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1. GENERAL BACKGROUND

The Kingdom of Spain comprises the mainland, the Balearic and Canary islands and the North African autonomous cities of Ceuta and Melilla. Spain is a civil law jurisdiction.

Spain is a decentralised country divided into 17 Autonomous Communities and two autonomous cities, all of which have administrative powers in the field of child protection. Six of these Communities (Balearic Islands, Catalonia, Aragon, Navarra, the Basque country and Galicia) have special private family law rules. These rules are basically assembled in the so called *Compilaciones del Derecho Civil* of Baleares, Aragón, Navarra and the Basque country. The family law rules of Catalonia are set out in the Catalan *Codi de família* and those of Galicia are contained in the *Ley de Derecho Civil de Galicia*. The rest of the territory is governed by the so called “common” civil law. Most of the family law rules are set out in Book I of the Spanish Civil Code (arts. 17-332).

The Spanish jurisdictional system is unitarian, that is, there is only one system of courts with jurisdiction for the whole territory. Civil law procedures are regulated in the *Ley de enjuiciamiento civil* of 2000. The Spanish Private international law rules are uniform and apply throughout the country. Jurisdiction, recognition and enforcement issues in Spain, as in other European Union (EU) States,¹ are governed by the Brussels II Regulation² (also known as Brussels II bis) which came into force on 1 March 2001. Although the Regulation has priority over Spanish domestic law, in its original form, it did not affect the application of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereafter ‘1980 Hague Convention’) to return applications made under it (see Article 4 of the Regulation). However, the revised Brussels II Regulation,³ which came into force on 1 March 2005,⁴ will have an impact insofar as an application is made in one EU State in respect of a child habitually

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¹ With the exception of Denmark which is not party to this Regulation – see Article 2(3).

² Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses OJ No L 160, 30.6.2000, p. 19.

³ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 OJ No L 338, 23.12.2003, p 1.

⁴ Article 72.

resident in another Member State.⁵ First, courts are required, when applying Articles 12 and 13 of the 1980 Hague Abduction Convention, to ensure “that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity”. Secondly, a court “shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged”. Thirdly, a court is not permitted to refuse a return upon the basis of Article 13b “if it is established that adequate arrangements have been made to secure the protection of the child after his or her return”. Fourthly, a court is not permitted to refuse a return unless the left-behind parent has been given the opportunity to be heard. If a return order is refused, the court must, within one month, transmit both the order and relevant documentation to the court or Central Authority of the State in which the child was habitually resident before the abduction. In turn the last mentioned court or Central Authority must invite the parties to make, within three months of notification, submissions in accordance with national law, so that the court can examine the question of the custody of the child. In other words, it is the court of the child’s habitual residence that has jurisdiction to hear the case on its merits. If, after hearing the merits, the court requires the child’s return, then such an order is enforceable without need for any further orders.

1.1 IMPLEMENTATION OF THE CONVENTION

Spain ratified the 1980 Hague Convention on 16 June 1987. The Convention is applicable in all its territories. It was the 9th Contracting State (the 8th to ratify but with Hungary also having previously acceded). Once ratified, international self-executing Conventions are directly applicable in Spain, upon the publication of the instrument of ratification in the Official Journal (*Boletín Oficial del Estado*, ‘BOE’). The instrument of ratification and the Convention were published in the BOE no. 202 of 24 August 1987. The Convention entered into force on 1 September 1987. After an initial period in which the Convention was not applied correctly,⁶ the situation significantly improved when implementing procedural rules were passed on 15 January 1996. They are contained in arts. 1901-1909 of the *Ley de enjuiciamiento civil of 1881*. Although these rules were not incorporated into the new *Ley de enjuiciamiento civil of 2000* (which generally substituted the 1881 statute) they are still in force (see the Final Clause of the 2000 LEC).⁷

⁵ Except Denmark, see Article 2(3).

⁶ Spain was specifically mentioned in the Conclusions to the First Special Commission on the operation of the 1980 Hague Convention held in 1989. The Commission commented that “In light of the fundamental difficulties of a structural, legal and procedural nature encountered by States Parties in the handling by Spain of incoming requests for the return of children during the two years since the Convention entered into force for that country, Spain is strongly encouraged without further delay to take all appropriate measures to ensure that its Central Authority and its judicial and administrative authorities are provided with the necessary powers and adequate resources to enable it fully to comply with its obligations under the Convention”. See the report of the First Special Commission at http://www.hcch.net/index_en.php?act=publications.details&pid=2269&dtid=2

⁷ This final provision states: “The law on civil procedure approved by *Real Decreto* of 3 February 1881 derogated with the following exceptions: 1st Title XII and Title XIII of Book II and Book III.” The rules on child abduction are contained in Book III of the 1881 Law.

Child abduction cases have also received wide attention from Parliament. The Spanish Ombudsman, a Parliamentary commissioner, whose function is to defend civil rights before the Administration, issued a Recommendation dealing with international child abduction.⁸ Several actions were suggested to the Ministry of Justice, namely, (a) the creation of a National Centre of Missing Children which would assist return petitioners, coordinate the different State agencies which intervene and collect statistical data, (b) reforming the Criminal Code in order to make child abduction a criminal offence (c) reforming the Civil Code in order to include preventive measures requiring the consent of both parents for authorising a child to leave the jurisdiction, and (d) the creation of a special registry of custody decisions. As will be seen (see post at 5.1), the Civil and Criminal Code were reformed along these lines.

1.2 OTHER CONTRACTING STATES ACCEPTED BY SPAIN

Spain was a Member State of the Hague Conference when the Fourteenth Session drafted the 1980 Hague Convention. As with all other States which were Members at that time it must accept ratifications. Nevertheless, under Art. 38, non-Member States may accede to the Convention and Contracting States are not obliged to accept accessions. Spain has tended to accept all accessions although at times with some delay. As of 1 January 2005 the Convention was in force between 71 Contracting States and Spain.

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

1.3 BILATERAL AGREEMENTS WITH NON-CONVENTION STATES

Spain has a bilateral agreement with the Kingdom of Morocco.⁹ This bilateral Convention provides for the return of children to the requesting State if the removal (a) infringes a judicially approved agreement between the abductor and the requesting party; (b) violates sole custody rights attributed to the requesting parent according to his or her national law; or (c) infringes a judicial decision of the requesting State and the child and his or her parents only have the nationality of that State. If the removal occurred less than six months before the return petition was filed, a return will be ordered unless (a) the child is only a national of the requested State and the abducting parent is the only custody holder according to the law of that State or (b) there is a contradictory custody order made in the requested State before the removal.

⁸ *Recomendación 66/1999, de 17 de noviembre, sobre sustracción y secuestro internacional de menores por uno de sus progenitores (BOCG. Cortes Generales. VII Legislatura. Serie A Núm 69 p. 51).*

⁹ *Convenio entre el Reino de España y el Reino de Marruecos sobre asistencia judicial, reconocimiento y ejecución de resoluciones judiciales en materia de derecho de custodia derecho de visita y devolución de menores, hecho en Madrid el 30 de mayo de 1997 (BOE nr. 150 of 24 June 1997).*

Even if it were operating well in practice (which it is not, see below) the Convention is of very limited use in the case of children with dual citizenship, unless immediate action is taken after the removal takes place. In the commonly occurring case of children whose sole nationality is Moroccan the Convention does not help to solve cases where the abductor is the Moroccan father of the child.¹⁰ Even where it might apply the Convention is not working well in practice. Difficulties in locating children in Morocco have been reported and not a single case has apparently reached the courts either in Morocco or in Spain.¹¹

Since Morocco has ratified the 1996 Hague Child Protection Convention,¹² which has now also been signed (though not yet ratified) by Spain, on behalf of the European community, on 1 April 2003, it may well be that in the future this multilateral instrument will offer better remedies in child abduction cases involving both countries than the bilateral Convention. Abduction cases between Morocco and Spain have been solved by recognising and enforcing custody decisions¹³ under a bilateral instrument on judicial cooperation between Spain and Morocco.¹⁴

1.4 CONVENTION NOT APPLICABLE IN INTERNAL ABDUCTIONS

Domestic abductions are not governed by the 1980 Hague Convention. There is no summary procedure in Spanish domestic law corresponding to the Hague Convention's return mechanism. A domestic abduction is however a criminal offence according to art. 225 bis of the Criminal Code, as amended in 2002 (see post at 5.1.2).

2. THE ADMINISTRATIVE AND JUDICIAL BODIES DESIGNATED UNDER THE CONVENTION

2.1 CENTRAL AUTHORITY

The Central Authority for Spain is located in the *Dirección General de Política Legislativa y Cooperación Jurídica Internacional* of the Spanish Ministry of Justice in Madrid. The Spanish Ministry of Justice has always acted as a Central Authority in cases covered by International Conventions on Child Protection of which Spain is party.¹⁵ Although this might cause some surprise since child protection

¹⁰ See Moya Escudero, M.- Zekri, H.: "Nuevo régimen bilateral de asistencia judicial internacional y reconocimiento y ejecución de decisiones con Marruecos", *Revista española de Derecho internacional*, 1997 vol. XLIX núm. 2, 365-369.

¹¹ Spanish Central Authority, May 2003.

¹² Viz. Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, 19 October 1996.

¹³ First Instance Court of Anfa (Casablanca). Case nr 1058/98, decision of 23 June 1998. Letter by Adolfo Alonso Carvajal, May 2003.

¹⁴ *Convenio de cooperación judicial en materia civil, mercantil y administrativa entre el Reino de España y el Reino de Marruecos, hecho en Madrid el 30 de mayo de 1997* (BOE nr. 151 of 25 June 1997).

¹⁵ There is only one exception. Under the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, Spain has named 23 Central Authorities. See BOE nr. 182, of 1 August 1995.

is decentralised (see ante at 1.1) no serious thoughts have been given to creating more than one Central Authority as would be possible under Article 6 of the 1980 Hague Convention. It is generally understood that in a matter in which speed is essential it is preferable not to add confusion and cause coordination problems by naming more than one Central Authority. There are no reported delays attributed to the fact that there is only one Central Authority.

The fact that the Spanish Ministry of Justice acts as a Central Authority has the advantage that it is a body well accustomed to administering international Conventions. Since, however, it does not deal with other child protection issues, its role is probably less active and committed than it might otherwise be. The Central Authority's current address is:

Dirección General de Política Legislativa y Cooperación Jurídica Internacional
Subdirección General de Cooperación Jurídica Internacional
Servicio de Convenios
Ministerio de Justicia
C / San Bernardo, 62
 28015 Madrid
 Spain
 Tel: +34 (91) 390 4437
 Fax: +34 (91) 390 4457

Web site: http://www.mju.es/cooperacion_juridica/g_sustmenores.htm

The members of staff responsible with regard to Hague Convention cases comprise three legal officers and one secretary. The staff have a working knowledge of English and French.

Given the annual case load (314 cases in 2002-2003)¹⁶ human resources are scarce,¹⁷ especially as regards official translators. The system appears to be too heavily based on the good will and personal involvement of those working at the Central Authority.¹⁸ This might explain an unusually high staff rotation: between 1995 and 2003 four different people have acted as heads at the Central Authority.

Although staff rotations and promotions are usual at the Ministry of Justice, efforts have been made in order to ensure continuity in the handling of child abduction cases. The member of staff who leaves or is promoted to another post usually trains the person taking over his or her post before leaving.

The Central Authority not only operates the 1980 Hague Convention but also the 1980 European Custody Convention and the bilateral Convention with Morocco.¹⁹ It does not, however, formally handle abductions to non-Convention countries, although it might provide some advice.

¹⁶ Spanish Central Authority. Data supplied by Esther Pías, May 2003.

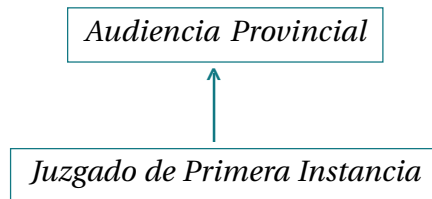
¹⁷ Gomez Bengoechea, B.: *Aspectos civiles de la sustracción internacional de menores. Problemas de aplicación del Convenio de la Haya de 25 de octubre de 1980*, Madrid, Dykinson, 2003, p. 132 (hereafter 'Bengoechea').

¹⁸ Letter by Adolfo Alonso Carvajal, May 2003.

¹⁹ It is likely that in the future the Central Authority will also deal with cases both under the revised Brussels II Regulation and under the 1996 Hague Convention on the Protection of Children though, at the time of writing, this has still to be decided.

One of the legal officers working at the Central Authority also participates in activities relating to child protection (not only specifically child abduction) at the Hague Conference and the European Union. Since cases handled under the 1980 European Custody Convention and the bilateral Convention with Morocco are not very numerous (4 and 7 cases respectively during 2002-2003 out of 314),²⁰ it can be assumed that the operation of the Hague Convention takes up most of the time.

2.2 COURTS AND JUDGES EMPOWERED TO HEAR CONVENTION CASES



During the first years after the entry into force of the Hague Convention in Spain, there existed considerable uncertainty about the courts empowered to hear Hague Convention cases. This changed radically after January 1996 when specific rules on the procedural implementation of the Convention were passed. These rules are set out in arts. 1901-1909 of the *Ley de enjuiciamiento civil of 1881* (LEC 1881). Although this law was derogated upon the entry into force of a new law on Civil procedure in 2000, the rules remain in force (see Final clause of the 2000 Act). Since they were, however, designed to work together with the old LEC, the rules work less well in practice now than they did when they were first introduced.²¹

The procedure applies to all abduction cases covered by an international Convention, that is, the 1980 Hague Convention, the 1980 European Custody Convention and the bilateral Convention with Morocco.

According to art. 1902 LEC 1881 jurisdiction is vested, in the first instance, in the local courts (*Juzgados de Primera Instancia*) of the judicial district where the child is located. This rule has created difficulties in the past because the Central Authority acts through the *Abogados del Estado* (see post at 3.3), a body of civil servants who represent the State in law suits. According to art. 15 of the *Ley de asistencia jurídica al Estado e Instituciones Públicas* civil law suits in which the State is a party are only heard by a reduced number of *Juzgados de Primera instancia*, those corresponding to the capital of the provinces (there are 50 in Spain). In some cases the *Abogados del Estado* filed law suits before the *Juzgados de Primera instancia* corresponding to the capital of the province and this court declined jurisdiction, so that it was necessary to file a new law suit before the judge of the judicial district in which the child was located. In order to avoid the delays this caused *Abogados del Estado* have now been instructed to file the law suit in the judge with jurisdiction according to art. 1902 LEC 1881 (judge of the child's whereabouts).²²

²⁰ Spanish Central Authority. Data supplied by Esther Pías, May 2003.

²¹ Letter from Adolfo Alonso Carvajal, May 2003.

²² Bengoechea, op. cit., n. 17, p. 123.

There are 953 *Juzgados de Primera Instancia* in Spain. Some of the courts of first instance specialise in family law especially in larger cities. These are likely, but not bound, to be more experienced in the handling of international abduction cases. Hague Convention cases are more likely to be heard by courts in certain geographic areas, simply because children are more frequently removed to places where there is a significant foreign population (e.g. popular tourist resorts or places where there are higher numbers of immigrated population). Judges of courts on the Mediterranean Coast (Málaga, Alicante, Valencia), on the Balearic or Canary islands as well as in cities such as Madrid or Barcelona are therefore more likely to be familiar with the 1980 Hague Convention. In some judicial districts with more than one first instance court a certain specialisation has been reached by systematically assigning child abduction cases to the same court. This can be agreed upon by the judges themselves in the so called *normas de reparto*, that is, in the rules about the distribution of cases among judges of the same level in the same district.

Given the large number of courts involved, familiarity with international child abduction cases can, however, not be taken for granted. Indeed, to the contrary, judges generally lack experience of Convention cases. This is only starting to be perceived as a problem. A judgment of the European Court of Human Rights (*Case Iglesias Gil and A.U.I. v Spain*, Application No 56673/00) of 29 April 2003 recently condemned Spain because the Spanish authorities did not take adequate measures to solve a child abduction case between Spain and the United States, which fell under the 1980 Hague Convention. The Spanish authorities involved with the case ignored the fact that the Convention provided an adequate remedy and this was held to be contrary to the right to respect for family life guaranteed under Article 8 of the European Convention of Human Rights. It is to be hoped that this judgment will exercise pressure to increase awareness about the Convention (see post at 6.1). In any event, the Permanent Bureau's *Guide to Good Practice*²³ stresses the importance and desirability of concentrating jurisdiction in abduction cases (see post at 8).

Art. 1908 LEC 1881 limits Convention cases to two court levels. The decision taken by the First Instance Court can only be appealed before the *Audiencia Provincial* (Higher Regional court). The appeal does not suspend execution in a case where the return of the child was ordered by the first instance judge (see post at 3.5). Any individual addressee of a court order can, however, lodge a *recurso de amparo* (constitutional complaint) within twenty days of the service of the order claiming that the court decision violates his or her constitutional rights. Although many *recursos de amparo* are lodged each year, the Constitutional Court (*Tribunal Constitucional*) dismisses the vast majority of them (96,66% of the complaints lodged in 2001 were, for example, held to be inadmissible).²⁴ When a constitutional complaint is filed, execution of the court decision which allegedly infringes constitutional rights is suspended until the Constitutional Court decides whether the case is admissible, which, due to the large number of constitutional complaints filed annually, is likely to take up some time.

²³ *Guide to Good Practice, Part II Implementation Measures* (Jordan's Family Law, 2003) and available on the Hague Conference on Private International Law web site at http://www.hcch.net/index_en.php?act=conventions.publications&dtid=3&cid=24, (hereafter 'Implementing Measures'), post at 5.1.

²⁴ *Memoria de actividades del Tribunal constitucional de 2002* at <http://www.tribunalconstitucional.es/MEMORIAS.htm>

3. OPERATING THE CONVENTION – INCOMING APPLICATIONS FOR RETURN

There are statistical data available for 1996-2000.²⁵ These statistical data include all child abduction cases handled by the Spanish Central Authority, that is they include cases under the 1980 European Custody Convention and the bilateral Convention with Morocco after 1997 as well as Hague Convention cases.

	1996	1997	1998	1999	2000
Incoming applications	55	48	35	42	68

In the time period 1996-1999 these applications came from 24 different countries. Only four countries filed however more than one petition every year. These were France, Germany, the United Kingdom and the United States. Outside Europe there were petitions from Argentina, Australia, Colombia, Ecuador, Israel, Mexico, Panama and the United States.²⁶

3.1 LOCATING THE CHILD

The Central Authority is responsible for locating the child in Spain. It usually cooperates with the police forces (*Dirección General de la Policía*) which, depending on the area of Spain, may have special sections dealing with cases involving children.

Difficulties have been reported in cases where children are under the care of illegal immigrants in Spain²⁷ or in tourist resorts where the “floating population” is considerable.²⁸ This results in a relatively high number of cases in which the child cannot be located.²⁹ This may be explained by the fact that Spain is one of the countries receiving more tourists in world-wide terms and because registration in the population municipal registry (*padrón municipal*) is not compulsory. Since Spanish rules of procedure confer jurisdiction to hear abduction cases on the First Instance Judge of the judicial district in which a child is located (see ante at 2.2), a failure to locate the child means that no judicial action can be taken.

²⁵ See Bengoechea, op. cit., n. 17, p. 33. Cf the findings in *A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* drawn up by Professor Nigel Lowe, Sarah Armstrong and Anest Mathias. Available at http://www.hcch.net/index_en.php?act=publications.details&pid=2853&dtid=32 (hereafter ‘1999 Statistical Survey’) discussed post at 7.1.1.

²⁶ See Bengoechea, op. cit., n. 17, p. 33.

²⁷ Spanish Central Authority, June 2003.

²⁸ See Report of the Third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997), nr. 1.9 where it is actually stated that “In Spain it is difficult to locate abducted children because they usually are taken to crowded touristic areas”. The report can be consulted at http://www.hcch.net/index_en.php?act=publications.details&pid=2271&dtid=2

²⁹ Four out of 36 applications made in 1999 were rejected because the child could not be located. See the 1999 Statistical Survey, op. cit., n. 25. Difficulties in locating children are confirmed in a recent survey carried out on behalf of the European Commission. See Fulchiron, H. (dir): *Conflit familial, déplacements d'enfants et coopération judiciaire internationale en Europe*, December 2002, pp. 174-175 (hereafter ‘Fulchiron’). According to the statistical data supplied by the Spanish Central Authority for 2002-2003, the child could not be located in 4% of the applications.

Difficulties in locating children are one of the reasons why a 2002 Statute (amending art. 225 bis of the Criminal Code) made child abduction a criminal offence (see post at 5.1.2). It is hoped that this will increase the police's powers to investigate. Even if the abduction took place before child abduction was made a criminal offence it is considered to be a *delito continuado*, that is, it is a criminal act which continues to take place as long as the child is not returned to his or her habitual residence.³⁰

If the child's whereabouts are unknown it is important to provide the Central Authority with two recent photographs of the child and, as far as possible, of the person who is supposed to be taking care of the child in Spain. The personal description of the child and the abductor should be as accurate as possible and relevant other persons who might be able to supply additional information should also be identified.

3.2 CENTRAL AUTHORITY PROCEDURE

The Spanish Central Authority works with sample forms which can be found on the web site of the Spanish Ministry of Justice (http://www.mju.es/cooperacion_juridica/g_sustmenores.htm). There are three different sample forms, a general one and two which have been agreed upon with the Central Authorities of Germany and Morocco (under the bilateral Convention).

There are certain documents which should be furnished, namely (a) the child's or children's birth certificate, (b) a copy of the judicial decision (if existing), which gave custody to the return applicant, (c) a photograph of the child and the abductor and (d) documents which prove that the child was habitually resident in the requesting State such as school or medical records.

Spain did not make a reservation allowed for under Article 24 of the Convention. Applications can therefore be in Spanish or in English or French. It is, however, necessary to translate the accompanying documents into Spanish in order to start judicial proceedings. The translation can be undertaken by translators at the Ministry of Justice, who tend, however, to be rather slow. If the documents are furnished in languages other than English or French it is generally possible to have the documents translated by translation services of the State. Although no costs are charged for these translations, it should be born in mind that in some cases it will be necessary to resort to services outside the Ministry of Justice, thereby causing further delay.³¹ If, in order to speed up the procedure, the petitioner wishes to provide the translations these should be official translations (*traducciones juradas*).

The application for the return of the child can be sent to the Spanish Central Authority by fax in order to speed up the procedure. The fax machine at the Ministry works 24 hours a day.

Once the application reaches the Spanish Central Authority it is registered on a data base which was designed to allow its close monitoring. Because of the already mentioned limited staff resources at the Spanish Central Authority, acknowledgment of the receipt of the application or / and the documents is not always immediate.³²

³⁰ See decision by the *Audiencia Provincial de Zaragoza* of 16 January 2003.

³¹ Bengoechea, op. cit., n. 17, p. 139.

³² Ibid., p. 132.

The application is checked by the Spanish Central Authority to assess whether it is or is not well founded. If, on the face of the information provided, the Central Authority is not convinced that the application is well founded it can, according to Article 27 of the 1980 Hague Convention, refuse to become active and reject the application. According to the 1999 Statistical Survey, rejections were slightly higher in Spain than in other countries.³³ Most of the cases were rejected because the child could not be located in Spain. There have, however, been some cases in which the Spanish Central Authority took the view that the child was not habitually resident in the requesting State or where the abducting parent was deemed to be the sole custody holder in Hague Convention terms.³⁴

A decision to reject an application can theoretically be challenged in accordance with the rules laid down for the control of administrative decisions under Spanish law. This option is not, however, practical since a long time is likely to pass before the courts reach a decision. It is therefore more advisable to file a return petition directly before the courts under the implementing legislation (art. 1902 LEC 1881). If the Spanish Central Authority, however, rejects the return petition the applicant will not benefit from the legal representation it provides (see post at 3.3) and will therefore have to look for a private attorney. Non governmental organisations may assist in finding a lawyer with experience in Hague Convention cases (see post at 6.2), something which cannot be assumed to be the case generally even among family lawyers, although awareness as to the terms of the 1980 Hague Convention is improving (see post at 6.1).

If the application is well founded the Spanish Central Authority will first proceed to locate the child if his or her whereabouts are unknown. Once the child is located it will instruct a Special State lawyer who acts on behalf of the Central Authority (see post at 3.3) to file a return petition before the competent court.

In common with other civil law cases in Spain, the procedure starts with a mediation phase. The judge will ask the abductor whether he or she will voluntarily return the child or is opposed to return under the grounds laid down by the 1980 Hague Convention. This direct involvement of judges in seeking a voluntary return under the pressure of an immediate court procedure in which the person who removed the child can be condemned to pay legal costs and expenses if he or she fails to prove that the child should not be returned, probably explains why Spain is quite successful in obtaining voluntary returns.³⁵ Indeed, according to the 1999 Statistical Survey,³⁶ 28% of all return applications ended in a voluntary return and was the single most likely outcome. The Spanish Central Authority does not, however, directly seek the obtaining of a voluntary return, it merely starts the judicial procedure and leaves the outcome to the competent judge.³⁷

3.3 LEGAL REPRESENTATION

Once the Spanish Central Authority accepts a petition it assigns an *Abogado del Estado* to represent the Central Authority in the judicial return procedure. The

³³ Nineteen percent as compared to 11%. See the 1999 Statistical Survey, op. cit., n. 25.

³⁴ Spanish Central Authority, May 2003.

³⁵ See Fulchiron (dir), op. cit., n. 29, p. 158.

³⁶ See the 1999 Statistical Survey, op. cit., n. 25. See also post at 7.1.2.

³⁷ Bengoechea, op. cit., n. 17, p. 135.

“*Abogados del Estado*” are civil servants who represent the State and defend its interests when the State is a party to a judicial procedure. They are a highly qualified body and the fact that the Spanish Central Authority operates through them has the fundamental advantage that no fees are charged for their intervention. The main disadvantage is that *Abogados del Estado* are generally not familiar with family law disputes and that contact between the *Abogado del Estado* and the petitioner is always through the Spanish Central Authority. The fact that the petitioner cannot communicate directly with the *Abogado del Estado* in charge of his or her case has been heavily criticised.³⁸ It might, however, be explained by the fact that *Abogados del Estado* do not deal with private persons, since their function is to defend the State in law suits.

The petitioner can avail him or herself of the services of a private lawyer. In such cases, however, the Central Authority refuses to take responsibility as to the outcome of the case and will only provide advice.

It is difficult to assess which way is preferable. On the one hand it should be born in mind that not all family lawyers in Spain are familiar with the Convention (see post at 6.1) and, that as mentioned above, resorting to a private attorney means that the Central Authority declines responsibility as to the outcome of the case. On the other hand, although the *Abogados del Estado* are generally efficient, cases have been reported in which it took an *Abogado del Estado* six months to acknowledge receipt of the documents sent by the Central Authority in order to initiate judicial proceedings³⁹ or in which another *Abogado del Estado* did not appear at a court hearing.⁴⁰

3.4 COSTS AND LEGAL AID

Spain made no reservation to Article 26 of the 1980 Hague Convention. Consequently it is bound to assume all costs related to the judicial proceedings and to legal representation. This is probably one of the reasons why the Central Authority operates through the *Abogados del Estado* (see ante at 3.3), since these are civil servants who defend the State’s interests in law suits.

The person who removed the child can, however, be ordered to pay the costs of the judicial procedure, as well as travel or other expenses of the petitioner and the return expenses of the child, if he or she does not agree to return the child voluntarily and the judge finally orders the return of the child. If the defendant does not prove that one of the exceptions for the return of the child applies, he or she will have to face financial consequences. This rule probably plays a major role in the reaching of an “amicable” settlement or voluntary return, although in practice it is not easy to enforce the decision on costs, since this decision can be appealed.⁴¹

3.5 LEGAL PROCEEDINGS

The petition for return is heard by the first instance judge of the district of the child’s whereabouts. Indeed, until the child is located, it is not possible to start judicial proceedings (see ante at 3.1).

³⁸ Ibid., p. 136.

³⁹ Ibid., p. 124.

⁴⁰ *Auto Audiencia Provincial de Valencia núm. 236/2002 (Sección 10ª) de 29 de noviembre.*

⁴¹ Letter by Adolfo Alonso Carvajal, May 2003.

The *Abogado del Estado* files the return petition on behalf of the Central Authority, but according to Article 29 of the 1980 Hague Convention and the rules of implementation (art. 1902 LEC 1881) the petitioner can issue the proceedings directly before the courts, if he or she should wish to do so. In such cases the Central Authority will refuse to take any responsibility for the conduct of the case.

The procedure is laid down in arts. 1901-1909 of the LEC 1881 which provide an ad hoc procedure which has been tailored to deal with child abduction cases. It is an oral, summary procedure which has to be finalised within a maximum of six weeks after the return petition has been lodged before the court. The statistics do, however, indicate that these time limits are not always respected in practice (see post at 7.1.3).

The child's interests are represented through the "*Ministerio Fiscal*", an administrative body, equivalent to the French "*Ministère Public*", which defends the interests of the State and society and advises on the correct administration of the law. The *Ministerio Fiscal* is always present if a proceeding relates to a child.

The petitioner (represented generally by the *Abogado del Estado*) or the *Ministerio Fiscal* can ask for a provisional order which prevents a further removal of the child or request any other order available under the Spanish law which seems adequate. Provisional measures are not, however, asked for in most of the cases. It has been suggested that the Spanish Central Authority should be more active in instructing the *Abogados del Estado* on this matter.⁴²

Within 24 hours of the filing of the return petition the judge has to convene a hearing which is to take place within a maximum of three days (art. 1904 LEC 1881). At that hearing the judge will ask the abductor either to return the child voluntarily or present a defence against the return as provided in the international Convention applicable to the case (the procedure applies not only to the 1980 Hague Convention but also to the 1980 European Custody Convention and the bilateral Convention with Morocco).

If the abductor agrees to return the child the judge will close the proceedings and order that the child be given into the hands of the person, institution or other body who holds custody rights (art. 1906 LEC 1881).

If the abductor refuses to return the child, he or she will have to present his or her defences in a new oral hearing, which has to take place within a maximum of five days from the first hearing. Evidence as to the defences can be collected in the meantime. Between the first and the second hearing the judge can hear the child if it seems appropriate. This will take place at a separate hearing in private. The judge can also ask for any reports he or she thinks necessary (art. 1907 LEC 1881). After the second hearing the judge has to decide whether or not to order the return of the child within a maximum of three days (art. 1908 LEC 1881). If the Judge decides to order a return the abductor will have to assume the costs of the court procedure. He will also have to reimburse expenses incurred by the petitioner including his or her travel expenses in order to appear before the court and those of carrying out the return order (art. 1909 LEC 1881).

If the abductor does not appear before the court at the first hearing the judge will convene a new hearing within a maximum of 5 days. At that hearing

⁴² Bengoechea, op. cit., n. 17, p. 133.

he will hear the petitioner and the *Ministerio Fiscal* and, if pertinent, the child (in a separate audience).⁴³ The judge will then decide within a maximum of two days whether return should or should not be ordered (art. 1905 LEC 1881).

The rules are very strict about time and exercise a strong pressure on the courts. Non compliance with time limits established by the law might even in theory lead to sanctions against the judge (for example, suspension or payment of a fine) based on arts. 132 LEC 2000 and 419.3 *Ley Orgánica del Poder Judicial*.⁴⁴ Nevertheless, according to the 1999 Statistical Survey these time limits are not, however, always adhered to.⁴⁵ Delays are likely to arise in the administrative phase, especially in those cases where the child cannot be easily located (see ante at 3.1). As stated above in some cases the Central Authority is slow in responding to petitions (see ante at 3.2), in other cases, however, it is the *Abogados del Estado* who do not respond quickly (see ante at 3.3). The fact that the 1980 Hague Convention is not widely known (see post at 6.1) and that jurisdiction is not centralised (see ante at 2.2) might also lengthen the judicial procedure. Slowness is moreover a general problem of the Spanish judicial system.

The child's objection to return is a popular exception in Spanish practice.⁴⁶ Although the 1980 Hague Convention does not impose an obligation to hear the child,⁴⁷ there is a tendency to do so, because the right of children to be heard is firmly established in Spanish law (Article 12 of the UN Convention on the Rights of the Child, which has been ratified by Spain, and art. 9 of the *Ley Orgánica 1/1996 de Protección Jurídica del Menor*). Since neither the Convention nor Spanish law establish the age at which a child has attained a sufficient degree of maturity, case law widely differs on that matter.⁴⁸

Article 13b is also a frequently invoked exception to return.⁴⁹ Although it is correctly applied in most cases,⁵⁰ there are still cases in which judges slip into determining the merits of the case.⁵¹ The fact that the Convention is not very well known in legal practice (see post at 6.1) and that jurisdiction to hear child abduction cases is not centralised (see ante at 2.2) effectively means that it is a matter of chance whether the case is handled by *Abogados del Estado* or judges who have acquired a working knowledge of international child abduction cases. More experienced judges and *Abogados del Estado* are likely to be found in larger cities or in popular tourist resorts along the Mediterranean Coast or the Balearic or Canary islands than elsewhere (see ante at 2.2).

⁴³ It has been suggested that the procedure could be tightened by having only one oral hearing since the petitioner and the *Ministerio Fiscal* will already be present at the first hearing. See Monton Garcia, M.: *La sustracción de menores por sus padres, Valencia, Tirant lo blanch*, 2003, p. 193 (hereafter 'Garcia').

⁴⁴ See Garcia, *ibid.*, p. 96.

⁴⁵ See post at 7.1.3.

⁴⁶ See Gonzalez Beilfuss, C.: "International Child Abduction in Spain" *International Journal of Law, Policy and the Family*, 2001, (pp. 327-349), p. 339 (hereafter 'Beilfuss') and the 1999 Statistical Survey, *op. cit.*, n. 25, discussed post at 7.1.2.

⁴⁷ But of the position under the revised Brussels II Regulation, Art. 11, discussed ante at 1.

⁴⁸ See Bengoechea, *op. cit.*, n. 17, pp. 95-96.

⁴⁹ Though this was not apparent from the 1999 Statistical Survey discussed post at 7.1.2.

⁵⁰ According to Calvo Caravaca-Carrascosa Gonzalez: *Derecho de familia internacional*, Madrid, 2003, p. 295, there are an increasing number of cases where this exception is restrictively applied.

⁵¹ Bengoechea, *op. cit.*, n. 17, p. 123.

Another source of problems are parallel custody proceedings. The judge hearing a custody case might not know that there is an abduction case pending before another judge. If these parallel proceedings reach contradictory results, that is, if on the one hand there is a return order and on the other a custody decision in favour of the abductor, it will not be possible to execute the return order. This posed a serious problem in one case which led to a decision by the Spanish Supreme Court.⁵² This decision confirmed that Article 16 of the 1980 Hague Convention establishes a negative jurisdiction rule, that is, that Spanish courts lack jurisdiction to hear a custody case until it has been determined that the child is not to be returned under the Hague Convention. The main practical difficulty has, however, not disappeared. There are no technical means of knowing whether there are parallel custody and abduction cases pending before different judges.

3.6 APPEALS

The decision taken by the *Juez de Primera Instancia* is open to appeal before a Higher Regional Court, the *Audiencia Provincial*. Such appeals have to be decided within 20 days (art. 1908 LEC 1881).

Contrary, to what happens in other family law suits⁵³ the appeal does not suspend execution, that is, if the first instance judge orders a return, filing an appeal will not mean that the return order will not be enforced. This might be interpreted as depriving the appeal of any useful effect. It has also been argued that the fact that the appeal does not suspend execution might pose constitutional problems if the appeal is successful.⁵⁴ Indeed, in a decision taken on 4 December 1998,⁵⁵ the *Audiencia Provincial of Madrid* dismissed an appeal against a return order arguing that since the return order had already been executed the appeal had no object. The Spanish Constitutional Court however decided, on 20 May 2002⁵⁶ that there was no legal basis for the dismissal of the appeal, even if the child had already been returned.

In order that the appeal against a return order is not deprived of any useful effect it has been suggested that the child should be given into the hands of the petitioner but not be allowed to leave the jurisdiction according to art. 528 LEC 2000.⁵⁷ This has not, however, occurred so far.

3.7 ENFORCEMENT OF ORDERS

The judge, who heard the case at the first instance, is competent to execute the return order made either at the first instance or by the appellate court, following an appeal against a first instance decision refusing to order the return.⁵⁸

⁵² *Sentencia del Tribunal Supremo* of 22 June 1998.

⁵³ See art. 525.1 LEC 2000.

⁵⁴ See Rodríguez Pineau, E.: "Sustracción internacional de menores: una tarea para el legislador", *La Ley*, 2000, D-29; See García, op. cit., n. 43, p. 209.

⁵⁵ *Audiencia Provincial de Madrid, Auto de 4 de diciembre de 1998, Aranzadi civil*, 1998, III, 1203-1204.

⁵⁶ STC 120/2002.

⁵⁷ See Herranz Ballesteros, M.: "La sustracción internacional de menores. A propósito de la STC 120/2002", *Revista de Derecho Privado*, October 2002, 754-770.

⁵⁸ Art. 545.1 LEC 2000.

The *Abogado del Estado* will file an execution petition based on the judgment rendered. Execution will be notified to the abductor who will be ordered to give the child into the hands of the person, institution or body holding custody rights. The order will specify when and where this has to take place and state the sanctions that can be imposed for non compliance such as fines or the use of physical force.

Execution can be opposed but the grounds of opposition are narrow and do not offer the abductor many possibilities to prevent the child from being returned to the requesting State.

In general, although there is some reluctance as to the use of physical force, the execution of the return orders does not seem to cause problems.⁵⁹ The main risk is if the abductor hides the child, since the police can have difficulties in locating him or her (see ante at 3.1).

4. OPERATING THE CONVENTION – INCOMING APPLICATIONS FOR ACCESS

4.1 / 4.2 CENTRAL AUTHORITY PROCEDURE AND LEGAL PROCEEDINGS

For the most part the system just described applies equally to access applications. Applications should be made to the Central Authority in Madrid, although there is also the possibility of directly applying to court.

As with return petitions, the Central Authority works with sample forms, which can be found on the web site of the Spanish Ministry of Justice (http://www.mju.es/cooperacion_juridica/g_sustmenores.htm). There are three different sample forms, a general one and two which have been agreed upon with the Central Authorities of Germany and Morocco (under the bilateral Convention). The applicant has to state the factual or legal grounds justifying the request. If it exists, he or she should provide the court decision granting access rights or, if it is the case, specify the civil proceedings concerning access which have already been undertaken or are in progress.

Once the child has been located (see ante at 3.1), the Central Authority will assign the case to an *Abogado del Estado* (see ante at 3.3) who will file a petition about the exercise of access rights before the Court on behalf of the Central Authority.

Spanish Courts have generally considered themselves bound by Article 21 of the Hague Convention. Instead of resorting to the procedures provided in general domestic law they apply the Hague Convention implementing legislation (arts. 1901-1909 LEC 1881). These rules do not, however, refer to access but only to return petitions under the 1980 Hague Convention. They have therefore to be applied by analogy.⁶⁰ This procedure will apply both if there already exists a court order in the requesting State granting access to the petitioner or when the court is asked to organise access rights. In this latter case

⁵⁹ This is confirmed by a recent survey carried out on behalf of the European Commission. See Fulchiron, *op. cit.*, n. 29, pp. 163-164.

⁶⁰ Gonzalez Beilfuss, C.: "Sustracción internacional de niños y ejercicio transnacional de los derechos de visita" in Adam Muñoz-García Cano: *Sustracción internacional de menores y adopción internacional*, Madrid, Colex, 2004, 96.

Spanish Private international law rules subject custody and parental responsibility to the child's national law.⁶¹ If the child is a foreign national it should be born in mind that there will be a need to prove the contents of foreign law and that this requires official documents. If this is not done, the court will apply Spanish law. If the child has dual citizenship and one of the nationalities it holds is Spanish, this will generally be given precedence.⁶² Spanish private international law adheres to the theory of *renvoi*, that is, if the conflict of law rules of the child's national law assign the case to Spanish law this will be applicable.⁶³

Although there are different rules in different parts of the country (see ante at 1.1) Spanish law widely recognises the right of the child to have contact with his or her parents, regardless of whether they are married or not. Grandparents are also granted access rights.⁶⁴

There are several cases in which judges have allowed contact to be exercised abroad because the State to which the child was to be taken was a State Party to the 1980 Hague Convention⁶⁵ or because the Spanish custody decision had been recognised by that State.⁶⁶ The 1980 European Custody Convention and the recent Brussels II Regulation are likely to be useful in order to convince Spanish judges that the exercise of access abroad will not lead to an unlawful retention as a prior step for changing the original Spanish custody or access order.

4.3 ENFORCEMENT OF ORDERS

The enforcement powers are broadly the same in respect of access orders as they are in respect of return orders. It should however be born in mind that the execution of access orders is generally more difficult than for return orders.

5. OPERATING THE CONVENTION – OUTGOING APPLICATIONS FOR RETURN

There are statistical data available for 1996-2000.⁶⁷ These include cases under the 1980 European Custody Convention and the bilateral Convention with Morocco as well as Hague Convention cases.

	1996	1997	1998	1999	2000
Outgoing applications	24	16	22	44	42

⁶¹ Art. 9.4 Civil Code and art. 3 Hague Child Protection Convention 1961 which applies to all children residing in Spain.

⁶² Art. 9.9 Spanish Civil Code.

⁶³ Art. 12.2 Spanish Civil Code.

⁶⁴ See art. 169 Spanish Civil Code and art. 135 *Catalan Codi de familia*.

⁶⁵ *Audiencia Provincial de Barcelona*, 27 June 2002. See comments by Gonzalez Beilfuss, C.: "Autorización de salida de menores de España", *Anuario Español De Derecho internacional privado*, 2002, 1023-1024.

⁶⁶ *Audiencia Provincial de Barcelona*, 8 November 1989, *Revista Jurídica de Catalunya* 1990-II, 878-880.

⁶⁷ See Bengoechea, op. cit., n. 17, p. 33. See also the 1999 Statistical Survey, op. cit., n. 25.

The Spanish Central Authority only handled two or more cases each year with two countries, the United Kingdom and the United States. Outside Europe, applications were made to Argentina, Australia, Canada, Colombia, Ecuador, Mexico, Panama, the United States and Venezuela.⁶⁸

5.1 PREVENTING THE REMOVAL OF THE CHILD FROM THE JURISDICTION

5.1.1 CIVIL LAW

On 23 November 2002⁶⁹ the Spanish Civil Code was modified so as to introduce measures to prevent the removal of children. The measures which are now available are:

- (a) *Non exeat* orders which prohibit leaving of the jurisdiction except with previous authorisation by the court.
- (b) Prohibition against the issue a child's passport or confiscation of a passport, if the child already has one.
- (c) Requiring any change of the child's habitual residence to be subject to court authorisation. This latter measure can also apply if the child's residence changes from one part of the country to another.

These measures can be taken as preliminary measures in the context of divorce, legal separation or annulment proceedings (art. 103 of the Civil Code), on request of the divorce petitioner or by the judge on his own motion, after hearing both spouses. They can, however, also be taken independently of divorce proceedings on request of the child, any family member or the *Ministerio Fiscal* acting in the child's interest. This means that (a) they are available to all children, regardless of whether the parents are married or not, and (b) preventive measures can be requested at any time not only by a parent but by any other family member who fears that the child is at risk of being removed from the jurisdiction.

Although these measures were only expressly enacted under the 2002 Statute, they were in fact already quite common in divorce proceedings if either spouse were foreign nationals or had strong ties with a foreign State. Practice has shown that they are not always effective especially since the removal of internal borders among certain States in the European Community (i.e. those party to the Schengen agreement).⁷⁰

5.1.2 CRIMINAL LAW

The 2002 Statute⁷¹ just referred to, introduced new provisions into the Criminal Code. Art. 225 bis of the Criminal Code making it a criminal offence to remove a child outside his or her habitual residence without the consent of the parent with whom the child resides or the persons, institutions and other bodies to whom the care of the child has been attributed. The retention of the child contrary

⁶⁸ Bengoechea, op. cit., n. 17, p. 36. See also the 1999 Statistical Survey, op. cit., n. 25.

⁶⁹ *Ley Orgánica 9/2002, de 10 de diciembre, de modificación de la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, y del Código Civil, sobre sustracción de menores.*

⁷⁰ See Bengoechea, op. cit., n. 17, p. 21.

⁷¹ *Ley Orgánica 9/2002, de 10 de diciembre, de modificación de la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, y del Código Civil, sobre sustracción de menores.*

to a court or administrative decision, is also made a criminal offence. Each offence is punishable by two to four years' imprisonment and deprivation of parental responsibility for a period ranging from four to ten years. The removal or retention is punishable regardless of whether the child is or is not taken outside the jurisdiction. The new criminal rules will therefore provide remedy in the case of domestic abductions, where the 1980 Hague Convention is not applicable (see ante at 1.4).

If, within 24 hours of the abduction or retention, the abductor informs the left-behind parent or person or institution taking care of the child, of his or her whereabouts and indicates a willingness to return the child, the Criminal Code leaves the crime unpunished, provided the child is effectively returned. The same occurs if the child is returned within 24 hours. Punishment is also less harsh if the child is returned in less than two weeks.

The same statute also provides that any infringement of a decision on parental responsibility by the parents of a child, which does not amount to a criminal offence, can be punished.

This Statute was passed after intense lobbying by some non governmental organisations. In the past some child abduction cases involving non-Convention States were solved by resorting to international detention orders which allowed Interpol to locate Spanish children abroad and which were a preliminary step to extradition procedures which allowed to exercise pressure on the abductors. Since child abduction was not *per se* a criminal offence it was not, however, possible to resort to extradition procedures against the abductor if the abduction was not connected to another criminal offence such as contempt of court.⁷²

5.2 CENTRAL AUTHORITY PROCEDURE

The Spanish Ministry of Justice also acts as a Central Authority for outgoing petitions for return under the 1980 Hague Convention, the 1980 European Custody Convention and the bilateral Convention with Morocco.⁷³

If a child has been removed from Spain to another Contracting State, applications for return can be filed by using the sample forms which can be found on the web site of the Spanish Ministry of Justice (http://www.mju.es/cooperacion_juridica/g_sustmenores.htm).

There are three different sample forms, a general one and two which have been agreed upon with the Central Authorities of Germany and Morocco (under the bilateral Convention). There are certain documents which should be furnished, namely (a) the child's or children's birth certificate, (b) a copy of the judicial decision (if existing) vesting custody on the return applicant, (c) a photograph of the child and the abductor and (d) documents which prove that the child was habitually resident in Spain immediately before the removal took place, such as school or medical records.

As far as outgoing petitions are concerned, the Spanish Central Authority acts mainly as a communicator between the applicant and the foreign Central Authority. It does, however, monitor the cases through

⁷² See Torres Fernandez, M.E.: "Los nuevos delitos de secuestro parental e inducción de hijos menores al incumplimiento del Régimen de custodia", *Diario La Ley* nr. 5857 of 25 September 2003.

⁷³ It is also likely to act as the Central Authority under the Revised Brussels II Regulation, but see ante at n. 19.

the use of a data base and is prepared to exercise pressure on the authorities of other Contracting States.

The main difficulty encountered by the Spanish Central Authority as regards outgoing petitions is linked to the reservation which some States have made under Article 26 of the Convention (i.e. not to assume any costs resulting from participation of legal counsel or advisers as from court proceedings, except insofar as these costs may be covered by its system of legal aid and advice). Although States under Article 26 are not bound to assume costs resulting from the participation of legal counsel or advisers or from court proceedings, they are nevertheless obliged to cover costs as provided by their systems of legal aid and advice. However, the Spanish Central Authority does not always have sufficient information as regards the conditions for legal aid. In other cases legal aid is considered insufficient. Lack of legal aid has caused reported difficulties in abductions to Germany and the United States.⁷⁴

6. AWARENESS OF THE CONVENTION

6.1 EDUCATION OF CENTRAL AUTHORITIES, THE JUDICIARY AND PRACTITIONERS

There is a Judicial School (*Escuela Judicial*) in Barcelona, which has to be attended by judges starting their career. This institution also provides some training about the handling of child abduction cases for existing judges. From time to time the judiciary and the Bar organise seminars on the problem of international child abduction. During 2003 the Spanish Ministry of Social Affairs subsidised specialisation courses for lawyers, psychologists and social workers.⁷⁵ The subject is also taught in most of the postgraduate family law courses organised at Spanish Universities. However, as with most of international family law issues, child abduction is not a well-known subject. Furthermore, attendance at these events is mostly voluntary and plays no role in the promotion of judges.

Spain has generally not participated in international judicial conferences other than the Special Commission Meetings held at The Hague. Budget restrictions and language may explain this. Most Spanish judges and practitioners do not have a good knowledge of French or English. It would be extremely helpful, therefore, if these international events could offer simultaneous facilities into Spanish.

The Spanish Government actively supports the use of the Spanish language in events connected to the Hague Conference. This is seen as part of its leadership role in Latin America. It has, for example, sponsored uniform translations of Hague Conventions into Spanish⁷⁶ and financed Conferences on international child abduction in Cartagena de Las Indias (Colombia) in 2001 and in Antigua (Guatemala) in October 2003.

⁷⁴ Bengoechea, op. cit., n. 17, p. 129.

⁷⁵ Letter by Adolfo Alonso Carvajal, May 2003.

⁷⁶ Gonzalez Campos-Borras. *Recopilación de Convenios de la Conferencia de La Haya de Derecho internacional privado (1951-1993). Traducción al castellano*, Madrid, 1996.

From spring 2003 *The Judges' Newsletter*⁷⁷ has been published in Spanish but at present this version can only be found at the web site of the Hague Conference. Although this web site contains some materials in Spanish it is not widely known. Some of the Spanish delegates at the Hague Conference have taken action to publicise *The Judges' Newsletter* on the judicial web site (<http://www.poderjudicial.es>).

6.2 INFORMATION AND SUPPORT PROVIDED TO THE GENERAL PUBLIC

The Spanish Central Authority basically informs the public through the Internet. It has created a web site which provides general information in Spanish about the international Conventions on child abduction which are in force and the administrative and judicial procedure in order to obtain the return of unlawfully removed children or the international enforcement of access rights. It is also possible to download the application forms. The Internet address is:

http://www.mju.es/cooperacion_juridica/g_sustmenores.htm

A support group operating in Spain which is of interest is the Asociación para la Recuperación de Niños Sacados de su País, which was founded by parents who suffered the international abduction of their children from Spain to other countries. This association is based in Zaragoza.

Asociación para la Recuperación de Niños Sacados de su País

Allúe Salvador, 13, 1º, of. 1

50001 Zaragoza

Tel: +(34) 976 23 11 00 (Monday to Friday from 10:00 to 13:00 and 17:00 to 20:00)

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Email: info@recuperacion-menores.org

Web site: <http://www.recuperacion-menores.org/>

7. THE CONVENTION IN PRACTICE – A STATISTICAL ANALYSIS OF APPLICATIONS IN 1999⁷⁸

The Central Authority in Spain handled a total of 78 new applications in 1999, making Spain the ninth busiest Convention jurisdiction in that year.⁷⁹

Incoming return applications	36
Outgoing return applications	27
Incoming access applications	6
Outgoing access applications	9
Total number of applications	78

⁷⁷ Published twice a year by Butterworth's (London) and found at http://www.hcch.net/index_en.php?act=publications.details&pid=2799&dtid=3

⁷⁸ The following analysis is based on the 1999 Statistical Survey, op. cit., n. 25.

⁷⁹ USA, England and Wales, Germany, Australia, France, Italy, Canada and New Zealand all handled more cases in 1999.

7.1 INCOMING APPLICATIONS FOR RETURN

7.1.1 THE CONTRACTING STATES WHICH MADE THE APPLICATIONS

Requesting States		
	Number of Applications	Percent
UK-England and Wales	9	25
Italy	5	14
Switzerland	5	14
Germany	3	8
Ecuador	2	6
France	2	6
Norway	2	6
USA	2	6
Argentina	1	3
Colombia	1	3
Netherlands	1	3
Panama	1	3
Portugal	1	3
Sweden	1	3
Total	36	~100

One quarter of all applications for return were made by England and Wales. The next highest number of applications were received from other European States, namely Italy and Switzerland. The USA made proportionally few applications to Spain. Compared with other European States, Spain perhaps predictably because of their common language, received more applications, nearly 14%, from Latin American States.

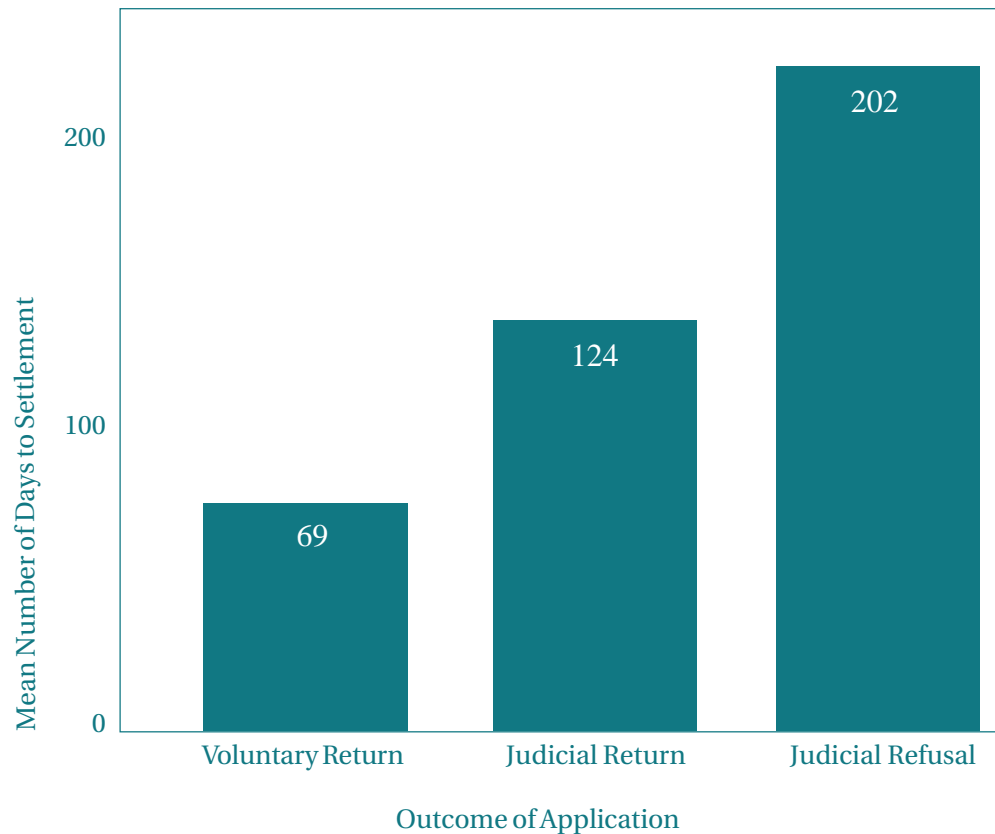
7.1.2 THE OUTCOMES OF THE APPLICATIONS

Outcome of Application		
	Number	Percent
Rejection	7	19
Voluntary Return	10	28
Judicial Return	8	22
Judicial Refusal	4	11
Withdrawn	3	8
Pending	3	8
Other	1	3
Total	36	~100

In total, 28% of applications resulted in the voluntary return of the child. This compares favourably with the global mean of 18%. Not surprisingly therefore the judicial return rate of 22% of applications was lower than the global average of 32%. Altogether, 50% of applications ended in the child's return, either voluntarily or by court order, which is identical to the global norm. Of the 12 cases which went to court, 67% ended with a judicial return being ordered, which is below the global norm of 74%. Three of the four refusals were based either wholly or in part on the child's objections. In one case the refusal was based on the objections of a child aged between 8 and 10 and a sibling aged

under 7.⁸⁰ Interestingly, in this survey no refusal was based on Article 13b which contrasts with other surveys referred to earlier.⁸¹ Nevertheless, the overall refusal rate at 11% was identical to the global norm. Proportionally, fewer applications were withdrawn, 8% as against the global norm of 14%. On the other hand, the rejection rate of 19% was markedly higher than the global norm of 11%. Three cases were still pending at 30 June 2001 when the survey ended.

7.1.3 THE TIME BETWEEN APPLICATION AND FINAL CONCLUSION



Information regarding timing was available for seven of the ten voluntary returns, all of the judicial returns and 3 of the 4 judicial refusals. The chart above, therefore, relates to these cases only.

At 69 days, the mean average speed of voluntary returns was quicker than the global average of 84 days. Spain was however slower in reaching judicial conclusions. Judicial returns took a mean average of 124 days compared with the global mean of 107 days. Taking a mean average of 202 days, judicial refusals took considerably longer than the global norm of 147 days. This may be due to the fact that one of the three cases took almost a year to conclude. The figures are of course mean average figures for a small number of cases in each category. Consequently one difficult and long case may have a disproportionate effect on the mean average overall, as will one particularly quick case. The following table shows the minimum and maximum number of days taken in each category as well as the mean and median average times.

⁸⁰ This was only one of two cases in which of all the States analysed a refusal was based upon the objection of a child below the age of 7.

⁸¹ See Beilfuss, *op. cit.*, n. 46.

Number of Days Taken to Reach Final Outcome			
	Outcome of Application		
	Voluntary Return	Judicial Return	Judicial Refusal
Mean	69	124	202
Median	66	131	218
Minimum	4	44	41
Maximum	131	216	348
Number of Cases	7	8	3

This table shows that one of the judicial refusals was actually decided relatively quickly.

Information was available regarding two appeal court decisions. These make up 18% of all the cases which went to court which is slightly above the global norm of 14%. In addition there was one case which was believed to have been refused at the appellate court. There were also another two applications, which were in the process of being appealed. Of the two confirmed cases, both ordered the return of the child. One application took 127 days, the other 216 days. This appears to be in line with the global mean of 208 days.

Reference has already been made to the disproportionate effect of one or two lengthy cases on the overall disposal times. Nevertheless, the fact remains that within the EU Spain is among the slowest to dispose of applications if they go to court. Significantly, according to the 1999 statistics, no return order was made within the six week deadline envisaged by Article 11(3) of the revised Brussels II Regulation, though one order was made 44 days after the application. Ironically, one judicial refusal was made within six weeks.

7.2 INCOMING APPLICATIONS FOR ACCESS

Six out of a total of 42 incoming applications made to Spain in 1999 were for access, which at 14% was proportionally slightly below the global norm of 17%.

7.2.1 THE CONTRACTING STATES WHICH MADE THE APPLICATIONS

	Requesting States	
	Number of Applications	Percent
Germany	3	50
UK-England and Wales	2	33
Switzerland	1	17
Total	6	100

Spain received the same number of access applications and return applications from Germany. All three Contracting States which made access applications to Spain, also made at least three return applications to Spain in 1999.

7.2.2 THE OUTCOMES OF THE APPLICATIONS

Outcome of Application		
	Number	Percent
Rejection by the Central Authority	0	0
Access Voluntarily Agreed	1	17
Access Judicially Granted	3	50
Access Judicially Refused	0	0
Other	0	0
Pending	1	17
Withdrawn	1	17
Total	6	~100

In 4 of the 6 applications, 67%, access was either granted or agreed which is above the global norm of 43%. Indeed in all applications that had reached a conclusion, access was granted or agreed. In the case stated as “pending” access had been granted pending the court hearing.

7.2.3 THE TIME BETWEEN APPLICATION AND FINAL CONCLUSION

Timing to Judicial Decision		
	Number	Percent
0-6 weeks	0	0
6-12 weeks	0	0
3-6 months	1	25
Over 6 months	3	75
Total	4	100

The voluntary agreement took over 6 months to reach a conclusion. One of the 3 court orders was decided within 3 to 6 months and the other 2 took over 6 months to reach a conclusion. Because of the small number of cases it is hard to draw any firm conclusions from these figures but they do not appear to be out of line with global averages. Globally, 42% of voluntary settlements took over 6 months to be reached and 71% of judicial decisions took over 6 months. In Spain however there do appear to be no cases in which the application was resolved in under 12 weeks.

8. CONCLUSIONS

After what some might consider an inauspicious beginning when Spain was perhaps too eager to ratify the Convention but failed to put in place all the necessary implementing legislation,⁸² the country now operates the Convention reasonably effectively. Certainly, for the most part, Spain complies with the recommendations as to good practice contained in the *Guide to Good Practice on Central Authority Practice and Implementing Measures* published by the Permanent Bureau of the Hague Conference.⁸³ Notwithstanding its generally

⁸² See ante at 1.1 and ante at n. 6.

⁸³ See *Guide to Good Practice*, Parts I *Central Authority Practice* and II *Implementing Measures*, op. cit., n. 23.

decentralised system for child protection, the decision to have a single Central Authority has proved a wise choice, for it generally operates the 1980 Hague Convention efficiently and effectively (although, it has to be said, that it does not always immediately acknowledge the receipt of the application and / or documents, which is a matter of some concern).⁸⁴ It is able to communicate in English and French as well as Spanish and information both about the Convention and Central Authority practice is available on its web site. In line with other civil law cases, court proceedings begin with a mediation phase with the judge being directly involved and not only do voluntary return rates compare favourably with the global average (28% as against 18%) but also, according to the 1999 Statistical Survey,⁸⁵ it is the single most likely outcome. According to the same survey, of the cases that had to be resolved by the court, 67% ended in a return which was only slightly below the global average. The overall return rate was exactly the same as the global average. Spain has made no reservation to Article 26 of the 1980 Hague Convention and therefore assumes the costs of legal proceedings and legal representation of the applicant save where the applicant chooses to hire his own lawyer.

Despite these positive points there are some concerns. Spain does not concentrate original jurisdiction⁸⁶ in cases of international child abduction in a limited number of courts. As the *Guide to Good Practice: Implementing Measures* states⁸⁷

“The Conclusions from the Fourth Special Commission, as well as Conclusions from a number of judicial seminars stress the importance and desirability of concentrating jurisdiction in Hague return cases”.

The principal advantages of such concentration are, as the *Guide to Good Practice: Implementing Measures* says,⁸⁸ “an accumulation of experience among the judges concerned; and, as a result, the development of mutual confidence between judges and authorities in different legal systems; the creation of a high level of interdisciplinary understanding of Convention objectives, in particular the distinction from custody proceedings; mitigation against delay; and greater consistency of practice by judges and lawyers”.

This has particular relevance for Spain since many of the 953 *Juzgados de Primera Instancia* empowered to hear a Hague case will lack the experience of such cases.⁸⁹ This can be particularly serious if the *Abogados del Estado* handling the case for the Central Authority is also ignorant of the 1980 Hague Convention which is not an unlikely scenario if the case is heard outside the larger cities or tourist resorts.⁹⁰ Indeed lack of familiarity with the Convention among the legal profession is something which needs to be addressed generally particularly as it can sometimes lead courts slipping into determining the merits of the case rather than simply determining the application of an exception to their duty to return.

⁸⁴ See ante at 3.2.

⁸⁵ 1999 Statistical Survey, op. cit., n. 25.

⁸⁶ Though like a number of other States, Spain has limited the number of appeals available, see ante at 2.2.

⁸⁷ *Implementing Measures*, op. cit., n. 23, ante at 5.1.

⁸⁸ *Ibid.*

⁸⁹ See ante at 2.2.

⁹⁰ See ante at 3.5.

Another problem area, at any rate in the past, is the location of abducted children, with particular difficulties being encountered in respect of illegal immigrants and the massive floating tourist population. However, some attempts to address this issue, in particular by making child abduction a criminal offence, and thus being able to invoke criminal procedure,⁹¹ have been made and it must be hoped that this will reduce the problem.

Another problem which has caused difficulties is where there are parallel custody proceedings but at least in this respect the recent ruling of the Spanish Supreme Court⁹² that there is no jurisdiction to determine a custody application pending adjudication of the Hague return application, has helped to reduce confusion (though the factual problem of being aware of other proceedings needs addressing).

A further concern about the Spanish system, at any rate as evidenced by the 1999 Statistical Survey,⁹³ is the slow disposal times particularly when reaching a judicial determination of a return application from which it is evident that the strict time limits provided for by the internal legislation⁹⁴ are not in practice complied with. According to the 1999 statistics, no judicial return order was made within six weeks of the making of the application (though ironically one judicial refusal was) and even voluntary returns took on average 69 days. There are perhaps a number of contributory reasons for the delay, for example, difficulties in locating children, the failure of some *Abogados del Estado* to respond quickly, the time taken by translators at the Ministry of Justice to translate documents, a general lack of familiarity with the Convention and perhaps too much time given to the mediation phase. These issues will need to be addressed as a matter of some urgency if Spain is to comply with the requirement under Article 11(3) of the revised Brussels II Regulation, that court proceedings for the return of children under the 1980 Hague Convention should be completed within six weeks.

Finally, it should be stressed that given the number of applications the Spanish Central Authority is not particularly well resourced. The system is too dependant on the good will and personal involvement of the staff working at the Central Authority. This might explain an unusually high staff rotation.⁹⁵

9. SUMMARY OF CONCERNS

- The Central Authority is not particularly well resourced and does not always immediately acknowledge the receipt of the application and / or documents.
- The system is too dependant on the good will and personal involvement of the staff working at the Central Authority.
- Jurisdiction to hear Convention cases is generally vested at first instance in the *Juzgados de Primera Instancia* by no means all of whom are familiar with the Convention.
- The *Abogados del Estado*, through which the Central Authority acts, are generally not familiar with family law disputes.

⁹¹ See ante at 5.1.1 and 5.1.2.

⁹² *Sentencia del Tribunal Supremo* of 22 June 1998, discussed ante at 3.5.

⁹³ 1999 Statistical Survey, op. cit., n. 25, and see ante at 7.1.3.

⁹⁴ See ante at 3.5.

⁹⁵ See ante at 2.1.

- There can be location difficulties particularly with regard to children of illegal immigrants or those in tourist resorts.
- There can be a problem with parallel custody proceedings although the legal issue has now been dealt with by a Supreme Court decision.
- The overall disposal times, particularly in cases where a judicial decision is required, were, according to the 1999 statistics, rather slow and outside the target obligation set by the revised Brussels II Regulation.

10. SUMMARY OF GOOD PRACTICES

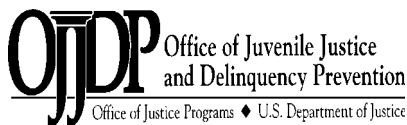
- The decision to have a single Central Authority for the whole of Spain has worked well and its location in the Ministry of Justice has meant that it is accustomed to administering international Conventions.
- The Central Authority (apart from the concern about acknowledgements noted above) is generally efficient in handling child abduction cases and is able to communicate in English and French as well as Spanish.
- There is information on the Central Authority web site.
- Although there is a high staff rotation within the Central Authority efforts have been made to ensure continuity in the handling of child abduction cases.
- Applicants are represented free of charge and translation of documents can also be provided without cost to the applicant.
- A relatively high proportion of return applications are settled voluntarily.
- Spain has accepted accession of most Contracting States.

APPENDIX

As at 1 January 2005, the Convention is in force between the following 71 Contracting States and Spain.

Contracting State	Entry into Force
ARGENTINA	1 JUNE 1991
AUSTRALIA	1 SEPTEMBER 1987
AUSTRIA	1 OCTOBER 1988
BAHAMAS	1 MARCH 1995
BELARUS	1 OCTOBER 1999
BELGIUM	1 MAY 1999
BELIZE	1 JULY 1992
BOSNIA AND HERZEGOVINA	1 DECEMBER 1991
BRAZIL	1 MAY 2001
BURKINA FASO	1 DECEMBER 1994
CANADA	1 SEPTEMBER 1987
CHILE	1 SEPTEMBER 1995
CHINA-HONG KONG SPECIAL ADMINISTRATIVE REGION	1 SEPTEMBER 1997
CHINA-MACAO SPECIAL ADMINISTRATIVE REGION	1 MARCH 1999
COLOMBIA	1 JUNE 1997
COSTA RICA	1 MAY 2001
CROATIA	1 DECEMBER 1991
CYPRUS	1 JUNE 1997
CZECH REPUBLIC	1 MARCH 1998
DENMARK	1 JULY 1991
ECUADOR	1 JULY 1992
EL SALVADOR	1 JUNE 2002

ESTONIA	1 AUGUST 2002
FIJI	1 MAY 2001
FINLAND	1 AUGUST 1994
FORMER YUGOSLAV REPUBLIC OF MACEDONIA	1 DECEMBER 1991
FRANCE	1 SEPTEMBER 1987
GEORGIA	1 MARCH 1999
GERMANY	1 DECEMBER 1990
GREECE	1 JUNE 1993
GUATEMALA	1 APRIL 2004
HONDURAS	1 JUNE 1997
HUNGARY	1 JULY 1992
ICELAND	1 APRIL 1998
IRELAND	1 OCTOBER 1991
ISRAEL	1 DECEMBER 1991
ITALY	1 MAY 1995
LATVIA	1 MARCH 2003
LUXEMBOURG	1 SEPTEMBER 1987
MALTA	1 MAY 2001
MAURITIUS	1 DECEMBER 1994
MEXICO	1 JULY 1992
REPUBLIC OF MOLDOVA	1 FEBRUARY 2000
MONACO	1 DECEMBER 1994
NETHERLANDS	1 SEPTEMBER 1990
NEW ZEALAND	1 JULY 1992
NICARAGUA	1 JUNE 2002
NORWAY	1 APRIL 1989
PANAMA	1 SEPTEMBER 1995
PARAGUAY	1 FEBRUARY 2000
PERU	1 DECEMBER 2002
POLAND	1 DECEMBER 1994
PORTUGAL	1 SEPTEMBER 1987
ROMANIA	1 DECEMBER 1994
SAINT KITTS AND NEVIS	1 JUNE 1997
SERBIA AND MONTENEGRO	1 DECEMBER 1991
SLOVAK REPUBLIC	1 FEBRUARY 2001
SLOVENIA	1 SEPTEMBER 1995
SOUTH AFRICA	1 FEBRUARY 2000
SRI LANKA	1 MARCH 2003
SWEDEN	1 JUNE 1989
SWITZERLAND	1 SEPTEMBER 1987
THAILAND	1 OCTOBER 2003
TRINIDAD AND TOBAGO	1 JANUARY 2002
TURKEY	1 JULY 2000
TURKMENISTAN	1 OCTOBER 1999
UNITED KINGDOM	1 SEPTEMBER 1987
UNITED STATES OF AMERICA	1 JULY 1988
URUGUAY	1 MAY 2001
UZBEKISTAN	1 MAY 2001
VENEZUELA	1 JANUARY 1997
ZIMBABWE	1 JUNE 1997



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