

EXECUTIVE SUMMARY

of the

SPANISH

BEST PRACTICE TOOL

for the Recognition and Enforceability
of Mediated Agreements in the EU
(Relocation Agreement)



This project was funded by the European Union's Justice Program (2014-2020)

Spain - Best Practice Tool for the Recognition and Enforceability of Family Law Agreements Involving Children within the European Union

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Executive summary



Step 1

Spain

Executive summary - International Relocation Agreement

(For details please consult Spanish National Best Practice Tool)

International relocation case inside the EU: The unmarried parents of a child (age: 10 years) who habitually reside in Spain split up. The parents, who have joint custody of their child, agree that child mother will relocate together from EU State A to EU State B; the father, who will remain in State A, will have personal contact with the child every fourth weekend and during school holidays; the father will pay a monthly child maintenance of 200 EUR to the mother. They set up a detailed agreement in writing. No legal proceedings are yet pending between the parents.

Step I: EU / international legal framework needs to be analysed to identify in which country the family agreement should first be rendered legally binding and enforceable to make best use of the mechanism of cross-border recognition and enforcement of EU / international law.

For relocation agreements such as the agreement in the above case, dealing with matters of parental responsibility the best “starting point jurisdiction” is the **State of habitual residence of the child** at the moment the agreement is rendered legally binding and enforceable. Hence, where the parents want to render the agreement legally binding before the relocation, the best “starting point jurisdiction” would be the State where the child currently lives (Spain).



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Step 2

Step 2: Using the national law options under Spanish law to render the family agreement legally binding in Spain

Option 1

Under Spanish law the parents have to file a legal proceeding to render the agreement legally binding and enforceable (only is possible Method A, see Spanish Best Practice Tool).

We can distinguish two situations:

(1) If it is a married couple:

In the case of family crises where divorce or legal separation proceedings are filed -proceeding by mutual agreement or consensual separation or divorce- if the parties have found an agreement out of court and they want to render it legally binding and enforceable: the court -subject to a report from the Public Prosecutor's Office - will homologated the settlement agreement if it is according with the best interest of the child and will issue a ruling that will bring the judicial process to an end.

(2) If it is an unmarried couple:

In the cases of unmarried couple the LEC, Book IV Title I of the LEC (Civil Procedural Act), in particular, these cases are included in Article 748.4 which refers to proceedings: "which deal exclusively with the custody of children who are minors or with maintenance claimed by one parent against the other on behalf of the minor children".

The parties have to submit the agreement to the Court who will homologated it if considers that the agreement is according with the best interest of the child. The Court will incorporated the agreement into a court decision.

Which local court or other authority is competent:

(1) Married couple:

In relation to territorial competence, the following will be competent to hear all the matters listed above, under Article 769.1 of the LEC:

1st) The Court of First Instance of the place of the marital home. If they reside in different judicial districts, the jurisdiction shall be, at the choice of the plaintiff, that of the last domicile of the marriage or that of the residence of the defendant.

2nd) If the proceedings are by mutual agreement, the court of the last common domicile or that of the domicile of any of the applicants will be competent (Article 769.2 LEC).

(2) Unmarried couple:

In relation to - parental responsibility - custody and access rights - and obviously in this case a matter of a request for relocation of a child is being dealt with - or - maintenance claimed by one parent against the other on behalf of the children the following courts will be competent:

The Court of First Instance of the place of the last common residence of the parents. In the case of residing in different judicial districts, the competent court will be the court of the domicile of the defendant¹ or of the residence of the minor, at the choice of the plaintiff (Article 769.3 LEC)².

¹ In relation with the concept of domicile see article 40 Cc.

² For the interpretation of this provision, see Supreme Court Judgment (1st Chamber) of 16 October 2012. Interpretation of Article 769.3 of the LEC, and the Supreme Court favouring the competence of the place of habitual residence of the child in the interest of the child.

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Representation by attorneys mandatory?

The following rules apply to the processes referred Book IV, Title I, Chapter IV of the LEC (Civil Procedure Act) (*Matrimonial Proceedings and Proceedings relating to Minors*), include parental responsibility - custody and access rights - child support:

- The involvement of the Public Prosecutor's Office is mandatory whenever there are minors in the proceedings, 749.2 LEC.
- The parties must be assisted by a lawyer and a solicitor (Article 750.1 LEC).
- The process is mandatory (Article 751 LEC).
- With regard to evidence, procedural preclusion does not apply, i.e. the proceedings will be decided on the basis of facts discussed that are proven, irrespective of the time when they were alleged or introduced into the proceedings (Article 752 LEC).

Are there other participants obligatory?

The involvement of the Public Prosecutor's Office is mandatory whenever there are minors in the proceedings, 749.2 LEC.

Time required

It is not easy to predict the approximate time for obtaining an enforceable court decision, but it may be possible to obtain a court order in: Consensual process (mutual agreement): less than 3 months in the 64,7 the cases; from 3 to 5 months in the 22.9 of the cases; from 6 to 11 months in the 9.4 of the cases; more than 12 months in the 3.1 of the cases. Always depending on the caseload of the competent Court³.

Costs incurred

In relation with the legal fees may vary depending on the appointed lawyer and the attorney fees. A judicial fee is not required⁴.

³ https://www.ine.es/en/infografias/infografia_divorcios_en.pdf

⁴ Real Decreto-ley 3/2013 de 22 de febrero por el que se modifica el régimen de las tasas en el ámbito de la Administración de Justicia y el sistema de Asistencia Jurídica Gratuita, BOE núm., 47 de 23 de febrero 2013.





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Step 3

Step 3: Making (the content of) the agreement, which is now enforceable in Spain travel cross-border with the assistance of EU law and guaranteeing enforceability in EU State B (not Denmark)

In relation with situation (1) and (2) the Court which has documented the maintenance obligation as court settlement will have to fill in the Annex I of the Maintenance Regulation.

Under the Spanish law in the situation described above the proceedings end with a judicial decision, Option 1, (it is compulsory when there are minors that the Court homologate the agreement). Method A.

Brussels II (bis) and Maintenance Regulation will be applied.

In situation (1) married couple will be required:

Brussels II (bis) Article 39 Annex I (matrimonial status)

Brussels II (bis) Article 39 Annex II (parental Responsibility)

Maintenance Regulation 4/2009 Article 20 Annex I (maintenance)

In situation (2) unmarried couple will be required:

Brussels II (bis) Article 39 Annex II (parental responsibility)

Brussels II (bis) Article 41 Annex III, (access to the child)

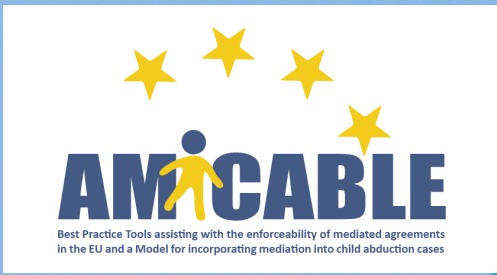
Maintenance Regulation 4/2009 Article 20 Annex I (maintenance)

In relation with situation (1) and (2) for certificates of matrimonial status and parental responsibility [Annex I and II Brussels II (bis)] the Court Clerck (Letrado de la Administración de Justicia) will have to fill both. For access right, the judge will have to fill the Annex III⁵.

⁵ Disposición final vigésimo segunda de la LEC (Civil Procedure Act):

1. The certificate concerning judgments in matrimonial matters and in matters of parental responsibility, provided for in Article 39 of Regulation (EC) No 2201/2003, shall be issued by the court clerk separately and by means of a form set out in Annexes I and II to that Regulation.

2. The judicial certificate concerning judgments on rights of access provided for in Article 41(1) of Regulation (EC) No 2201/2003 shall be issued by the judge separately and by order, using the form set out in Annex III to that Regulation.



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(Return Agreement)



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Step 1

Spain

Executive summary - International Abduction Case – return agreement

(For details please consult the Spanish National Best Practice Tool)

International child abduction inside the EU: The unmarried parents of a child (age: 10 years) who habitually reside in State B split up. They have joint custody of their child. Against the wish of the father, the mother takes the child to her home-country, Spain, with the intention to settle there. Since the mother does not return the child voluntarily, the father applies for the return of the child under the 1980 Hague Child Abduction Convention to the competent court in Spain.

In parallel to the Hague return proceedings, the parents follow specialised mediation and come to a return agreement, which regulates the following main aspects:

- Mother and child will return to State B (details given, including the modalities of the return and cost payment)
- The parents will continue to exercise the rights of custody jointly.
- The child will live with the mother in State B; father and child will maintain regular contact (details given).
- The father will pay a fixed amount of child maintenance on a monthly basis (details given).

Step I: EU / international legal framework needs to be analysed to identify in which country the family agreement should first be rendered legally binding and enforceable to make best use of the mechanism of cross-border recognition and enforcement of EU / international law.

In international child abduction cases **special rules on international jurisdiction apply for matters of parental responsibility** in accordance with Art. 10 Brussels IIa Regulation (equivalent to Art. 7 of the 1996 Hague Child Protection Convention). These rules preserve the international jurisdiction of the authorities in the State of the child's habitual residence *ante* abduction (= State B). In addition, Art. 16 of the 1980 Hague Child Abduction Convention blocks jurisdiction for custody proceedings in the

State to which the child has been taken (=State A) as soon as a judicial or administrative authority in this State informed of the abduction and until it has been determined that the child is not to be returned or no return application is lodged within a responsible time. This ensemble of rules aims to protect the children affected by international child abduction. The provisions are premised on the notion that the most appropriate forum to determine the long-term merits of custody is usually the State of the habitual residence of the child (=State B) (see Art 8 Brussels IIa Regulation) and that the child's removal or retention by one parent in breach of the other parent's custody rights should not bring about a change of jurisdiction and provide procedural advantages for the taking parent.

Consequently, one might be tempted to simply re-

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fer the parties to the authorities of State B in order to render their return-agreement enforceable, since the authorities in State A (Spain) lack international jurisdiction on the merits of custody. However, this can cause **major inconveniences in practice**: Time is of the essence in international child abduction cases, therefore the court seized with Hague return proceedings in State A is under the legal obligation to decide swiftly (six-weeks-time-frame imposed by Art. 11(3) Brussels IIa Regulation). The authorities in State B are under no such obligation when being asked to render the parental agreement enforceable. For the parties who have negotiated a return agreement it will be **crucial to avoid partial binding force of the agreement**. Where the Hague return proceedings end with a return order while the agreed conditions to the return and the agreed custody and contact arrangement following the return are not yet binding, we have a de facto partial validity of the agreement which is likely to be a source for new conflicts. Even where the authorities in State B are ready to act swiftly and render the return agreement legally binding within the time frame the Hague court has to act, difficulties may arise, where the authorities of State B request the presence of the abducting parent and / or wish to interview the child.

Specialised judges have over the past decades developed **good practices and tools (such as direct judicial communications)** to assist the parties in upholding the amicable solution of their dispute. In practice, it is often thanks to personal engagement of Hague judges and the efforts undertaken by specialised judges in the Hague International Network of Judges as well as the European Judicial Network, that practical solutions can be found to bring about a binding force of agreed solutions despite challenges imposed by the legal systems involved. The promoted way forward is twofold and can be summarised as follows: (1) Giving the return agreement in front of the Hague court (State A) binding force to the maximum extent feasible and (2) doing everything feasible to obtain binding force for the remainder of the agreement as speedily as possible in the State B, ideally before the Hague proceedings are terminated in State A.

For proceedings commenced on or after 1 August 2022, the new Brussels IIa (recast) Regulation will remedy the above described dilemma: In cases of wrongful removal or retention the international jurisdiction can be prorogated in line with Article 10 of the new Regulation, see Article 9 of the Brussels IIa (recast) Regulation. In its Recital 22 the new Regulation furthermore encourages Member States with concentrated jurisdiction to “consider enabling the court seized with the return application under the 1980 Hague Convention to exercise also the jurisdiction agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility where agreement of the parties was reached in the course of the return proceedings. Such agreements should include agreements both on the return and the non-return of the child. If non-return is agreed, the child should remain in the Member State of the new habitual residence and jurisdiction for any future custody proceedings there should be determined on the basis of the new habitual residence of the child.”

The following summary of national law will address the legal situation under the current Brussel IIa Regulation but will also be most useful to assist in cases under the new Brussels IIa (recast) Regulation since it will highlight what competencies the court seized with Hague return proceedings has under national law to render agreements on matters usually contained in typical return agreements legally binding and enforceable.

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Step 2

Step 2: How can the court seized with Hague return proceedings in Spain assist with rendering the return agreement legally binding and enforceable? Can the judge seized with Hague return proceedings render all parts of the return agreement for which international jurisdiction is given in State A legally binding? What can the judge seized with Hague return proceedings do to assist with rendering the remainder of the agreement binding in State B?

(1) *Which local court has jurisdiction for Hague return proceedings and is there specialised / concentrated jurisdiction for Hague cases?*

The Court of First Instance of the capital of the province, Ceuta or Melilla, with competence in family law matters, will have competent jurisdiction, in the district where the child who has been the object of an illicit transfer or retention is located, if any, and, in the absence of such a court, to which it corresponds by the rota system (article 778 quater Civil Procedure Act).

(2) *Does national Spanish procedural law allow the Hague judge to render all parts for which international jurisdiction could be assumed in State A (return & modalities of return etc & possibly maintenance matters) legally binding and also enforceable?*

It is true that the wording of Article 778.12 (quinquies) Civil Procedure Act is open in the sense that it does not delimit the subject-matter of the mediation and consequently does not limit the enforcement of possible agreements reached.

But what appears clear is that the Spanish Court, as the authority that is hearing the return, has the competence to approve any agreement that the parties have agreed to establish: details of the return (day, hour etc.), modes of return of the child, payment of the return trip, who accompanies the child etc. (Article 778.9 quinquies and paragraph 10). Thus, the Spanish authority in its return decision may approve that part of the agreement concerning: the form and the time limit for enforcement, being able to adopt the necessary measures

to avoid a new illicit retention or transfer of the child after the notification of the judgment.

a. *Is representation by lawyers mandatory?*

Representation by lawyers is required.

b. *Are there other participants obligatory?*

Public Prosecutor.

c. *How about hearing the child?*

The child generally has to be heard by the judge before a court decision is rendered. The court, in accordance with various articles of the Civil Procedure Act and the Civil Code will hear the minor, depending on his or her age and degree of maturity, although, as in the case of the abduction, the Court may request that this be done by videoconference (its use in cases of abduction is expressly envisaged in Article 778.8 quinquies)¹.

(3) *What options has the judge seized with Hague return proceedings in line with national procedural law to assist the parties in obtaining binding legal force to the remainder of their agreement in State B (direct judicial communications etc.)?*

The judge competent for the Hague return proceedings can contact a Spanish Network Judge either in the Hague Network of Judges or in the European Judicial Network or to the Central Authorities (article 778.7 quater Civil Procedure Act).

The judge will forward any questions concerning foreign law to the counterpart in the State of habitual residence of the child. The Network Judges can also liaise direct judicial communication between the judges in both States involved.

There are lot of information made by the Consejo General del Poder Judicial in relation with the Network Judge².

¹ In the examination of the child, it shall be ensured that the child can be heard in conditions suitable for safeguarding his or her interests, without interference from other persons, and exceptionally with the assistance of specialists where necessary. This action may be carried out through videoconference or other similar system.

² <http://www.poderjudicial.es/cgpj/es/Temas/Redes-Judiciales/Red-Judicial-Espanola---REJUE/>

Change of perspective – Assuming the child had been taken to State B and Spain would be the State of return

Hague return proceedings are ongoing in State B, how can the parts of the return agreement on custody and contact, for which international jurisdiction remains in Spain be rendered legally binding and enforceable in the swiftest way possible, ideally before the Hague proceedings are concluded?

In the Spanish legal system, the agreement on custody and visit rights will be legally binding and enforceable only through a court decision.

If there is an agreement drawn up by the parents, it would have to be approved by the court and with the compulsory report of the Public Prosecutor's Office. In this regard, custody proceedings would have to be initiated and the usual channels followed. There is no quick process to ensure its completion before the Hague return process is complete.

a. Which local court or other authority is competent?

The Court of First Instance of the place of the last common residence of the parents. In the case of residing in different judicial districts, the competent court will be the court of the domicile of the defendant³ or of the residence of the minor, at the choice of the plaintiff (Article 769.3 Civil Procedure Act)⁴.

b. Is representation by attorneys mandatory?

Yes (article 750.1 Civil Procedure Act).

c. Are there other participants obligatory?

Public Prosecutor (article 749.2 Civil Procedure Act).

d. How about hearing the child? Is it necessary? If so, can this be done via long-distance communication?

Article 777.5 of Civil Procedure Act establishes the obligation to hear the children in the proceedings if they have sufficient judgment when it is deemed necessary ex officio or at the request of the Public Prosecutor, parties or members of the Court's Technical Team or the minor him/herself.

Any process begun in Spain requires the presence of the abducting parent and the child. This situation becomes more complicated if, as in the Spanish system, abduction is a criminal offence. The possibility of using Council Regulation No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters would allow the Spanish judge to use video conferencing.

The judge, in accordance with various Articles of the LEC and the Cc, will listen to the minor, depending on his or her age and degree of maturity, although, as in the case of the abductor, he or she may request that this be done by videoconference (its use in cases of abduction is expressly envisaged in Article 778.8 quinquies)⁵.

e. Time required

A decision concerning custody and visit rights may be possible in approximately one month and a half of two months and a half.

f. Costs incurred

There are no court fees.
Lawyers' fees may vary.

³ In relation with the concept of domicile see article 40 Cc.

⁴ For the interpretation of this provision, see Supreme Court Judgment (1st Chamber) of 16 October 2012. Interpretation of Article 769.3 of the LEC, and the Supreme Court favouring the competence of the place of habitual residence of the child in the interest of the child.

⁵ In the examination of the child, it shall be ensured that the child can be heard in conditions suitable for safeguarding his or her interests, without interference from other persons, and exceptionally with the assistance of specialists where necessary. This action may be carried out through videoconference or other similar system.



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Step 1

Spain

Executive summary - International Abduction Case non-return agreement

in cases where international jurisdiction on matters of parental responsibility has shifted to the State to which the child had been taken

(Cases where the international jurisdiction has not shifted will have to be solved as described under
International Abduction Case – return agreement)

(For details please consult the Spanish National Best Practice Tool)

International child abduction inside the EU: The unmarried parents of a child (age: 10 years) who habitually reside in State B split up. They have joint custody of their child. Against the wish of the father, the mother takes the child to her home-country, Spain, with the intention to settle there. Since the mother does not return the child voluntarily, the father applies for the return of the child under the 1980 Hague Child Abduction Convention to the competent court in Spain.

In parallel to the Hague return proceedings, the parents follow specialised mediation and come to a return agreement, which regulates the following main aspects:

- Mother and child will not return, they will from now on live in Spain
- The parents will continue to exercise the rights of custody jointly.
- The father and child will maintain regular contact (details given including payment of travel costs).
- The father will pay a fixed amount of child maintenance on a monthly basis (details given).

Step I: EU / international legal framework needs to be analysed to identify in which country the family agreement should first be rendered legally binding and enforceable to make best use of the mechanism of cross-border recognition and enforcement of EU / international law.

Since we focus here on those cases of international child abduction, where **international jurisdiction for matters of parental responsibility** has shifted in accordance with Art. 10 Brussels IIa Regulation

(equivalent to Art. 7 of the 1996 Hague Child Protection Convention), the ideal starting point jurisdiction to render the non-return agreement legally binding and enforceable is Spain, i.e. the State to which the child has been taken.

These cases are much easier to handle than those where the international jurisdiction has not shifted. However, the settings of national law may nonetheless make it difficult to render the agreement with the above ingredients binding at once by the judge seized with the Hague proceedings or

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another authority within the remainder of the six-weeks-timeframe imposed by Art. 11(3) Brussels IIa Regulation. For the parties who have negotiated a non-return agreement it will be **crucial to avoid partial binding force of the agreement**. Where the Hague return proceedings end with a non-return order while the agreed conditions to the non-return and the agreed custody and contact arrangement are not yet binding, we have a de facto partial validity of the agreement which is likely to be a source for new conflicts.

For proceedings commenced on or after 1 August 2022, the new Brussels IIa (recast) Regulation will allow for a prorogation of international jurisdiction in line with Article 10 of the new Regulation, see Article 9 of the Brussels IIa (recast) Regulation. In its Recital 22 the new Regulation furthermore encourages Member States with concentrated jurisdiction to “consider enabling the court seized with the return application under the 1980 Hague Convention to exercise also the jurisdiction agreed upon or accepted by the parties pursuant to this Regulation in matters of parental responsibility where agreement of the parties was reached in the course of the return proceedings. Such agreements should include agreements both on the return and the non-return of the child. If non-return is agreed, the child should remain in the Member State of the new habitual residence and jurisdiction for any future custody proceedings there should be determined on the basis of the new habitual residence of the child.”

The following summary of national law addresses the legal situation under the current Brussel IIa Regulation. However, since the focus is here on cases where the international jurisdiction has shifted, the analysis will be most useful for cases under the new Brussels IIa (recast) Regulation since it will highlight what competencies the court seized with Hague return proceedings has under national law to render agreements on matters usually contained in typical return agreements legally binding and enforceable.

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Step 2

Step 2: How can the court seized with Hague return proceedings in Spain assist with rendering the return agreement legally binding and enforceable? Can the judge seized with Hague return proceedings render the entire non-return agreement legally binding and enforceable simultaneously with ending the Hague proceedings? If not, what can the judge seized with Hague return proceedings do to assist with rendering the remainder of the agreement binding in State A most swiftly?

(1) *Which local court has jurisdiction for Hague return proceedings and is there specialised / concentrated jurisdiction for Hague cases?*

The Court of First Instance of the capital of the province, Ceuta or Melilla, with competence in family law matters, will have competent jurisdiction, in the district where the child who has been the object of an illicit transfer or retention is located, if any, and, in the absence of such a court, to which it corresponds by the rota system (article 778 quater Civil Procedure Act)

(2) *Does national Spanish procedural law allow the Hague judge (assuming international jurisdiction has shifted) to render all parts (non-return, custody and contact arrangement, & possibly maintenance matters) legally binding and also enforceable?*

It is true that the wording of Article 778.12 (quinquies) Civil Procedure Act is open in the sense that it does not delimit the subject-matter of the mediation and consequently does not limit the enforcement of possible agreements reached.

But what appears clear is that the Spanish Court, as the authority that is hearing the return, has the competence to approve any agreement that the parties have agreed to establish: details of the return (day, hour etc.), modes of return of the child, payment of the return trip, who accompanies the child etc. (Article 778.9 quinquies and paragraph 10). Thus, the Spanish authority in its return decision may approve that part of the agreement con-

cerning: the form and the time limit for enforcement, being able to adopt the necessary measures to avoid a new illicit retention or transfer of the child after the notification of the judgment.

- a. *Is representation by lawyers mandatory?*
Representation by lawyers is required.
- b. *Are there other participants obligatory?*
Public Prosecutor.
- c. *How about hearing the child?*

The child generally has to be heard by the judge before a court decision is rendered. The court, in accordance with various articles of the Civil Procedure Act and the Civil Code will hear the minor, depending on his or her age and degree of maturity, although, as in the case of the abduction, the Court may request that this be done by videoconference (its use in cases of abduction is expressly envisaged in Article 778.8 quinquies)¹.

¹ In the examination of the child, it shall be ensured that the child can be heard in conditions suitable for safeguarding his or her interests, without interference from other persons, and exceptionally with the assistance of specialists where necessary. This action may be carried out through videoconference or other similar system.