request for return of the six- and five-year-old children to the United States was denied, as the exception of Article 13, paragraph 1 b of the Hague Convention applied.
- COSTS:
  - No court fees, Article 26.
  - Father had to reimburse the mother's legal fees.
- FACTS:
  - The parents had lived in Germany until they moved to the United States in 1984. They lived there together with the two children (a girl born in September 1985 and a boy born in October 1986) until May 1991. At that time, the mother returned to Germany with the children where she moved in with her parents.
- HOLDING:
  - The court based its decision in favour of the exemption of Article 13, paragraph 1 b (and, therefore, the remainder of the children with the mother in Germany) on the fact that the mother had cared for the children continuously in the past and could do this much better than the father who was working full time. Although the mother then took a job in Germany as a nurse from 6.45 am until 3.30 pm in Germany, the court held that she still had time enough to care for the children in the afternoon and evening after their return from kindergarten.
  - In addition, the court referred to the children's vehement refusal to return to the United States, as testified by the youth welfare office.
  - This added up to the court's opinion that a return to the United States would contradict the children's well-being and put them in an intolerable situation.
- INTERESTING:
  - The court referred to both the Hague and the Luxembourg Conventions.
  - Apparently, there had been a custody proceeding going on at the same time or earlier in the same court, as the youth welfare office's report had been taken from another proceeding (September 1991).

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(20)

25 FEBRUARY 1992  
Amtsgericht N RNBERG, Beschlu  vom 27.2.92,  
AZ 8F 186/92

- United States (Texas)

- RESULT:

The child had to be returned to his father in the United States immediately under Article 12, paragraph 1 of the Hague Convention.

- EXECUTION:

In case of non-compliance with the court order, the mother had to fear coercive enforcement penalty possibly amounting up to DM 50,000.

- COSTS:

- No cost decision was considered necessary.

- The regulation concerning the costs derived from the law.

- As to the extra-court expenses of the parties, there was no reason to deviate from the principle that these did not have to be reimbursed.

- REQUIREMENTS for a return under Article 12 as examined by the court:

1) wrongful removal or retention according to Article 3;

2) not more than one year ago, Article 12, paragraph 1;

3) none of the exceptions of Article 13 applies.

- FACTS:

- The American father and the German mother had lived together in the United States, where their son had been born in January 1991, until the mother left with the child for Germany in August 1991.

- The mother lied to the father in order to leave the United States by pretending that her own mother had had a car accident in Germany.

- The mother refused to return to her husband and was unwilling to turn the boy over to his father for return to the United States.

- HOLDING:

- The court held that the Hague Convention intended to reinstate the situation before the wrongful removal of the child. Therefore, any decision about custody over the child had to be suspended under Article 16 until a decision in the Hague Convention proceeding.

- But the court also emphasized that under Article 19 a decision in favour of return did not constitute a decision on custody.

- The removal of the seven-month-old boy by the mother was wrongful under Article 3, as both parents had joint custody under Texas law and as the father only agreed to a four to six week visit of mother and child to Germany, but not to a permanent stay of the boy. The court elaborately investigated by testimony and documents if the father agreed at some point to a permanent stay, but denied this.

- The court did not see any reason to grant the exemption of Article 13 as its requirements were not fulfilled or, at least, not proved. The father proved that he exercised his custody rights prior to the removal and did not agree to a permanent one, Article 13, paragraph 1 a.

- Article 13, paragraph 1 b did not apply, as it had to be interpreted restrictively in favour of the return of the wrongfully removed child. Restrictively meant that the harm had to be caused by the return itself. As the boy had lived in the United States since his birth and as the mother was free to return with

him in order to provide him with her presence and adequate care until a final custody decision in the divorce proceedings started by the father in a Texas court, and, as the boy was too young to express and experience any substantial ideas about his preferences, there was no risk of harm to him by a return to the United States.

- Reasons that could come into play in a custody decision were not to and, therefore, had not been considered.

- Article 20 obviously did not apply.

- INTERESTING:

The court very clearly and thoroughly applied the provisions of the Hague Convention to the facts.

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(21)

6 MARCH 1992

Amtsgericht BAD KREUZNACH, Beschl. vom 6.3.92,  
AZ 9F 63/92

- United States (Texas)

- RESULT:

The father's request under the Hague Convention (Article 12) to return the three girls to him in the United States was denied, as (the removal of the children by the mother and their retention in Germany was not wrongful and) Article 13, paragraph 1 b applied.

- FACTS:

- The children were six, five and two years old. In September 1991, the mother took them for a visit with her to Germany. The father had agreed on an extended visit to Germany and brought his family to the airport. After one month in Germany the mother informed the father that she would stay there with the children permanently.

- The father filed an application with the German Central Authority under Article 12 of the Hague Convention in January 1992.

- The mother had started a custody proceeding in a German family court in November 1991. The father requested transfer of the custody proceeding to the competent Texas court that had territorial and subject matter jurisdiction. In case of denial of this request, he applied for custody in the German court. The local youth welfare office opted in favour of the mother's custody in February 1992.

- HOLDING:

- The court applied Article 13, paragraph 1 b saying that the children had been cared for since their births by their mother and that their focus of life was with her. (This was confirmed by the two older girls' testimony, who were heard in court in late February 1992 and said that they wanted to stay with their mother.)

- The court easily determined that it would be incompatible with the well-being of the children to return them to Texas where they did not know anybody except the father who was working full-time as an Air Force officer and where nobody known by them could care for them.

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(22)

19 MARCH 1992  
Amtsgericht PIRMASENS, Beschlu  vom 19.3.92,  
AZ 1F 124/91

- United States (Tennessee)

- RESULT:

The father's request to return the six-year-old girl him in the United States was denied because of the exception of Article 13, paragraph 1 b.

- COSTS:

- The parents had to share the court fees.  
- Other legal fees had to be paid by each party for him/herself.

- FACTS:

- The father alone had had custody over the girl since the parents' divorce in a Tennessee court, when the mother came to visit the girl at the father's place in Tennessee.  
- The mother took the child back with her to Germany where she was put into elementary school.

- HOLDING:

- The court granted the exception of Article 13, paragraph 1 b, as the girl had developed in Germany from an undisciplined and nasty child into a well-behaved, progressing student who lived in a perfectly normal and safe environment with her mother and maternal grandparents.

- The court agreed with the social worker that a return to the United States would put the girl in the risk of harm to her well-being as well as of severe negative impact on her development.

- The seven-year-old girl who was heard in court was considered mature enough for her opinion to be taken into account. The girl vehemently opted for staying with her mother in Germany.

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(23)

30 MARCH 1992  
Amtsgericht CELLE, Beschlu  vom 30.3.92,  
AZ 23F 73/92

- England

- RESULT:

The father's request to return the two five- and two-year-old children to him in England was denied, as the court held that the removal of the children by the mother had not been wrongful under Article 3 of the Hague Convention.

- COSTS:

The father had to bear the costs.

- FACTS:

- The parents were married in Germany in 1982 and lived there with their two sons (born in June 1986 and in July 1987) until they moved to England in October 1990. On 18 January 1992, the



mother left England without knowledge and consent of the father and took the boys to her parents' home in Germany.

- The father then filed a request under Articles 1, 3 and 12 of the Hague Convention for immediate return of the children to England.

- HOLDING:

- The court based its decision not to return the children on the assumption that their removal had not been wrongful under Article 3.

- The court held that under English law the parents had joint custody for the children and therefore the legal situation was not different from German law.

- The court reasoned in the following way:

If the parents could not agree on the place of residence of a common child, they were unable to determine it jointly. If in this situation one parent - without consent by the other parent - determined the place of residence of the child unilaterally, this could not be unlawful, as each parent's rights equalled exactly the other parent's rights in the joint custody situation. If one parent could not unilaterally determine the place of residence, it would be impossible to do so lawfully.

- In order to support this reasoning, the court said that, if the mother had told the father about her intention to leave with the children and if he had not agreed with it, his conduct then would not have been considered unlawful as well.

- In situations like that, a solution of the conflict would only be possible by asking a family court to give sole custody to one parent.

- The decision was appealed by the father, and REVERSED by: Oberlandesgericht Celle, Beschl. vom 18.5.1992, AZ 17 UF 92/92. (see No. 27)

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(24)

9 APRIL 1992

Amtsgericht BERLIN-CHARLOTTENBURG, Beschl. vom 9.4.92, AZ 179 UF 3704/92

- United States (Tennessee)

- RESULT:

The one-year-old boy had to be immediately returned to his father in the United States under Article 12 of the Hague Convention..

- EXECUTION:

- If necessary, with the help of a bailiff or police officers under use of force.

- The bailiff could look for the child in the mother's apartment against her will.

- The mother also had to turn over the personal belongings of the child to the father.

- The execution could only take place if the father agreed with time and place, and, if he was present at the very moment in order to take over the child.

- If, when, and where the father made use of his right of return lay within his discretion.

- Immediate enforceability of the decision was ordered.

- COSTS:

- The court fees had to be shared half/half by the father and the mother.
- The counsels' fees had to be paid by each party for her/himself.

- FACTS:

- The parents and the boy had lived together in Tennessee until February 1992, when the mother left her husband and took the then seven-month-old boy with her to Germany. On 9 March 1992, she filed an application for sole custody with the German family court.

- On 6 March 1992, the German Central Authority indicated that the boy had been wrongfully removed to Berlin.

- The father who had obtained sole custody by a Tennessee court order of 28 February 1992, produced a certification under Article 15 by the Tennessee court stating that the removal of the boy against the father's will violated the laws of Tennessee and therefore was wrongful under Article 3.

- HOLDING:

- The removal of the child from the United States to Berlin by the mother had been wrongful, as both parents had joint custody under the laws of Tennessee, and, as the father had not agreed to the removal, Article 3. For this determination, the German court relied completely on the certification of the Tennessee court under Article 15.

- There were not obvious factual reasons to grant the exemption under Article 13, paragraph 1 b, as the mother was not nursing the boy any longer and as the father sufficiently explained to the court his plans for the care of the child. The father also produced a certification by a local youth welfare office about his capability to care for the child.

- By the time of the German court's decision on grounds of the Hague Convention, the father had already been granted exclusive sole custody by a Tennessee court and he was present in Berlin in order to take the child home with him. This was the reason for the special (return) arrangements made by the court.

INTERESTING:

- The father produced a certification by a Tennessee court under Article 15 stating that the removal was wrongful.

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(25)

10 APRIL 1992  
Amtsgericht COCHEM, Beschl. vom 10.4.92,  
AZ 46 UF 66/92

- United States (Michigan)

- RESULT:

The one-and-a-half-year-old child had to be returned to his father in the United States immediately.

- EXECUTION:

The return could take place in the way that the mother went back to the United States with the child.

- FACTS:

- The father who was a member of the American armed forces and the German mother were married in Germany and lived there with the

child until the father was transferred back to the United States.

- In January 1992, the mother had left the family home in the United States with the one-year-old boy without informing the father in advance and therefore surprising him.

- The father requested the return of the boy with the Central Authority in Germany and through his counsel under the Hague Convention.

- HOLDING:

- The court ordered the return of the boy under Article 12, as the removal had been wrongful and as less than one year had passed since it happened.

- The exception of Article 13, paragraph 1 b did not apply as the testimony of a Germany social worker proved that the child had a close relationship with both parents and would not even suffer harm if he returned without his mother to the United States.

- The court emphasized that its decision was appropriate, as the final custody decision still had to be taken. Therefore, it proposed that both the mother and the child should return to the United States until the final custody decision would have been rendered there.

- INTERESTING:

Citing to Section 8, paragraph 2 of the German implementing law, the court notified the parties of the remedy of immediate appeal to the Oberlandesgericht Koblenz.

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(26)

5 MAY 1992  
Amtsgericht VECHTA, Beschl. vom 5.5.92,  
AZ 12 UF 304/91 HK

- England

- RESULT:

The British father's request to return the two eight- and six-year-old children to him in England was denied.

- FACTS:

- The father who was a member of the British Army and the German mother were married in Germany in September 1983. Their son was born there in December 1983 and they lived there until 1985, when the father left the British Army and the family moved to England, where the daughter was born in September 1985. At that time the father started to serve in Saudi-Arabia, whereas the mother went back to Germany with the two children in June 1986. The father joined his family there after he had finished his contract in Saudi-Arabia. In March 1990, the family moved back to England again where the father had bought a house and where the children went to school in the following time.

- In June 1991, the mother left the father and took the children with her to Germany, where she put the boy in primary school and the girl in kindergarten.

- Whereas the father claimed that his family was gone when he came home from work in the evening of 24 June 1991, the mother claimed that the father had kicked them all out of the apartment.

- The father claimed that the children had been wrongfully removed by the mother and that this action was against an English family court decision of 7 July 1991, holding that the removal had been wrongful (certification under Article 15?), ordering the return of the children within 14 days and giving the father

interim joint custody. He then filed an application under the Hague Convention with the German Central Authority for return of the children.

- The mother claimed the exemption of Article 13, paragraph 1 b alleging that the children's return would cause them the risk of severe psychological harm, as they were completely integrated in Germany (neighbourhood, school, kindergarten, sports club) and as they feared to have to go back to England to a foreign environment.

- HOLDING:

- The court held that the removal had been wrongful under Article 3, as both parents had joint custody under the English Guardianship Act of 1973 and as none of them could take a decision against the will of the other parent under the English Children Act of 1975.

- The court denied the father's request to return on this ground, as the children were heard in court and clearly declared that they did not want to return to England but stay with their mother, and, as they had spent most of their lives in Germany. In addition, both spoke faultless German to the degree that could be expected at their age.

- The court's decision was mainly based on the testimony of a court-appointed expert witness, a professor of psychology, who testified that the children's return to England could put them in a severe risk of psychological harm.

- Under Article 16 of the Hague Convention, the custody proceeding started in Germany by the mother in the meantime was suspended.

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(27)

18 MAY 1992  
Oberlandesgericht CELLE, Beschl. vom 18.5.92,  
AZ 17 UF 92/92

- England

- Appeal decision REVERSING:  
Amtsgericht Celle, Beschl. vom 30.3.92, AZ 23 F 73/91. (see No. 23)

- RESULT:

Contrary to the decision of the Amtsgericht, the five- and two-year-old children had to be returned to their father in England.

- EXECUTION:

- If necessary, with the help of a bailiff or police officers.  
- In case of non-compliance, the mother had to fear coercive enforcement penalty up to DM 5,000.

- COSTS:

- No court fees.  
- Both parents received legal aid (Article 26, paragraph 4).

- FACTS:

- The parents were married in Germany in 1982 and lived there with their two sons (born in June 1986 and in July 1987) until they moved to England in October 1990. On 18 January 1992, the mother left England without knowledge and consent of the father

and took the boys to her parents' home in Germany.

- The father then filed a request under Articles 1, 3 and 12 of the Hague Convention for immediate return of the children to England. This return request was denied by the lower court, as the removal of the children allegedly had not been wrongful under Article 3.

- HOLDING:

- The removal of the children from England to Germany was wrongful under Article 3, paragraph 1 a, as the father's joint custody rights under English law were breached by the mother's act of secret, unannounced removal of the children.

- The court held that the children were not old and mature enough to be heard under Article 13, paragraph 2.

- The court emphasized that the custody decision still had to be taken and that the primary concern of the Hague Convention was to return the children as soon as possible and without delay in the courts, Article 11, paragraph 1 of the Hague Convention.

- The mother invoked the exemption under Article 13, paragraph 1 b, as the children's return to their father, who supposedly is an alcoholic, beat her and the boy once and attempted suicide in April 1992, would expose the children to harm or place them in an intolerable situation, but the court saw no proof for her allegations.

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(28)

3 JULY 1992

Oberlandesgericht CELLE, Beschl. vom 3.7.92,  
AZ 15 UF 103/92

- England

- Appeal decision REVERSING:  
Amtsgericht Springe, Beschl. vom 22.4.92, AZ 6 F 47/92.

- RESULT:  
Contrary to the decision of the Amtsgericht, the five-year-old boy had to be immediately returned to his father in England.

- EXECUTION:

- If necessary, with the help of a bailiff or police officers.

- In case of non-compliance, the mother had to fear coercive enforcement penalty amounting possibly up to DM 50,000.

- COSTS:

- Both the mother and the father were granted legal aid and an attorney was appointed to each of them.

- No court fees.

- FACTS:

- The parents and the boy had lived together in England until 10 August 1991, when the mother left and took the boy with her to Germany.

- The father had exercised his custody rights until that day.

- HOLDING:

- Keeping the child in Germany was a wrongful retention under Article 3, paragraph 1 of the Hague Convention, as the child's habitual residence was England, as the parents had joint custody under the relevant English law (Guardianship Act of 1973, Children

Act of 1989), and, as the father did not agree to the child's retention in Germany or as there did not exist a court decision (necessary under the Guardianship Act of 1973) instead.

- The question, if the child was going to remain with the father in England, had to be decided by English courts in the trial on custody.

- INTERESTING:

The mother did not try to invoke (and prove) the exemption under Article 13, paragraph 1 b.

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(29)

6 JULY 1992

Oberlandesgericht KOBLENZ, Beschl~~u~~ vom 6.7.92,  
AZ 11 UF 520/92

- United States (New York)

- Appeal decision AFFIRMING:  
Amtsgericht Bad Kreuznach, Beschl~~u~~ vom 15.5.92, AZ 9 F 85/92.

- RESULT:

As granted by the Amtsgericht, the two-year-old boy had to be returned to his father in the United States.

- COSTS:

- The mother had to pay the legal fees under Article 26, paragraph 3 of the Hague Convention and Article 6, paragraph 1 of the German implementing law.

- No court fees.

- FACTS:

- The mother took the child from the United States to Germany in December 1991 without consent of the father.

- The father obtained sole custody by order of the Family Court of the State of New York) on 8 June 1992.

- HOLDING:

- Immediate appeal was admissible under Article 8, paragraph 2 of the German law implementing the Hague Convention.

- As mother and father had joint custody and the father did not agree to the removal, it was an unlawful act under Article 3, paragraph 1 a of the Hague Convention (referring to No. 71 in the P~~o~~rez-Vera Report). The court held the New York custody order irrelevant for this determination.

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The court did n o t grant the exception under Article 13, paragraphs 1 b and 2, as the child was only two years old and the mother could help him to get used to his old/new environment in the United States, if she was really interested in the well-being of the child. The court had the impression that the mother was willing to do so. The fact that German was the child's only spoken language at this point had no impact.

- The court had no information about, and therefore could not consider, allegations about a former drug addiction of both parents and drug addiction treatment of the mother or the father's smoking of joints.

- The court emphasized that its decision had no impact on any further custody decision.

- The boy was too young for any consideration under Article 13,

paragraph 2,

- Article 20 obviously did not apply.

- INTERESTING:

- The court applied the Hague and Luxembourg Conventions at the same time.

- The court referred twice to the Pérez-Vera Report (No. 71, No. 118).