PRACTICAL APPLICATION OF THE HAGUE CONVENTION AND REGULATION 2201/2003. THE ROLE OF THE CENTRAL AUTHORITY

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1. THE ABDUCTION OF MINORS

Applicable conventions

In Spain, the following conventions apply:

a) On an international but non-Community scale, The Hague Convention of 1980 applies to the civil issues involved in the international abduction of minors, with all the states that have formally adhered thereto. The said convention has now been accepted by 81 countries. To date, Spain has accepted 78 countries. It has yet to accept Armenia, Albania and the Seychelles.

b) In the Community framework, Regulation (EC) 2201/2003, which applies preferentially in the matters regulated thereby over The Hague Convention No. 28 of 1980 and the Luxembourg Convention, convention No. 105 of the Council of Europe of 1980.

c) In the framework of the Council of Europe, the Luxembourg Convention of 20 May 1980 on the recognition and enforcement of decisions concerning the custody of minors and the re-establishment of the said custody applies. This convention is open to non-European states that are not members of the Council of Europe and European states that are not members of the Council of Europe. After Regulation 2201/2003, this convention is applied with Iceland, Liechtenstein, Moldova, Montenegro, Norway, Serbia, Switzerland the Macedonian Republic, Turkey, Denmark (which, although a member of the European Union, is not subject to Regulation 2201/03) and the Ukraine.

d) On a bilateral scale, all we have is a bilateral agreement with the Kingdom of Morocco, dated 1997, on judicial assistance, the recognition and enforcement of judicial decisions in matters concerning custody rights, visiting rights and the return of minors.

e) In other international areas, Spain has signed the following bilateral conventions in judicial assistance and the recognition and enforcement of judicial decisions, whose scope of application includes family law:

- Treaty between the Kingdom of Spain and the People's Republic of China on judicial assistance in civil and mercantile matters, signed in Peking on 2 May 1992.

- Convention between the Kingdom of Spain and the Russian Federation on judicial assistance in civil matters, signed in Madrid on 28 October 1990.

- Convention between the Kingdom of Spain and the Republic of Tunisia on judicial assistance in civil and mercantile matters and the recognition and enforcement of judicial decisions, signed in Tunis on 24 September 2001.

- Convention on judicial assistance in civil and mercantile matters between the People's Democratic Republic of Algeria and the Kingdom of Spain, signed on 24 February 2005.

- Convention on judicial assistance in civil and mercantile matters between the Kingdom of Spain and the Islamic Republic of Mauritania, signed in Madrid on 12 September 2006.

f) With the other states, we must observe the recognition of foreign decisions and the corresponding enforcement thereof, in accordance with general legislation.

2. THE HAGUE CONVENTION OF 1980

The abduction of minors is an occurrence that increases year after year. The following table shows the situation. Although we need to highlight the fact that these figures are the only figures available to the Central Spanish Authority, having received an application; therefore, it is easy to imagine that the real number of cases is much higher.

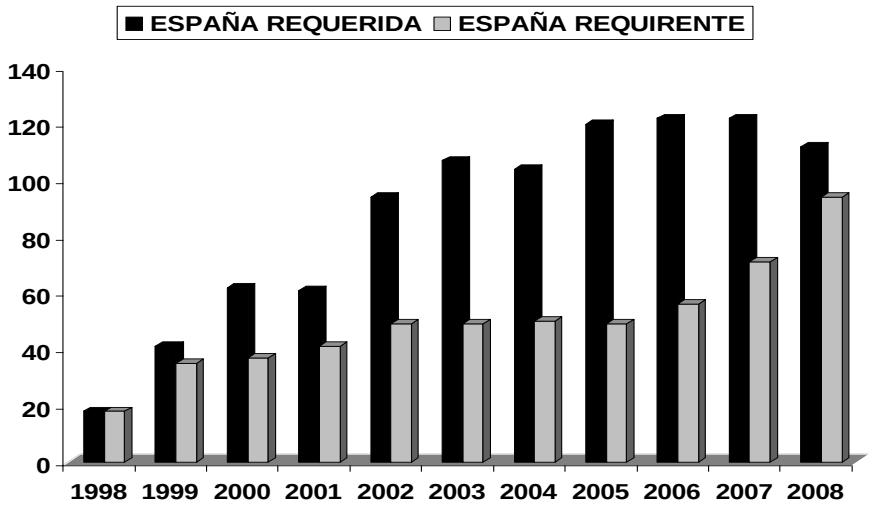
In the study that was performed in 2003 in view of the fifth meeting of the special commission for reviewing the implementation of the Hague Convention, held between 30 October and 9 November 2006, and of 45 of the countries that were examined, Spain appeared with an increase of almost 145% in comparison with the previous study for the year 1999. It was the third-ranking country that had received the highest number of return applications (7% of the total), preceded by the United States (23%) and the United Kingdom (England and Wales) (11%). However, it appeared in 11th position regarding the applications that had been sent.

I would like to highlight the increase in applications sent by Spain to other signatory countries in the last two years. I think that the reason for this has been the diffusion of the Convention by the various legal players, the leaflet published by the Spanish Ministry of Justice in 2007 and the cases that have been covered by the media.

Spain receives more applications from the European Union than from the rest of the world. However, Spain requires other countries more than countries of the European Union, mainly South America. In 2008, this trend changed and, for the first time, Spain has required more countries of the European Union than countries of the rest of the world.

In general, it can be said that the convention is more familiar and the judicial decisions are more in keeping with it; however, we still have recent decisions that decide on the merits of the case, such as that of case H 28 (1904) Spain-Mexico, in which the

Family Court No. 17 of the Federal District, in its decision of 27/02/09, rejected the return of the minor and awarded the custody to the mother that had abducted her child, or decisions that misinterpret key concepts of the convention, such as case H 28 (1939) Italy-Spain, in which the Provincial Court of Cordoba, in its decision of 26/01/09, when deciding in an appeal procedure to reject the return ordered in the initial court, states, "that a primary consideration must be added and it is that in this case, the basic presuppositions of the abduction and the purpose sought in the convention do not apply... It is an abduction committed by the mother in specific circumstances, in other words, when she decided to stop living with her partner".



SPAIN REQUIRED
SPAIN REQUIRING

THE HAGUE CONVENTION OF 1980 AND REGULATION (EC) 2201/2003

The Hague Convention of 1980 does not define the legal concepts provided in its articles. Article 3 provides the cases in which the transfer or retention of the minor are considered illegal.

The institution of custody is also not defined in the convention, which limits itself to indicating what the custody includes for the intents and purposes thereof.

However, Regulation 2201/03 expressly defines the illegal transfer or retention (article 2.11) for the intents and purposes of the regulation itself:
"When there has been a violation of a custody right acquired by virtue of a judicial decision, by operation of law or by an agreement with legal effects in accordance with the legislation of the member state in which the minor held his/her usual residency immediately prior to his/her transfer or retention and the said right was being exercised at the moment of the transfer or the retention in an effectively separate or joint manner or would have been exercised if the transfer or retention had not taken place. It is considered that the custody is exercised jointly when, by virtue of a judicial decision or

by operation of law, one of the parties holding parental responsibility cannot decide the place of residence without the other party's consent".

Although the two existing notes are maintained in the HC, further specifications are given in relation to the custody right, the different ways in which the said right can be acquired, the importance and consequences arising from the minor's usual place of residence and, finally, the specifications of the cases in which only one holder of the said right may decide on the place of residence or in which both have to take the decision.

It also defines parental responsibility as the rights and obligations awarded to an individual or body corporate by virtue of a judicial decision, by operation of law or by a legal agreement in relation to a minor's person or rights. In particular, the term includes custody and visiting rights.

PRACTICAL APPLICATION OF THE HAGUE CONVENTION/REGULATION (EC) 2201/2003

Acceptance of the application by the central authority

Article 27 of the Convention provides that a central authority will not be obliged to accept the application when it is demonstrated that the required conditions have not been met or the application has no grounds.

Unfortunately, applications that have no grounds are often received. We consider that the requiring central authority has the duty to inform its applicants about the requirements provided in the convention and not to send the applications that have no grounds or lack the required documentation. Of course, it is easier not to deal with the applicants and transfer the responsibility to the authorities of the other country.

In general, Latin American countries are the ones that present the applications with the highest number of faults. Copies are occasionally illegible, the judicial, notarial and other stamps are not complete, the legislation is not referred to or they refer to articles of laws with no reference whatsoever to the law or code in question, the judicial decisions referred to in the application are not referred to, etc. This gives rise to numerous notices that are either ignored or, when they are processed, the required documents are received with many months' delay.

Spain maintains biannual meetings with the central authorities of Ibero-America. The 4th meeting was held last summer. The conclusions that were drawn from the meeting pointed out, among other issues, the need to require the central authorities to ensure that the applications sent to the required authority cover all the legal and factual issues that are essential for avoiding unnecessary delays in the respective procedure and to ensure that the legislation that is referred to is endorsed by the stamp of the requiring central authority and accompanied by an explanation.

The applications not accepted by the Spanish central authority due to the fact that they have no grounds are the ones that are based on facts. They are the cases in which, after the term of one year since the illegal transfer or retention has lapsed

excessively, the applicant has not lifted a finger. The applicant has not started any legal action in his/her country, has not reported the disappearance of his/her children, does not file documents on the payment of alimony, school certificates, census certificates, in other words, no document that proves his/her version of the events.

It is true that the Spanish central authority has been sentenced to pay costs by a first-instance court for proceeding with wilful disregard, which has led to a more detailed analysis of the applications and the requirement of the exact documents on which the claim can be founded. In cases of doubt, the state lawyers' opinions on the viability of the claim are required. In the cases in which, after giving the reasons for not accepting the application, the requiring authority insists, the certificate provided in article 15 of the convention is requested.

There have also been cases in which fraudulent use of the convention has been detected to obtain a visa for entering into Spain. One example of such use is case H 28 (1649) Colombia-Spain, in which the mother filing the application obtained a visa for humanitarian reasons and, once in Spain, declared her intention to stay in our country before the judge. The judge informed the Ministry of Justice so that the corresponding measures could be taken and the situation was notified to the Aliens Department. In another case H 28 (1627) Argentina-Spain, the father filing the application required the return of his son, who had been transferred without his consent. The mother demonstrated that the reason for transferring the minor was for him to have a surgical operation, with the father's consent. Once the applicant was in Spain, both parents appeared before the court with a separation settlement in which the custody was awarded to the mother and visiting rights to the father. The visits consisted of one weekend every 15 days, Wednesday afternoons and half the school holidays. As is obvious, the father was to reside in Spain.

In other cases, such as H 28 (1858) United Kingdom-Spain, the applicant who had been awarded visiting rights admitted in his/her own handwriting that he had not seen the minor in the two years before the transfer owing to the problems the mother, who held custody over the child, caused him and that he had not started any legal action in his country in the belief that when the minor reached legal age, he/she would decide for himself/herself. We were unable to understand that the father effectively exercised custody before the illegal transfer.

In case H 28 (2116) Honduras-Spain, the Spanish central authority upheld that a stay of three months in the said country, with no association therewith, could not be considered as the usual residence of the minors of 8 and 6 years of age. The couple held its residence in the United States and then moved to Spain for a period of four months. The father, who was from Panama, went to Honduras for his work and agreed that the mother, who was Spanish, would stay with the minors in the United States. Shortly after the father had left, the mother moved to Honduras with the minors. In the said country, the parents did not live together; the father was reported by the mother for violence and abandonment of his economic undertakings.

In case H 28 (2111) Belgium-Spain, a father who had visiting rights requested the return of his child one year and three months after he had learned about the transfer (proved by the presentation of documents). The basic rule of the regulation is that, in the cases of the abduction of minors, the courts of the State in which the minor held his/her

usual residence before the illegal transfer or retention maintain their jurisdiction. Article 10 of the regulation provides when a new residence is acquired in the state to which the minor has been transferred. When the minor has resided in the other member states during a minimum period of one year, he/she is integrated in his/her new surroundings and the holder of the custody right has not filed whatsoever claim for his/her return in the term of one year after he/she has learned about the transfer or retention. This was a very young minor and the integration was considered as completed.

If the central authority does not accept the application, the applicant will not benefit from the legal representation provided thereby and if he/she wishes to continue with his/her application, he/she will have to find a lawyer. Article 29 of the Convention provides that the applicant can claim directly before the judicial authorities.

Translation of documents

All requests, notices and other documents sent to the central authority of the required state must be sent in the original language and accompanied by a translation into the official language of the required state or, when it is not easy for the translation to be made, it must be accompanied by a translation into French or English. However, a signatory state may file a reservation in accordance with article 42 and challenge the use of one of these languages or both.

Spain did not file the reservation and therefore accepts applications in both languages. However, 19 countries have filed this reservation and do not accept English or French. In particular, Germany requires foreign documents to be accompanied by a translation into German and Brazil requires the same but into Portuguese.

This means a lot of work for the translation services of the Ministry of Justice, which has officers who translate the applications that are received and sent into and from English and French, except for the applications from Spanish-speaking applicants and applications with Portugal, with which Spain has signed an agreement.

The Ministry of Justice does not have sufficient staff for completing the translations within the reasonable term necessary for the processes to be as fast as required.

This led to the central authorities reaching agreements with certain countries. Accordingly, with the United Kingdom, which does not accept French, and with France, which does not accept English, we send translations in their languages and they send them in Spanish. Holland sends us the applications in Spanish and we send them in English.

With Germany, which only accepts German, and with Brazil, which only accepts Portuguese, the private services of approved translators have to be hired, with the cost this implies, which is why we have decided to proceed on the basis of a principle of reciprocity. We send them our applications translated into their languages and we require them to send them to us in Spanish.

With Belgium, which has not filed a reservation with regard to languages, we have had problems on several occasions. After sending the documents translated into

French, we have been required to send a translation into German owing to the fact that the minor had been abducted to a German-speaking area.

With Poland, which has not filed any reservation with regard to languages, we have also had problems owing to the fact that we are required to send the translations into Polish.

Locating the minor

One of the obligations provided in the Hague Convention is the location of the minors that have been transferred or retained illegally.

In Spain, the central authority resorts to Interpol to locate the minors. Although the results are highly positive and the collaboration of the said office is exemplary, the location often takes too long. It must be understood that these matters are not concerns of public safety and, therefore, cannot be given priority over other situations in which Interpol have to intervene. In addition, the scope of Interpol's intervention is limited, since, as it proceeds as a collaborator of the Spanish central authority, it cannot make certain enquiries without the prior issue of a court warrant (logically, before knowing the exact address of the minors, the claim cannot be filed and, therefore, no judge has been awarded jurisdiction).

Undoubtedly, the existence of national databases (e.g. a register of minors at school) would help locate them quickly. Unfortunately, these registers do not exist in every autonomous community.

The Spanish central authority does not have the powers to find out the location of the minors and, therefore, cannot consult these registers or other files to determine the minors' addresses. It would be advisable for the corresponding powers to be awarded by virtue of a regulation. Having a legal framework that provides the obligation of certain organisations and institutions, such as the municipal census or educational authorities, to collaborate with the central authority would enable the rapid commencement of proceedings and avoid overloading Interpol with the said requests.

Despite this, the local authorities of the small towns and schools have provided their collaboration when so required by the central authority; however, this is not true of the local authorities in large cities.

With regard to the search for minors who have been transferred illegally from Spain to other countries, mainly South America, the Spanish central authority has an agreement with Interpol Spain in which they request the collaboration of their peers to locate the Spanish minors and the agreement is producing very good results.

Representation and defence

Spain has not filed a reservation under article 26 of the convention. Any individual filing an application with the Spanish central authority will obtain immediate assistance without the need for demonstrating that he/she does not have sufficient economic resources.

This representation will not be provided by the same lawyers who represent citizens without resources, i.e. duty solicitors, but rather by state lawyers.

Accordingly, once the central authority accepts an application, it sends all the documentation to the state lawyers of the province in which the minor is located. The "state lawyers" are highly qualified officers who represent the state and defend its interests when the state is a party to judicial proceedings. Accordingly, when they file an application for return or visits with the court, they do so on behalf of the Spanish central authority, the Ministry of Justice, in the defence of the application of an international convention.

The main disadvantage is that the contact between the state lawyer and the applicant is always made through the central authority. The lack of direct communication between the applicant and the state lawyer responsible for processing the case has been criticised. However, the explanation can be found in the fact that the state lawyer does not assume the interests of individuals since their function is to represent the state in the defence of general interests.

The applicant can hire the services of a private lawyer if he/she so wishes. Article 29 of the convention provides that the applicant can claim directly before the judicial authorities. In this case, the central authority declines all responsibility regarding the decision on the case and limits its functions to providing consultancy services.

It is not easy to assess which of these options is more preferable. On the one hand, consideration must be given to the fact that not all Spanish family lawyers are familiar with the convention and, as mentioned earlier, resorting to a private lawyer implies that the central authority declines all responsibility regarding the decision issued on the case.

The remission of the case to the state lawyer is accompanied by a writ issued by the central authority requesting the presentation of the claim before the judge that corresponds to the minor's address. A brief outline of the case is given, with references to the documents on which the claim is based, and the need for being informed about the development of proceedings is pointed out so that the central authority can comply with its duties in accordance with article 7 of the convention. When the application comes from a Community country, express mention is made of articles 2 sections 11 b), 11.4, 11.5 and 11.8 of Regulation 2201/2003 in order to emphasise when it is understood that the custody is exercised jointly, that the return of a minor cannot be rejected on the basis of the provisions of paragraph b) of article 13 of the Hague Convention if it is demonstrated that the appropriate measures have been adopted to guarantee the protection of the minor after his/her return, that the applicant must be given the possibility of a hearing and that the court of origin has the final word.

When so required by the case, in order to prevent the minor from suffering more significant damage, either at the request of the requiring central authority or in our own opinion, the lawyer is required to apply for the internment of the minor in a centre for the protection of minors as part of the claim. This measure is requested only in serious cases and the court usually agrees the corresponding measures.

I would like to point out case H 28 (2160) Italy-Spain, in which the applicant is the social services. They stated that the minor was abducted by his/her mother from the

house in which the minor was located with a foster family. The mother went to the house with an axe and destroyed the door. The mother is in psychiatric care and or proceedings have been started for the crime of the abduction of minors by a perturbed individual. The Italian central authority did not request the adoption of any measures. Based on the obligations imposed thereon by article 7.b) of the convention and in order to prevent the minor from suffering further, the Spanish central authority considered that there may be serious risk or danger for the minor and, accordingly, required the state lawyer to apply for the minor to be interned in a centre for the protection of minors as part of the claim for his/her return during the proceedings. The first-instance court of Madrid rejected the adoption of the said measure.

Throughout the proceedings, the central authority was in direct contact with the state lawyer, who informed it of the situation of the claim. The information was passed on to the requiring central authority.

The Community countries that have filed a reservation under the Convention and, therefore, do not assume the costs of representation and defence except when the said expenses may be covered by the benefit of free justice, are Germany, Bulgaria, Denmark, Slovakia, Finland, Greece, Latvia, Lithuania, Luxembourg, Monaco, Poland, the Czech Republic and Sweden. Thus, for example, in Germany, if the applicant does not have the right to free legal assistance, he/she has to hire the services of the lawyer he/she chooses. If he/she prefers the German central authority to provide a lawyer, he/she has to pay the amount of €1500 in advance for the first instance, €512 for the second instance and possibly another amount for the enforcement (information from the German central authority for the year 2008).

France, the United Kingdom and Holland filed a reservation in the past, but do not apply it today. In France, the applications for visiting rights and for the return of the minor are filed by the solicitors of the Republic, without the need for the applicant to demonstrate his/her income. The United Kingdom does not apply the reservation for return applications, but does apply them for applications for visiting rights. The central authority sends the case to one of the lawyer firms with which it works and the said firms process the procedures for obtaining the public funds that are necessary for each case. After confirming that Spanish lawyers work in one of these firms, in our applications, we require that the case must be sent to them owing to the dual advantage of the language and the knowledge these lawyers have of Spanish and English law. In Holland, the central authority itself files the claims before the court. Occasionally, they proceed as "judge and party". In case H 28 (1242) Spain-Holland, after two returned decisions issued by the courts, the central authority did not want to enforce them. It considered that the father filing the application was not apt for taking care of the minor owing to the fact that he ran a bar. On 03/02/06, the court of The Hague issued a decision criticising the actions taken by the Dutch central authority, stating that the said authority had not taken any action for almost one year. The minor was finally returned to Spain after more than three years.

The Community countries that did not file any reservation are Austria, Slovenia, Hungary, Italy, Ireland, Malta, Portugal and Romania. In Italy, the representation and defence of the applicant are also provided by state lawyers, albeit only in the first instance. Appeals can be filed against the decisions with the Appeals Court, but, as the

state lawyers do not intervene, the applicant has to find a private lawyer. He/she has a term of 60 days after he/she has been notified of the decision.

Competent court

Spain does not merge jurisdiction in the international abduction of minors into a limited number of courts, as recommended by the Hague Conference in its good practice guide. Internal application measures. The main advantage of the said merger is, as provided in the said guide, "the accumulation of experience by the judges that are involved; and, consequently, the development of mutual trust between judges and the authorities in the various legal systems; the creation of a high level of interdisciplinary understanding of the objectives of the convention, especially the distinction of custody proceedings; the reduction of delays and greater coherence in the corresponding practices by judges and legal experts".

Some countries have merged jurisdiction into one single court or into a small number of them. Accordingly, the United Kingdom, the Czech Republic, Romania, Finland, Bulgaria, Germany (in 22 district courts for the first instance and 22 appeals courts), Austria (16 district courts, only return applications, not applications for visiting rights) and France (family judges in the large-instance courts and the jurisdiction of only one court in appeals courts).

In Spain, article 1902 of the Civil Proceedings Act provides that the jurisdiction will fall to the first-instance Judge in whose judicial district the illegally transferred or retained minor is located.

This article has created problems in the past since the central authority proceeds, as we have already stated, through state lawyers, a body of civil officers that represent the Administration in judicial proceedings. In accordance with article 15 of the law on legal assistance for the state and public institutions, the civil proceedings in which the state is a party are only conducted in the first-instance courts that correspond to the capital towns and cities of the corresponding province (52 in Spain). In some cases, the state lawyers filed claims with the first-instance courts corresponding to the capital towns and cities of the corresponding province and the court declared itself incompetent. It was then necessary to file a new claim with the judge of the district in which the child was located. To avoid the delays that were caused by this situation, the state lawyers have been instructed to file the claim with the competent judge by virtue of article 1902 of the Civil Proceedings Act (the judge of the place in which the child is located).

In Spain, there are more than 900 first-instance courts. In view of the high number of courts, it cannot be taken for granted that the judges will have experience in deciding on cases involving the abduction of minors.

It is true that the matters to which The Hague Convention applies arise more frequently in certain geographical areas: the Mediterranean Coast, the Balearic and Canary Islands, Madrid and Barcelona. Therefore, the judges who hold jurisdiction in these territories are usually more familiar with the Convention.

In some provinces, such as Madrid, Malaga, Cantabria and Navarre, the judges themselves, through the distribution rules, have decided that the cases should be

processed in the courts that correspond to the capital town or city of the province, regardless of the place in which the minor resides.

The Spanish central authority considers that it would be appropriate for the jurisdiction to be merged into only a few courts, which could be the provincial courts and one single section and in procedures of one single instance. It has sent the corresponding report to the Minister of Justice.

Procedure

The procedure is regulated by articles 1901 to 1909 of the Civil Proceedings Act of 1881 in the tenor given by Organic Statute 1/96 on the Legal Protection of Minors.

Article 1904 provides that: when the case has been brought by an application including the documentation required by the corresponding international convention, the judge will issue, in the term of 24 hours, a decision in which the individual that has abducted or is retaining the minor will be required, with the corresponding legal summonses, to appear in the court with the minor and declare the following on the date that is determined, which may not exceed the term of the following three days:

a. Whether he/she agrees voluntarily to the return of the minor to the individual, institution or organisation that holds the corresponding custody rights or, if that is not the case,
b. If he/she opposes the return owing to the existence of one of the causes provided in the corresponding convention whose text is attached to the summons.

In this phase, we often encounter surprises, which lead to the abandonment of the claim by the state lawyer in order to avoid the award of costs. We discover that the applicant has proceeded in bad faith and both the requiring authority and the required authority have been deceived. He/she has hidden information, there are decisions in his country subsequent to those that have been provided or that decide on the merits of the case or authorisations to prove the consent for the minor's transfer, proceedings that challenge paternity, etc.

There are many causes, such as the example of case H (1828), in which the applicant hid information. He/she had been divorced in Spain with a lawyer/solicitor and a visiting system had been drawn up prohibiting the minors from leaving the country. There were proceedings involving domestic violence. The parent left Spain and requested the return of the minors.

In another case, H28 (1511) with Germany, the usual residence of the married couple and the minors was Spain, at least since the year 2003, according to the abundance of documentation presented by the respondent. The mother and father were going through a crisis and the father went to Germany and applied for the return.

When the abductor agreed to the voluntary return of the minors, a certificate of this agreement was issued. However, the judge did not have details of how the return should be carried out and the consequences of the breach thereof. As the term in which the minor is to be returned is not ordered, the enforcement has sometimes had to be

requested several months after verifying that the abductor has no intention of returning the minor.

If the abductor does not agree to voluntary return, the proceedings will continue in a verbal hearing. Accordingly:

a. At the same hearing, all the interested parties and the Public Prosecutor will be summonsed to declare what they consider fitting and, where applicable, the evidence is examined at a later hearing held within the term of five days after the first hearing, where the said term cannot be extended.
b. In addition, after the first hearing, the judge will hear the minor separately, where applicable, regarding his/her return and may draw up the reports he/she considers appropriate.

Evidence. Accessing the questioning of the parties

The reason for this section is to point out that certain courts take the abductor's declarations as proven, since he/she is a national of the required country and his/her declarations are taken as valid even though there is no supporting evidence. One example of this is case H 28 (1855) Spain-Norway: The first-instance court of Vestfold rejected the return of the minors to Spain on 13/12/07. The applicant was not summonsed to the hearing and the mother declared that she had been subjected to physical violence by the applicant and to harassment by his family, that the minors lived in intolerable conditions in Spain, that they were frequently ill and behaved abnormally with rage attacks.

An appeal was filed with the second-instance court, to which both parties were summonsed and appeared and the court ordered the return of the minors on 03/07/08 after verifying that the mother's declarations were not objective. The documentation provided showed that the father belonged to a well-off family. The minors studied at expensive private schools, were well integrated and demonstrated affection for their father.

As an example of good practice, I will refer to case H 28 (2016) Italy-Spain, in which the provincial court of Las Palmas, section 3, issued the order for the return to Italy on 09/03/09 after an appeal filed by the state lawyer. The court considered that the appeal was fitting since the main ground, i.e. the father's consent to the transfer of the daughters' residence to Spain, had not been demonstrated in the least. The only evidence of the existence of the said consent comprised the declarations made by the respondent mother and her sister during the hearing. The court referred to the provisions of article 316 of the Proceedings Act on the assessment of the parties' questioning. The said article provides that the party's declarations only provide evidence against the author when they are damaging for him/her. Not the declarations that are in his/her favour. In this case, the respondent had to demonstrate the existence of the consent, not because the proof of a negative fact is diabolical, but rather because she alleges a fact that involves legal consequences and because of the corresponding proof.

Foreign law

Foreign law is not always easy to interpret. As far as our applications are concerned, we do not encounter problems with countries with which we have a common body of written law: the Roman law systems, such as France, Italy, Portugal and Belgium. The main problems arise with Germany and Holland, which occasionally confuse the institution of patria potestas with custody or fail to understand that the exercise of patria potestas is shared between both parents, regardless of whether or not they are married. Article 39 of the Spanish Constitution guarantees the social, economic and legal protection of the family in its twin facet of law and institutional guarantee. This article does not prejudge or describe the constitutionally protected family model. Family and marriage are not two coincidental realities. The former is a broader institution than the latter, such that the matrimonial family is not the only family constitutionally recognised by fundamental law. This statement, which has been reiterated by the Constitutional Court on more than one occasion, is also the logical result of other constitutional provisions that guarantee personal freedom and non-discrimination, such as article 10.1, which proclaims personal dignity and the free development of personality as the basis of political order and social rest, or article 14, which provides the principle of equality in law and in the application of the law.

Urgency

Both the Convention and the Regulation provide that the jurisdictional body must act urgently and issue its decision within a maximum term of six weeks after the claim has been filed. In our experience and except for only a few cases, this term is never observed.

Article 7.c of the Convention provides that the central authorities must adopt, in particular, whether directly or through an intermediary, all the appropriate measures for guaranteeing the voluntary return of the minor or finding an amicable solution. It is not my intention to criticise the use of mediation for solving conflicts, but rather to point out certain authorities that spend too much time looking for an amicable solution that is never found. In case H 28 (1788) Spain-Holland, the Dutch central authority took 7 months to file a claim, despite it having been required insistently to do so and that the applicant did not want to continue mediation in view of the refusal of the mother who had abducted the child to reach an agreement. In case H 28 (2047) Spain-Germany, the father filing the application had been awarded custody by a judicial decision and the mother had been awarded visiting rights. The minor travelled to Germany to visit her mother and was retained there. After the hearing, the court delayed the date for issuing its decision on four occasions. The applicant was given the proposal to mediate in Germany at weekends with a cost of €2500 per parent. The applicant required the return of the minor and was in favour of the mediation taking place in Spain.

If the decision is to be issued urgently, the return must also be made urgently. In case H 28 (1788) Spain-Holland, the application for the return of the minor was sent on 01/06/07. The court issued its decision on 28/02/08 (i.e. 9 months later). The court ordered the return and ordered that it was to take place 8 weeks later during the school holidays. It did not think that it was violating the Convention.

Return order

The Hague Conference has said that the obligation provided in the Convention is not simply to order the return, but for it to be carried out and for it to be carried out in a reasonable term. Accordingly, it recommends that, when training judges to exercise their functions, the states should insist on the importance of the judge hearing the case being capable of issuing clear orders that take into account practical issues, the precise details of how the return is to be carried out and the consequences of the violation thereof.

In Spain, the courts never indicate the date, form and place for the return of the minor in the writs that order the return. Furthermore, they generally fail to point out the consequences of the violation of the order, which implies a great number of practical problems for the delivery.

In Spain, the return orders are not directly enforceable. The general term of 20 days is awarded for voluntary fulfilment and, if it does not take place, enforcement procedures must be started, which gives rise to a new source of delays. For his/her part, the respondent can oppose the enforcement and, on occasions, his/her opposition is successful.

The Spanish central authority has no jurisdiction during the enforcement phase other than applying for it through the state lawyer and acting as a party before the court in the enforcement proceedings.

In other jurisdictions, the enforcement is possible due to the threat of a coercive penalty, an arrest warrant or authorisation for the use of force. In many jurisdictions, the court can order the issue of an arrest warrant or the detention of the minor. For example, Rumania established the term in which the minor was to be returned in case H 28 (2041) as 3 months from when the decision was final and, in case H 28 (1867) as 30 days from when the decision was final or the penalty would be the application of a fine.

Certain courts involve the parties in the details of the return. They examine the commitments accepted by the claimant to reduce any effects on the minors as far as possible. They also issue provisions to ensure that the person responsible for the abduction cannot disappear with the minor between the date of the order and the date of the return. Or they provide penalties to discourage the violation of a return order, such as penalties for contempt of court, fines or imprisonment.

Of the countries that indicate the details of how the return must be carried out, special mention must be made of the United Kingdom and Australia.

In the case of Australia, this can be seen in the example of case H 28 (2069), a decision issued by the Family Court of Australia in Sydney on 20/01/09.

The order provided that the parties must reach the necessary agreements for the minors to be returned to Spain accompanied by their father or mother. If the mother who had abducted the children returned with them, she had to do so within the term of 14 days after the date of the order, booking and paying for the plane tickets for herself and the children and the date for leaving Sydney could not be prior to 21 days after the date of the order. The mother had to supply a copy of the route to the central authority within the term of three days after she had made the booking.

If the mother failed to return with the children, she had to comply with the above obligations but she had to pay the ticket for the father. If they failed to reach an agreement on the departure date, the father would indicate the date in the term of seven days after the order.

The order stated that the passports of the mother and the minors had to be handed over to the representative of the central authority. The central authority's representative would then give them to the mother three days before the scheduled departure date. The order also stated that the order had to be notified to the police, that the prohibition of leaving the country had to be lifted and the names of the interested parties had to be removed from the alert systems.

In the return orders issued in the United Kingdom, besides giving details of the date, time, place and manner in which the minor has to be returned in a similar way to Australia, they also include the undertakings assumed by the claimant or the parties. As the said undertakings are included in the order itself, they are binding and enforceable.

A good example is case H 28 (2104), a Decision issued by the High Court of Justice, Family Division on 05/03/09, where the order was issued for the minor to be returned to Spain before 16:00 on 1 April 2009, which would be carried out by the respondent mother unless she refused to accompany a minor, in which case the minor would return with the claimant father or any other relative appointed thereby. If the order was not obeyed, the respondent would be accused of contempt of court and could be sent to prison.

If the respondent decided to accompany the minor on his/her return to Spain, she had to ensure that, at least 48 hours before abandoning the jurisdiction, she would inform the claimant and his lawyer of the place in which she and the minor would reside in Spain and that they would not change their address until the first inter parties hearing.

List of undertakings for the claimant:

- He would not start, maintain or continue any criminal action against the respondent with regard to the illegal transfer.
- After the return of the minor to Spain, he would not remove the minor from the care of the mother until the matter was heard by the competent court in an inter parties hearing and the court had issued its decision.

- The father would supply accommodation for the mother and the minor, initially in the house owned by the claimant's family and later in accommodation agreed by and between the parties, in which the respondent could live alone and without interference, as well as €100 a week for the minor's alimony until the competent court issued its decision on the matter.

- He would pay the air tickets for the return of the mother and the minor.

However, in another case, H 28 (1887) Spain-United Kingdom, the High Court of Justice issued its decision on 09/04/08, ordering the return of the minor, where the mother had to return the minor to Spain on the date and under the conditions determined by the Spanish court of Tenerife (before which proceedings for the

regulation of measures concerning children born out of wedlock was being processed). This came as a big surprise since, as clearly indicated by the Guide of Good Practices II, the court should not only order the return, but also carry it out. The Spanish court did not consider it acceptable owing to the lack of proceedings in our law. Finally, the Spanish court required the English decision to be certified in accordance with Annex II of Regulation 2201/2003.

Rejection of return

- **Article 12 of the convention: calculation of the term of one year**

Article 12 of the Convention provides that, "when a minor has been transferred or retained illegally and when, on the date on which the proceedings begin before the judicial or administrative authority of the signatory state in which the minor is located, a period of less than one year has lapsed from the moment when the illegal transfer or retention took place, the competent authority must order the immediate return of the minor.

After the term of one year, the judge must also order the return of the minor, unless it is demonstrated that the minor has integrated into his/her new surroundings.

How is the term of one year calculated in Spain? Minor case law has preferred to understand that the *dies a quo* begins on the date on which the transfer took place. In the case of retention, the date will be that on which it began to be illegal, in other words, the moment when the minor should have been returned. With regard to the *dies ad quem*, the date for calculating the term is not that on which the requirement for intervention is sent to the central authority, but rather that on which the proceedings begin before the authority that is to order the return of the minor. Therefore, in our country, as it is a judicial authority and not an administrative authority, the date on which the claim is filed applies.

The term of one year is calculated rigorously and no interruption for whatsoever cause is accepted. The decisive element is not that the reasons for the delay of the processing of the application are more or less justified, such as the delay in locating the minor, but rather the fact that the minor has been in the situation the application is trying to change for more than one year, with the consequent material possibilities of integration.

After the term of one year, only very few decisions order the return of the minor based on his/her integration in his/her new surroundings.

Certain courts distinguish between integration and adaptation to the new surroundings, considering that integration is a broader concept and involves more factors that are to be taken into account than the mere adaptation of the minor to the new circumstances. Rootage goes beyond the minor going to school, which in Spain is mandatory, or the learning of the language, given the great capacity minor show for adapting to new situations. The judge must assess what the minor has left behind, a matter that is not easy as there are usually insufficient elements on which to base the decision. However, in principle, he/she leaves behind a parent, grandparents, cousins, school friends, neighbourhood friends, customs and a way of life, etc.

In addition, the situation of rootage should be analysed on the date on which the claim for the return is filed and not when the decision on the proceedings is issued, since the delays in the judicial or administrative procedure always benefit the non-return.

With regard to illegal retention, I would like to highlight the problems that occur in some cases, especially in the countries of South America. The parents sign an agreement, formally documented, which provides that the minors will live in Spain with one of the parents during the term of one year and, on occasions, during a term of up to 2 years. At the end of the said term, the minors must return to the country of origin.

After the agreed term, the parent with whom the minors live refuses to return the minors. Article 3 of the Convention provides that the retention of a minor will be considered illegal in accordance with the law in effect in the state in which the minor held his/her usual residence immediately prior to his/her retention. What is the usual residence? How should the term of one year be calculated as provided in article 12 and when should it be considered that there is an exception to the return owing to integration in the new surroundings? How should we understand that the parent who has been left behind effectively exercises his/her custody?

When the minors are of sufficient age, their examination can clear any doubts, since article 13 of the Convention allows the judge to refuse the return if he/she confirms that the minor himself/herself opposes it. The problem arises with minors of a younger age. The courts have refused the return on the basis of article 13b of the Convention by considering that the return would expose the minor to serious physical or mental danger by separating him/her from the parents, usually the mother, with whom he/she has lived for most of his/her life.

Another problem that arises is the determination of the usual residence of the minors that are less than one year old. In our experience as both the requiring authority and the required authority, no minor of less than one year old who has been abducted by the mother has ever been returned.

- **Article 13b) of the convention and the amendments made by Regulation 2201/2003:**

The Convention provides that there is no obligation to order the return of the minor if the individual, institution or other organisation that opposes his/her return demonstrates that:

b) there is a serious risk of the return of the minor exposing him/her to serious physical or mental danger or that the return would place the minor in an intolerable situation in any other way.

Article 10.4 of Regulation 2201/2003 provides that the jurisdictional bodies may not refuse the return of a minor on the basis of the provisions of paragraph b) of article 13 of the Hague Convention of 1980 if it is demonstrated that appropriate measures have been adopted to guarantee the protection of the minor after his/her return.

It must be understood that if the authorities of the state of residence keep their jurisdiction for the matter of parental responsibility, they also keep it to adopt, where

applicable, the measures that protect the minor in the event of his/her return. It is not possible to suspect that they will not do so or that they will do so inefficiently. In the Community climate of mutual trust, the argument of the serious risk affecting the minor loses strength and the return is ordered.

However, the interpretation of this article also includes problems. What are appropriate measures? Should the measures that are to be adopted be specified or is the generic declaration of the central authority stating that the appropriate measures will be adopted sufficient?

In cases H 28 (1827) Germany-Spain, an application was filed for the return of minors transferred to Spain by their mother. At the time, the parents were involved in divorce proceedings in which the measures that correspond to the children had not been decided.

In the preliminary hearing that took place in Spain, the respondent provided a great deal of documentation to prove that the proceedings were taking place as a result of domestic violence, that she lived with her daughters in a home for abused women, that she did not have sufficient resources due to the fact that she had been dismissed by her husband from the company in which she worked, that she received social benefits. She also presented reports on the minors, who did not want to see their father, declarations stating that the husband harassed her by waiting for her to leave the home in which she lived, etc. The Spanish central authorities sent all the documentation to the German central authority, collecting information and confirming what had been provided and requiring the German authorities, in accordance with the provisions of article 11.4 of Regulation 2201/2003, to inform us of the measures that had been adopted to guarantee the protection of the minors after their return in order to prevent a decision of rejection based on article 13b) of the Hague Convention.

After several requirements, Germany sent a certificate as per article 15 of the Hague Convention stating that the transfer had been illegal.

After new requirements, the German central authority sent a fax with a generic statement indicating that the corresponding measures would be adopted. The state lawyer issued a full report of the case to the Spanish central authority, requiring the provision of all the necessary documentation and information, as well as the specific measures that would be adopted by the competent services to appropriately guarantee the protection of the minors after their return. The report stated that, in Spain, protection measures had been adopted and a restriction order had been issued. If the required documentation were not received, it was suggested that the Spanish central authority should issue its approval for abandoning the return proceedings.

Germany offered the mother the possibility of living in another home if she did not want to return to the home in which she was living.

The court rejected the return on the grounds of article 13b of the Convention. In Germany, the divorce proceedings continued and the mother was represented by a lawyer.

Hearing the applicant

As we have already stated, the Spanish central authority emphasises the need for hearing the applicant. This is provided in the writ for the remission of the case to the state lawyer and, after the preliminary hearing in which the abductor opposes the return, it is necessary to indicate the date of the hearing.

In general, the knowledge of the fact that it is a requirement that must be met is becoming more and more widespread. The summons of the applicant is normally made through the central authorities in Spain and in other countries; however, the courts occasionally summons the applicant directly or occasionally use the Community notification regulation.

Here, I provide three cases with different solutions ordered in our country.

- The writ issued by the provincial Court of Almería, section 2 on 12/01/2009, when deciding on the appeal against the writ of the first-instance court that rejected the return of the minors, ordered the following:

As the appellant, the Ministry of Justice, represented and directed by the state lawyer, claimed the nullity of the proceedings in the case as from the moment of the violation of the provisions of article 11.5 of Regulation 2201/2003, owing to the fact that the individual who filed the application for the return had not been given the possibility of being heard.

"The applicant for the return of the minor cannot be confused with the representation of the central authority that received the application and that now presents it to the court, i.e. the state lawyer. This possibility can be observed in the scope of this Regulation without it being damaging for the necessary speed and flexibility in the processing of the application..., whereby the father of the minors could easily be summonsed by direct notice from the court of his residence to enable the possibility of him being heard..."

The appeal was accepted and the decision of the instance court was declared null and void, where the proceedings had to be returned to the hearing to give the father of the minors the opportunity to be heard.

- The writ issued by the provincial Court of Cantabria on 31/03/2009, when deciding on the appeal against the writ of the first-instance court that refused the return of the minors, ordered the following:

"It is also alleged that the father of the minor has suffered from defencelessness as he has not had the opportunity to be heard; which must be rejected from the moment when the Spanish administration acts in these proceedings on behalf of the central authority and the applicant, as indicated in its statement of claims, whereby it can only be understood that the father and party initially bringing the case has had the occasion and opportunity to reasonably know its status and appear personally to be heard if he had considered it appropriate, without the need for any notice or summons beyond those sent to the state lawyer taking part.

- In case H 28 (1924), in which the Czech Republic was the requiring state, the judge of first-instance court No. 7 of Lerida indicated in the order of 22/09/08 the

following: That, given the speed required by legislation in these matters and taking into account that there is direct communication between the Spanish state and the party bringing the case, the summons by this Court is not applicable owing to the fact that it would represent an extreme delay to the decision issued thereby, without prejudice to the state lawyer proceeding on behalf of the claimant ensuring the participation thereof in the hearing.

The court subsequently required the provision of a justification of the notice served to the claimant so that he/she could appear for the intents and purposes of article 11.5 of Regulation 2201/2003.

Accordingly, in this case, the summons was issued through the central authorities. After the claimant had responded that the attendance at the hearing would cost an amount of money that he/she did not have, the court agreed, in order to guarantee the right to being heard, that the applicant could make the declarations he/she considered appropriate in writing and gave him/her the term of one month to do so. It also ordered that the new elements incorporated into the proceedings, such as the declarations made by the respondent, the conclusions drawn from the report that was issued at the Public Prosecutor's request by the competent services of Catalonia on the integration of the minor and a copy of the report the respondent filed with the Department for the Protection of Minors in her country (Czech Republic) should be sent to him.

Appeal and provisional enforcement

Article 1908 of the Civil Proceedings Act provides that, against the order in favour or against the return, only one appeal may be made. In other words, even though the decision is not final, it may be provisionally enforced.

Almost no country enforces the decision that orders the return of the minor when an appeal has been filed against it. In some countries, the possibility of appealing to the Supreme Court, such as in Germany, Argentina and Chile, causes excessive delays to the decision of the cases.

In Spain, the provisional enforcement has given rise to problems when the final decision has revoked that issued by the instance court, rejecting the return, and the minor has already been returned. The fact that the appeal does not suspend the enforcement can lead to constitutional difficulties if the appeal is successful.

The principle of effective protection not only contains the right to obtain a decision based on reasonable grounds, but also the enforcement of the decision when it is final. The Constitutional Court has repeatedly declared that the right to the enforcement of the decisions in their own terms is part of article 24-1 of the Spanish Constitution (decision 148/89). If this were not the case, the judicial decisions and rights recognised thereby would simply be declarations of intent with no practical scope or effectiveness whatsoever (decision 167/87). Similarly, decisions 152/90, 35/94, /98, among many others.

In case H 28 (1602) UK-Spain, the father filing the application, who held visiting rights, required the return of the minor. The first-instance court of Málaga ordered the return of the minor to the United Kingdom. The mother, who held custody rights, refused to return the minor and filed an appeal. The return order was enforced provisionally. The

father came to Spain and the minor was returned. When deciding on the appeal on 11/09/07, the provincial Court of Málaga rejected the return of the minor. The final decision was therefore the rejection of the return. In this case, do sections 6, 7 and 8 of article 11 of Regulation 2201/2003 apply?

Appeals and Regulation 2201/2003

Regulation 2201/2003 provides that, when a member state to which the minor has been transferred or in which he/she is being retained illegally issues a decision rejecting the return, the decision must be reviewed by the member states in which the minor held his/her usual residence before the illegal transfer or retention. If the latter state issues a decision ordering the return of the minor, it will be enforceable without the need for whatsoever proceedings.

The Spanish central authority considers that there is no point in processing appeals when the member state in which the minor held his/her usual residence before the illegal transfer or retention has the final word. The appeal, which in some cases can take more than one year, only produces a delay in the time before the minor is returned, which is evidently against the minor's own interests.

In article 1322.6 of its judicial code, Belgium provides that no appeal may be filed against the decision issued in Belgium against the return of a minor in accordance with article 13 of the Convention.

Remission of the documentation in the case of the rejection of a return in accordance with article 13 of the Convention

Article 11.6 provides that a copy of the judicial decision rejecting the return and the corresponding documents, especially the certificate of the hearing, must be sent immediately to the competent jurisdictional body or the central authority of the member state in which the minor held his/her usual residence immediately before his/her illegal transfer or retention either directly or by means of the corresponding central authority, in accordance with the provisions of national legislation. The jurisdictional body.

Normally, the documents are sent through the central authorities. One example of this is the writ of the provincial Court of Santa Cruz de Tenerife of 18/09/2006: "In accordance with the provisions of article 11.6 of Regulation (EC) No. 2201/2003, a copy of this decision, of the hearing of 25/01/2006, of the certificate of the hearing held on 20 February 2006, in which the father of the child, Luis Manuel, was heard and a copy of the documents provided at the said hearing by the lawyer of Ms Elisa must be sent to the central authority of the United Kingdom by means of the Spanish central authority. All the foregoing documentation must be delivered to the state lawyer for the intents and purposes of its transfer to the central authority of the United Kingdom".

In some cases, the Court sends the documentation directly to the competent court, but the Spanish central authority is not informed, which is why we also require the documentation to be sent to us.

The jurisdictional body must receive all the documentation in the term of one month. In most cases, this term is not met by Spain or by other countries, but there are

exceptions. In our case, we require the state lawyer to send the said documentation on several occasions.

The aforementioned documentation is sent and translated. Except in special cases, the countries send it in the language in which they were issued.

When the Spanish central authority receives decisions refusing the return, it sends them to the applicant and to the court it considers competent. On one single occasion, the court responded by alleging that it was not competent and that it would send the documentation to the senior court.

In my opinion, Spain needs to issue rules of application for this regulation. I consider article 1210.6 of the Civil Procedural Code of France particularly interesting when it provides that: The decision rejecting the return of a minor issued abroad, as well as the corresponding documents, once sent to the French central authority in accordance with section 6 of article 11 of Regulation (EC) of the Council No. 2201/2003, dated 27 November 2003, on the jurisdiction, recognition and enforcement of decisions in matrimonial matters and parental responsibility, must be sent to the public prosecutor of the Large-Instance courts as provided in article 1210-4, which holds territorial jurisdiction by virtue of article L. 312-1-1 of the judicial organisation Code, which shall open the corresponding proceedings before the family judge by means of the corresponding application.

Without prejudice to the provisions of articles 100 and 101 of this code, the other family judges that were hearing the same litigation or associated litigations must declare their incompetence in favour of the former.

Article 55 of Regulation 2201/2003 Cooperation in cases that are specifically related to parental responsibility

The Spanish central authority has received 43 applications based on this article, requiring information on the situation of the minor, the recognition and enforcement of decisions, the provision of communications between jurisdictional bodies, especially for the application of sections 6 and 7 of article 11 and article 15, and the application of article 56 by the corresponding jurisdictional bodies.

Recognition and enforcement of judicial decisions in accordance with Regulation 2201/2003

The Spanish central authority has no intervention except that of providing consultancy services and information.