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ARGENTINA

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction adopted on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, was ratified by Argentina¹ effective June 1, 1991. On May 31, 1998, pursuant to article 45 of the Convention, the Argentinean government transmitted a declaration rejecting the extension of the Convention to the Falkland Islands by the United Kingdom of Great Britain and Northern Ireland. Argentina also reaffirmed its sovereign rights over the Malvinas (Falkland Islands), South Georgia, and South Sandwich Islands. It applies to all countries Argentina recognizes as parties thereto.²

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Convention in Argentina is the *Dirección General de Asuntos Jurídicos-Dirección de Asistencia Judicial Internacional* of the Ministry of Foreign Affairs, International Commerce and Worship.³

A. Return Requested from Abroad

The Central Authority addresses only the administrative and informational functions, because the judiciary always decides on the return of a child or the visitation schedule. Once an application for return has been received, the Central Authority will verify that the petition complies with all the requirements provided for under the Convention. Before seeking a child's return or voluntary visitation from the parent in whose residence the child is located, the Central Authority must obtain the prior approval of the requesting parent. If the child's return or voluntary visitation schedule does not take place at this first stage, the petition will have to be submitted by a private attorney to the competent court. The Central Authority will provide the appropriate court with a general background of the Convention and will also offer its assistance to the court during the proceedings.

The Central Authority's role is administrative and informative, whereas the judiciary decides on the feasibility of the application for return or access rights.

¹ Law 23857 of Oct. 19, 1990 in BOLETIN OFICIAL [B.O.] Oct. 31, 1990.

² Countries where the Agreement is effective with the Argentine Republic: Australia, Austria, Bahamas, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Burkina Faso, Canada, Colombia, Costa Rica, Croatia, Chile, China, Hong Kong Region, China- Macau, Cyprus, Denmark, Ecuador, Slovakia, Slovenia, Spain, United States of America, Former Republic of Yugoslavia, Fiji, Finland, France, Georgia, Germany, Greece, Honduras, Hungary, Ireland, Iceland, Israel, Italy, Luxembourg, Malta, Mauricio, Mexico, Moldova, Monaco, Norway, Netherlands, New Zealand, Panama, Paraguay, Poland, Portugal, UK (Isle of Man, Cayman Islands, Falkland Islands, Montserrat, Bermuda), Check Republic, Romania, Saint Kitts and Nevis, South Africa, Sweden, Switzerland, Turkmenistan, Turkey, Uruguay, Uzbekistan, Venezuela, Yugoslavia, and Zimbabwe.

³ Law 24190 *Ley de Ministerios*, art. 17 inc. 11 and Decree 488/92 and Ministerial Resolution 203/94. Ministry of Foreign Affairs, International Trade and Worship, General Department for Legal Matters, Division for International Legal Assistance, address: Esmeralda 1212 - 4th floor (1007) - Federal Capital - Argentine Republic, Telephone: (54) 11 4 819-7000 extensions: 7629/7187, Fax: (54) 11 4 819-7170/7121 email: menores@mrecic.gov.ar.

However, the Central Authority does not provide legal assistance to private individuals during the proceedings before Argentine courts. A private lawyer will have to be hired to carry out the judicial aspect of the request. Those who cannot afford a private lawyer, and who qualify, may obtain the assistance of a public funded attorney.

Similarly, once the judicial stage has been instituted, the Central Authority will be at the Court and the parties' disposal to provide any information necessary for the implementation or application of the Convention with regard for the best interest of the child.

When the minor's domicile has not been located, the Argentine Central Authority will inform Interpol, the agency which will be in charge of locating the minor in question.

B. Return Requested from Argentina

The petitioner must fill out a standard set of forms from the Central Authority and return them to the Central Authority in triplicate. This form requests all the information necessary to locate the child, including identity information concerning the child and the person who has taken the child; the child's date of birth; the reasons for claiming the return; and information on the presumptive domicile of the child. A copy of the judicial decision or agreement on the custody of the child may also be attached.⁴ Seeking legal counsel is recommended in order to complete the form, although this is not required. In case the petition is addressed to a non-Spanish speaking country, the forms will have to be submitted both in English and Spanish.

Once all documents have been submitted, the Central Authority will evaluate whether the case meets all the requirements of the Convention. If the case is admitted, the Central Authority will send the return and visitation petition to the Central Authority of the requested country. The proceedings abroad, of course, will depend on the internal regulations of the respective Central Authority together with the procedural norms applied by the competent courts. In many cases the petitioner will have to hire a private attorney in the requested country. If the petitioner cannot afford to hire a private attorney, he may investigate whether he qualifies under Argentine law to receive free legal advice and become eligible for such assistance abroad.

The petitioner will be kept informed by the Argentine Central Authority about the status of his case since both Central Authorities will be in constant contact about the case.

Argentina has also become a member to the Inter-American Convention on International Return of Minors (IACIRM) adopted in Montevideo, Uruguay, on July 15, 1989, and ratified by Argentina on November 1, 2000.⁵ This Convention applies to any return case involving a minor whose permanent residence is in any of the member countries⁶ and has been illegally or wrongfully taken abroad. The Convention also applies to the enforcement of visitation and custody rights.⁷ The IACIRM also provides

⁴ Jose Carlos Arcagni, *La Convención de la Haya sobre los Aspectos Civiles de la Sustracción Internacional de Menores y el Derecho Internacional Privado Tuitivo*, 1995-D REVISTA JURÍDICA ARGENTINA LA LEY, Sec. Doctrina, 1032 (Buenos Aires, 1995).

⁵ Law 26358 of November 1st, 2000 in Boletín Oficial (B.O.) Dec. 12, 2000.

⁶ Member countries are: Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Haiti, Mexico, Paraguay, Peru, Uruguay and Venezuela, see <http://www.oas.org/juridico/spanish/firmas/b-53.html>.

⁷ *Supra* note 5, art. 1.

that for members of the Organization of American States that are party to this Convention and also party to the Hague Convention on Civil Aspects of International Child Abduction, the IACIRM will apply, unless stated otherwise between the parties through bilateral agreements.⁸

II. Domestic Laws Regarding Child Abduction and Parental Visitation

Under the Criminal Code,⁹ the punishment for anyone who takes and hides a minor 10 years of age or younger from the control of his parents, guardian, or person in charge of him is imprisonment from 5 to 15 years.¹⁰ Scholarly opinion is not clear on whether a parent who takes a child from the other parent is guilty of this crime.¹¹ However, a number of court decisions¹² have suggested that any parent who takes and keeps a child out of the control of the parent who has been judicially assigned the custody of the child is guilty of this crime.

Law 24270¹³ created the crime of *Impedimento de Contacto de Hijos Menores con sus Padres no Convivientes* (preventing minors from having contact with the non-custodial parent). Therefore, the parent or a third person who illegally prevents or obstructs contact between a minor and his non-custodial parent will be punished with imprisonment from 1 month to 1 year. If the child is younger than 10 years of age or handicapped, the punishment is imprisonment from 6 months to 3 years.¹⁴

The same sanctions would apply to the parent or third person who, in order to prevent the parent not living with the child from contacting him, takes the child to another domicile without judicial authorization. If, with the same purpose, such a person takes the child out of the country, the punishment would increase up to double the minimum and half of the maximum.¹⁵

In such cases, the court must take all necessary measures to restore the parent's contact with the child within 10 days.¹⁶ The court must also establish a provisional visitation schedule to be applied for not more than 3 months, or if there is already a visitation schedule, the court must enforce it.¹⁷

Although articles 5 and 21 of the Convention guarantee some type of visitation schedule during the return proceeding, the courts have interpreted these provisions narrowly considering that the

⁸ *Id.* art. 34.

⁹ O. y Florit, *Código Penal de la República Argentina*, Editorial Universidad, Buenos Aires, 1997.

¹⁰ *Id.* art. 146.

¹¹ *Id.* at 347.

¹² Cámara Nacional Criminal y Correccional, Sala II, December 3, 1987, in *Boletín de Jurisprudencia Cámara Nacional Criminal y Correccional*, 1987, No. 4 at 1680; Sala III, May 27, 1992 in *Boletín de Jurisprudencia Cámara Nacional Criminal y Correccional*, 1992, No. 2, at 141; Sala I, June 28, 1994, in *Boletín de Jurisprudencia Cámara Nacional Criminal y Correccional*, 1994, No. 2, at 77.

¹³ Law 24270 of Nov. 3, 1993, amending the Criminal Code published in *B.O.*, Nov. 25, 1993.

¹⁴ *Id.* art.1.

¹⁵ *Id.* art. 2.

¹⁶ *Id.* art. 3.1.

¹⁷ *Id.* art. 3.2.

Convention does not expressly require member countries to establish or enforce a visitation schedule during the conventional procedure.¹⁸ There are some scholarly opinions to the contrary; some authors¹⁹ have interpreted the Convention as very clear in requiring Central Authorities to file petitions for visitation, as well as return purposes. According to J.C. Arcagni, the Convention does not require the precondition of enforcing parental visitation rights to the issue of abduction itself. According to this author, the narrow interpretation that the courts have adopted may be due to the fear that visitation rights that may require taking the child out of his habitual residence or domicile may create the risk of abduction.²⁰ Thus, in order to avoid such risks and conflicts, the Central Authorities will have to play a very important role to secure the conditions and timing of the visits through permanent and effective supervision over the minors.²¹

According to sources from the Argentine Central Authority, Dr. Ignacio Goicoechea, to date, all Argentine courts have waited for the court deciding on the issue of the custody of the child to establish the visitation schedule provided for under Article 21 of the Convention. However, in many cases a voluntary agreement between the parties was reached during the return proceedings.

The Argentine Civil Code²² establishes that in some cases, express consent of both parents will be required in order for the minor to carry out certain actions.

This provision refers to parents legally married and living together with the child, as well as parents that are separated or divorced, especially when one of the parents has physical custody of the minor, and the other has only visitation rights.

Authorization to leave the country is included among the actions for which express consent is required by both parents. This means that either the father or the mother may grant or deny this authorization, or grant it for a limited period of time, and therefore express his agreement or disagreement regarding a possible change of residence of the minor.

When a parent wishes to relocate with the child in a foreign country, he will need to acquire the court's authorization when a legal custody arrangement has been settled. This is also the case when a parent has only physical custody of the minor, since according to article 264 of the Argentine Civil Code, consent of both parents is required in order to leave the country. Of course, the problem arises when a parent is denied the relocation by the courts, and he decides to abduct the child.

III. Court System and Structure – Courts Handling the Hague Convention

When Argentina is the requested country and there is no voluntary return of the child, the competent court for return proceedings under the Convention will be either the civil ordinary courts in the Federal Capital and national territories or the provincial courts, which may be family courts in those provinces that have such, or the civil courts. The case may be appealed to the respective Court of Appeals

¹⁸ *Id.* at 1034-1035.

¹⁹ *Id.* at 1035.

²⁰ *Id.*

²¹ *Id.*

²² Código Civil, Zavalía, Buenos Aires, 1999, art. 264 quarter.

and, if admissible, to the Supreme Court. So far, there has been only one case that has reached the Supreme Court.²³ In this case, the Supreme Court finally ordered the return of the child who was illegally taken from Canada to Argentina by her mother. The child went back to Canada after an extremely protracted process (over a year), compared to the Convention's standard (not more than 6 weeks).

In 2000, the Argentine courts decided a very interesting case,²⁴ applying the Convention, without the intervention of the foreign Central Authority. The case involves a German man who married an Argentine woman in Denmark. They had a daughter who was born in Argentina. When the girl turned 4 months old, the family moved to live in Germany. After 2 years, the couple separated and the mother was granted the child's full custody by a German lower court. Later, the mother and child traveled to Argentina, and from there, the mother notified to the German court she and her daughter were going to establish their permanent residence in Argentina. The German Court of Appeals revoked the lower court decision granting the child's custody to the mother, but at the same time did not grant it to the father. The German Court of Appeals maintained that it lacked international jurisdiction on this child's custody issue, because her permanent residence was in Argentina. This occurred, because of the legitimate right of the mother, who had exclusive custody of the child, and therefore, had the right to determine the permanent residence of the child.²⁵

In view of the German court's decision, the father requested the return of his daughter to Germany before the lower courts in Argentina, who granted the petition under the provisions of the Hague Convention. The mother appealed the decision, and the Argentine Court of Appeals reversed the lower court decision, on the basis that the Hague Convention was not applicable in the case, because the child in question was not illegally or wrongfully moved from Germany. The mother had the exclusive custody of the child, which included the right to establish their permanent residence. The final decision on the case, rejecting the return of the child to Germany, was consistent with the aim of the Hague Convention, which is mainly to prevent that, through illegal means, the child is taken away from the competent courts to decide the custody of the child. However, in this case, it was the same German court that decided its lack of jurisdiction, pointing out that the case should be decided by Argentine courts.²⁶

IV. Law Enforcement System

Both the Central Authority and the courts have requested assistance from the police and Interpol to locate children and secure the enforcement of authorities' orders.²⁷ In Argentina children are sought by Interpol, not only in the cases derived from International Conventions, but also in those originated in countries where no conventions exist.

²³ Wilmer, E.M. c/ Oswald, M.G., LA LEY, 1996-A, 260, Supreme Court, June 14-1995.

²⁴ C1 CC San Isidro, Sala 1, Aug. 31, 2000, M., V.c/G.B., M. s/ *Restitución de menor y tenencia y régimen de visitas* in Revista El Derecho, Jurisprudencia General, Vol. 191, Buenos Aires 2001.

²⁵ I.M. Weinberg de Roca, LA APLICACIÓN DE LA CONVENCION DE LA HAYA SOBRE RESTITUCIÓN DE MENORES SIN INTERVENCIÓN DE AUTORIDAD EXTRANJERA REQUIRENTE, in *Id.* at 115-116.

²⁶ *Id.* at 121.

²⁷ Soraya Nadia Hidalgo, *Restitución Internacional de Menores en la República Argentina*, 1996-C REVISTA JURÍDICA ARGENTINA LA LEY 1393 (Buenos Aires, 1996).

According to the Argentine Central Authority, since January 2000 to the present, the request statistics are as follows:

Return requests (outgoing) Return requests (incoming)

Pending: 78	Pending: 19
Closed: 92	Closed: 32
TOTAL: 170	TOTAL: 51

Visitation requests (outgoing) Visitation requests (incoming)

Pending: 13	Pending: 3
Closed: 16	Closed: 7
TOTAL: 29	TOTAL: 10

On June 11, 2003,²⁸ the National Registry of Information about Missing Minors was created under the National Program for the Prevention of the Abduction and Trafficking of Minors and Crimes Against their Identity, created by Resolution 284/02, within the Ministry of Justice, Security, and Human Rights. The Registry will establish a database that will collect all information related to cases of children that have been abducted or missing. The database will be available on Internet and will include all information needed to locate them and also to check on the status of the search.²⁹

Both parents are required under the law to authorize, not only the minor's travel abroad, but also the issuance of a passport to a minor. The withdrawal of such a passport, as well as the denial or restrictions on the issuance of visas, may only be ordered by a court. Therefore, in order for a minor, who is not traveling with both parents, to leave the country, he will have to present his valid passport, as well as the absent parent's authorization to travel, before the border authorities. Administrative measures and court orders may become ineffective if border controls in the country are not duly carried out. This is the case for dry/land boundaries due to the length of the Argentine borders. However, border controls are highly effective with regard to air carriers and ferries.

When a court orders a prohibition to leave the country, such an order is given to border authorities, including Federal Police, Immigration, Interpol-Argentina, and Aeronautic Police.

V. Legal Assistance Programs

Legal Assistance Programs are not available. A private attorney must be hired if a voluntary return fails, and judicial proceedings need to be started. However, a public defender may be available if the claimant can prove that he cannot afford a private attorney.

²⁸ Law 25746 of July 1, 2003 in B.O. July 2, 2003 regulated by Decree 1005/2003 of Oct. 30, 2003 in B.O. Oct. 31, 2003.

²⁹ *Id.* arts. 1 and 2.

VI. Conclusion

The Ministry of Foreign Affairs has a website³⁰ to provide information on those conventions referred to child protection from different viewpoints or scopes. It is addressed to those who, on account of their duties, must enforce some of those mentioned international conventions. It is also addressed to those who are included in some of the situations covered by the conventions and need to know whom to address the application in order to prevent unnecessary delays. The website intends to disseminate the rights derived from the Convention on the Rights of the Child and point out some helpful hints for their protection.

However, due to the lack of human and financial resources, the government has not been able to provide more comprehensive information to prevent abductions. The role of non-governmental organizations (NGOs) has been very important in this regard, because they fill a gap that cannot be filled by governments.

NGOs, such as the Argentine chapter of Missing Children,³¹ have webpages on the Internet to provide assistance to parents whose children are missing. The webpage provides a comprehensive multilingual database which includes pictures of the missing children, as well as a progressive age picture, showing how a child could have aged through the years, based on the latest available picture. It also provides their identification and physical description.³² There are other local NGOs, such as *Fundacion PIBE*, based in the Province of Tucuman, which also provides information and support to parents of missing children through their webpage.³³

The application of the Convention in Argentina appears to be successful, particularly in expediting the return of minors. The Convention is an example of the humanization of private international law, with its most important goal being the well-being of the child. Of all the cases to which the Convention was applied, the one reaching the Supreme Court in 1995 has had extensive media coverage. This promotion of the Convention raised public awareness, and Argentineans became more conscious about the serious issues involved in international parental child abduction.

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³⁰ <http://www.menores.gov.ar>.

³¹ <http://ar.missingkids.com>.

³² *Id.*

³³ <http://www.pibe.org.ar>. See also, Fundación Niños Unidos para el Mundo, <http://www.foundchild.org.ar>.