CONCLUSIONS OF WORKSHOP NUMBER 2

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The conclusions reached following the work done by Workshop 2 were as follows:

1.- Return procedures within the framework of the European Union need to be made more flexible.

It has been shown that the time it takes to return children is too long and this is mainly due to two factors: the Central Authority's lack of resources due to the increased number of cases and, secondly, court delays caused in some countries by a lack of specialisation in the courts hearing the cases. The delay in cases of abduction is a tragedy for the children abducted. There have been cases in which, despite the fact that the application for return was made prior to the year of the abduction or unlawful retention, the return has been delayed three or more years until it is finally implemented. Delays such as that described are extremely harmful to the child and in many cases will have undesirable results. In order to prevent irreversible harm to a child, finally the return does not take place.
The need to concentrate cases of abduction in just a few courts was noted, as this would permit both flexibility in processing cases and provide the necessary specialisation of courts, lawyers, and social services attached to these.

2. Need to define and limit the grounds for non-return contained in points a) and b) of article 13 of the Hague Convention of 1980 on civil aspects of international abduction of minors.

Since the entry into force of the Hague Convention of 1980, a considerable number of cases have been detected in which return was refused based on the concurrence of the grounds for non return contained in article 13 b) *"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that (...) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".* In fact, and by way of an example, two Spanish rulings may be cited (Order No. 20/2004 of the Provincial Court of Almería and Order of the Provincial Court of Barcelona of 28 October 2002) in which this ground for non-return is used.

The excessive use (and at times abuse) of this ground for non-return led to *Council Regulation (EC) No. 2201/2203 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000* amending the application of the 1980 Convention between the Member States and enormously restricting their use

of the grounds of non-return contained in article 13 b). The limit is found in points 4 and 8 of article 11 of Regulation 2201/2003 which establish:

> *"Art. 11.4 (...) A court cannot refuse to return a child on the basis of Article 13 b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return (...).*
>
> *8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child".*

Despite the admirable intention of strengthening the efficacy of the return system between Member States, it is nevertheless still true that grounds for opposition to this as contained in article 13 b) continue to be used although in a less excessive manner (eg. Order No. 100/2006 of the Provincial Court of Granada dated 16 June and Judgment No. 463/ 2007 of the Provincial Court of Málaga of 11 September.

One of the solutions arising in the course of the workshop analyses was the need to promote an exchange of information between courts of the Member States of the European Union in order to increase trust between them. A generic mention of the requesting state indicating that it guarantees the child's wellbeing in the return process should not be sufficient. The requesting state would need to describe in detail the measures to be adopted in the specific case, in order to guarantee that wellbeing, and thus to reassure and reinforce the trust of the requested State, which will make the return with all guarantees and in the most flexible manner possible.

With respect to the grounds for non-return contained in article 13 a) it establishes as follows: "*Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced to the removal or retention*".

The problem of this ground is based on definition of the term "effective custody". The term does not have the same meaning in all Member States and it may be that according to a specific right it is considered that effective custody has been infringed by the applicant and in others it is considered that the applicant was not exercising it in an effective manner. By way of example we cite the Judgment of the Court of Grand Instante of Pau (France) of 7 March 2006. In this case a dispute between a couple with a two-month old son coupled with the father abandoning the home for just one week was considered by the French judge as "absence of exercise of effective custody" and grounds for not returning the child to Spain, his country of residence. Unquestionably a week is not sufficient time to determine whether effective custody was no longer exercised, particularly when the father could not visit his child as the mother would not allow it, however, he continued to provide financial maintenance for the child.

For the purpose of determining what is understood by exercise of effective custody in each case by the authorities of the different Member states involved, the legal provisions which define it should be facilitated. Thus for example, in Spain it is common practice of the Central Authority, to send, together with the application for return, a copy of articles 154 and 156 of the Civil Code which refer to the fact that if there is no court ruling which indicates otherwise, the guardianship and custody of the child belongs to both parents equally, and that also, although the care and custody is attributed to a single parent, the guardianship would continue to be conserved by both and, by virtue of this guardianship, the parent who does not have custody should be consulted on any important decisions in the life of their child (which school it will go to, whether or not it should have a specific operation and of course <u>whether its residence is moved to another country or not).</u>

In fact, the definition is vital as the courts of the Member States are not very clear on whether transfer of children to another country in order to establish their new residence there with the parent having custody is considered to be abduction or not. Case law is divided on this, considering that in some cases it is not abduction (see *Order No. 54/2008 of the Provincial Court of Las Palmas de Gran Canaria of 3 March; Order of the Provincial Court of Santa Cruz de Tenerife No. 172/2006 of 22 November; Judgment No.* 461/2006 of the Provincial Court of Málaga of 11 September; Judgment of the Supreme Court of Ireland of 14/04/2000 (INCADAT, REF. *HC/E/IE 271)*; *Judgment of the Court of Appeals for the Second Circuit of the United States of 20/09/2000 (INCADAT, HC/E/313)*, whereas in other cases the same conduct is considered to be abduction (see. *Orders of the Provincial Court of Santa Cruz de Tenerife No. 227/2004 of 1 June and No. 106/2008 of 12 May*). *Judgment of the Constitutional Court of South Africa of 12/04/2000* (*INCADAT, REF. HC/E/ZA 309)*; *Oberlandsgericht Dresden of Germany 21/01/2002 (INCADAT REF. HC/E/DE 486; Court of Appeals for the Eleventh Circuit of United States of 03/10/2004 (INCADAT REF. HC/USF 578*).

3. It is important to avoid use of article 10 of Regulation 2201/2003 as a way of “punishing” the abducting parent.

Through the still scant practical application of Regulation 2201/2003 in matters of abduction it was possible to verify that some Member States are using article 10 of the regulation as a way of “blindly” modifying custody of minors granting it to the parent who has been deprived of the children without any other consideration than that of "punishing" the abducting parent. This occurred in the Judgment of the Court of First Instance of Turnhot (Belgium) where the Spanish mother had illegally retained her children aged 1, 3 and 5 years who were living in Belgium, in Madrid. The father lodged a return procedure, and also requested protection, pursuant to article 10 of the Regulation, of full custody of the girls. The court, without examining the children, and without having any other consideration other than that of abduction, granted custody to the father, refusing the mother any visiting rights.

Article 10 should not be used by the courts to modify custody without previously examining the children, and without checking that said change of custody is genuinely for the best. The return system is not designed to modify custody but to reintegrate children in the state where they resided prior to their move or unlawful retention. It is

when the return has occurred that decisions should be made on the questions of custody visits etc. with the children in the territory and placed at the judge's disposal, in order to be able to examine them together with the corresponding social services, and to decide on their future.

4.- It is important to establish a procedural resource for treatment of decisions of non-return.

In some Member States (for example in Spain) there is a marked absence of a procedural resource which will indicate how state courts of origin should address refusal of the order for return of the Member state of destination (art. 11, sections 6 to 8).

Following the example of Spain, the absence of the internal procedural resource in this country causes some consternation in the Central Authority, as it is unsure with regard to which court it should send the non-return ruling and also to the court that does not have an established procedure for analysing the order and deciding whether it should be revoked or not.