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BRAZIL

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction was adopted on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law.¹ Brazil² acceded to the Convention on October 19, 1999, effective January 1, 2000. Decree No. 3413/00³ promulgated the Convention in Brazil on April 14, 2000. Other parties to the Convention have accepted the accession of Brazil, and the Convention has gone into force between Brazil and other 38 members.⁴ The United States of America accepted the accession of Brazil to the Convention on September 29, 2003, effective December 1, 2003.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Convention in Brazil is the Secretariat of State on Human Rights (*Secretaria de Estado dos Direitos Humanos*) of the Ministry of Justice.⁵ Decree No. 3951/01,⁶ effective January 7, 2002, provides for the competence and powers of the Secretariat, and it also creates the National Program for Cooperation on the Return of Internationally Abducted Brazilian Children.⁷

A. Return Requested From Abroad

The Central Authority has only administrative and informational competence, as established by Decree 3951.⁸ Brazilian Courts decide the cases of parental kidnapping and the return and visitation schedules for abducted children.

¹ Brazil became a Member of the Hague Conference on Feb. 23, 2001, available at http://www.hcch.net/e/members/signrat_br.html.

² Decree-Law No. 79 of Sept. 15, 1999, available at http://convencaodehaia.com/juridico/decreto_79.htm.

³ Decree No. 3413 of Apr. 14, 2000 in *D.O.U.* of Apr. 17, 2000. The instrument of accession contains a reservation provided for in art. 1 of the Decree: "(...) with a reservation as provided for in art. 24 of the said Convention (permitted under art. 42), to the effect that foreign documents appended to legal instruments must be accompanied by a translation into Portuguese done by a sworn translator," available at <http://www.hcch.net/e/status/stat28e.html#br>.

⁴ Countries where the Agreement is in force with Brazil as of Feb. 2004: Argentina, Australia, Austria, Belarus, Canada, Colombia, Chile, China (Macao Special Administrative Region only), El Salvador, Estonia, Finland, Germany, Guatemala, Hungary, Ireland, Israel, Italy, Latvia, Luxembourg, Mexico, Moldova, Netherlands (for the Kingdom in Europe), New Zealand, Nicaragua, Norway, Panama, Peru, Poland, Portugal, Serbia and Montenegro, Slovak Republic, Spain, Sri Lanka, Sweden, Switzerland, Trinidad and Tobago, the United States of America, and Uzbekistan. This information is available at <http://www.hcch.net/e/status/stat28e.html#br>.

⁵ Located at Esplanada dos Ministérios, Bloco T, 4^o andar, sala 420, 70064-900, Brasília. Tel.: + 55 (61) 429-3454/ 255-0906; Fax: + 55 (61) 223-2260; E-mail: direitoshumanos@mj.gov.br. This information is available at <http://www.hcch.net/e/authorities/caabduct.html#br>.

⁶ Decree No. 3951 of Oct. 4, 2001 in *D.O.U.* of Oct. 5, 2001.

⁷ *Id.* art. 4.

⁸ *Id.* art. 2.

The application for the return of an abducted minor to Brazil must be directed to the Brazilian Central Authority, which will, upon receipt of the return application, analyze and verify all the information and decide whether it complies with the requirements provided for under the Convention. Because the activities of the Central Authority are informational and administrative only, a lawyer will be necessary for the judicial request, and the Central Authority must take the necessary measures in order to facilitate public funded assistance to those in a need of legal aid.⁹

The Central Authority must take the necessary precautions closely with the Federal Police of the Ministry of Justice, through the division of the International Criminal Police (Interpol), to assure the location and the return of a minor illegally taken to Brazil.¹⁰

B. Return Requested from Brazil

If the Central Authority receives an application, which meets all the requirements under the Convention, from a requester parent, it will send the return or visitation petition to the Central Authority of the requested country, which will act under its own procedural norms. Under the Convention, the courts of the requested country must order the immediate return of the minor to his country of origin.

According to Decree No. 3951/01, the Brazilian Central Authority must take the necessary precautions, jointly with the Ministry of the Foreign Affairs of Brazil and with the Federal Police, through Interpol, for the safe return of Brazilian minors illegally taken out of the country.¹¹

There is no central police file to report cases of missing children in Brazil.¹² State Police (at the regional level) and Interpol (at the international level) are the responsible authorities to take actions in cases involving missing persons. If there is no substantial proof that a minor has been taken abroad from his residence, the abduction must first be reported at the regional level (State Police), and it will be reported internationally (to Interpol), only a year later. If such proof exists, the case is directly reported to Interpol.¹³

Brazil has also become a member to the Inter-American Convention on International Return of Children,¹⁴ adopted in Montevideo, Uruguay, on July 15, 1989, and ratified by Brazil¹⁵ on May 3, 1994. The purpose of this Convention is to secure the safe and prompt return of a child,¹⁶ whose permanent

⁹ *Supra* note 6, art. 2.VII.

¹⁰ *Supra* note 6, art. 2.V.g.

¹¹ *Supra* note 6, art. 2.IX.

¹² *In* Legislation of Interpol Member States on Missing Children – Brazil, Section III - Means of investigations, *available at* <http://www.Interpol.com/Public/Children/Missing/NationalLaws/mcBrazil.asp>.

¹³ *Id.*

¹⁴ *Convenção Interamericana sobre Restituição Internacional de Menores*. The full text of the Convention in English is *available at* <http://www.oas.org/juridico/english/treaties/b-53.htm>.

¹⁵ Decree-Law No. 3 of Feb. 7, 1994, *available at* <http://www.mp.rs.gov.br/hmpage/homepage2.nsf/pages/DLF03>.

¹⁶ *Supra* note 14, art. 2. Note that a child must be younger than 16 years of age under this Convention.

residence is in one of the Member countries¹⁷ and who has been wrongfully removed from one Member country to another or who has been lawfully removed, but has been wrongfully retained. It also provides for the enforcement of visitation and custody rights.¹⁸ In addition, article 34 of the Convention states that in cases involving Members of the Organization of American States (OAS) that are also Members to this Convention and to the Hague Convention on the Civil Aspects of International Child Abduction, this Convention must prevail, unless stated otherwise through bilateral agreements between the parties.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

The Federal Constitution of Brazil¹⁹ and Law No. 8069/90²⁰ (the Statute of Children and Adolescents (ECA)) are the main pieces of legislation regarding the protection of children's rights in Brazil. The Constitution provides that one of the purposes of the social assistance in the country is to protect underprivileged children and adolescents,²¹ and it also sets forth that the protection of children must occur through government incentives, in accordance with the law.²²

The ECA regularizes the constitutional rules on the guarantee of children's rights in the country, emphasizing the basic rights of children²³ and adolescents,²⁴ such as the right to be raised and educated among the child's family (and in some cases, in a substitute family)²⁵ and the right to have the support of both parents for the custody and education of their young child.²⁶

¹⁷ Member countries to this Convention are: Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Haiti, Mexico, Paraguay, Peru, Uruguay and Venezuela; <http://www.oas.org/juridico/english/sigs/b-53.html>.

¹⁸ *Supra* note 14, art. 1.

¹⁹ C.F., *Constituição Federal Anotada*, Ivo Dantas, 2^a ed. revista e aumentada, Editora Renovar, Rio de Janeiro, Brasil, 2002, article 5.XXVII. For the official full text of the Federal Constitution of Brazil online, at <https://www.planalto.gov.br>. The English version of the Constitution is available at <http://www.senado.gov.br/bdtextual/const88i.pdf>.

²⁰ Law No. 8069 of July 13, 1990, as amended in *D.O.U.* of July 16, 1990. ECA - *Estatuto da Criança e do Adolescente Comentada*, Munir Cury, Antônio Fernando do Amaral e Silva e Emilio Garcia Mendez, 4^a ed. revista e atualizada, Malheiros Editores, Brazil, 2002. For the official full text of the ECA online, at <https://www.planalto.gov.br>. For the English version of the ECA, see <http://www.mj.gov.br/sedh/ct/conanda/ecaingles.htm>.

²¹ *Supra* note 19, art. 203.II.

²² *Id.* art. 227.3.VI.

²³ *Supra* note 20, art. 2. Note that under this Law, a child must be under 12 years of age.

²⁴ *Id.* Note that under this Law, an adolescent must be between 12 and 18 years old.

²⁵ *Id.* art. 19.

²⁶ *Id.* art. 22.

A. Child Abduction

Under the Brazilian Penal Code,²⁷ the punishment for any person who takes and keeps a minor²⁸ from the control of his parents or guardian, or from any other person in charge of him, is imprisonment from 2 months to 2 years.²⁹ Any parent who takes and keeps the child away of the control of the other parent, who has been judicially assigned the custody of the child, is also committing a crime.³⁰ The judge may, however, decide not to apply the penalties provided for in this article in case the child has been returned to his residence with no evidence of bad treatment during the period of abduction.³¹

Law No. 8242/91³² created the Conselho Nacional dos Direitos da Criança e do Adolescente (CONANDA)³³ in an effort to increase the protection of children's rights and fight child abduction in Brazil. The ECA does not provide for a classification of missing children categories, and according to Interpol,³⁴ cases of parental abductions are considered in Brazil to be cases of missing children, and therefore, statistics are sometimes misleading, because other cases of missing children, such as abduction by unknown persons, may be included in the available data in Brazil. The Ministry of Justice³⁵ reports that although it is very difficult to predict the real number of missing persons³⁶ in Brazil, it estimates that there are 10,000 cases annually involving missing children and adolescents.

B. Parental Visitation

The Brazilian Civil Code³⁷ and the ECA³⁸ establishes that minors are under the supervision of their families (paternal power),³⁹ and that both the father and mother may exercise such power under equal conditions. Usually a custody agreement is reached at the time of the separation of the parents. However, in case of disagreement between the parents, both the father and mother may turn to the proper judicial

²⁷ C.P., *Código Penal*, 8ª Ed. atualizada até 01.01.2003, Ed. Revista dos Tribunais - RT, São Paulo, Brazil, 2003. For the updated and official full text on-line of the Brazilian Criminal Code, see <https://www.planalto.gov.br>.

²⁸ *Id.* Also note that a minor under the C.P. is considered to be a person who is less than 18 years old.

²⁹ *Id.* art. 249.

³⁰ *Id.* art. 249.1.

³¹ *Id.* art. 249.2.

³² Law No. 8242 of Oct. 12, 1991 in *D.O.U.* of Oct. 12, 1991.

³³ CONANDA, more information is available at http://www.mj.gov.br/sedh/ct/conanda/abert_conanda.asp.

³⁴ *Supra* note 12, § I.

³⁵ *Infra* note 61.

³⁶ *Id.* Note that, although there are some specificities on the categories of missing children available at <http://www2.mj.gov.br/desaparecidos/frmMenu.aspx>, no specific data for cases of parental abduction alone have been found.

³⁷ C.C., *Código Civil Anotado e Legislação Extravagante*, Nelson Nery Junior and Rosa Maria de Andrade Nery, 2ª ed. *Revista e ampliada*, atualizado até 02.05.2003, Ed. REVISTA DOS TRIBUNAIS – RT, Sao Paulo, S.P., Brazil, 2003. For the official full text of the Civil Code of Brazil online, at <https://www.planalto.gov.br>.

³⁸ *Supra* note 20, art. 21.

³⁹ *Supra* note 37, art. 1630.

authority to solve the disagreement,⁴⁰ in which case the best interest of the child must prevail, and the physical custody of the minor, assigned to one or both parents, may be determined by the competent judge.⁴¹

The Civil Code, in article 1584, states that if no agreement was reached with regard to the custody of the minor, the judge must determine the custody rights, taking into consideration the person who will be able to provide for the best environment and conditions for the development of the child. The visitation rights may be modified at any time by the competent judge, as long as there is a well-founded judicial act, and the Office of the Attorney General has been heard.⁴² Such a modification must represent the best interest of the child,⁴³ and it must account for the best environment for the social and physical development of the minor as well.⁴⁴

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

Brazil is a federated republic, with a civil law system, and according to article 92 of the Constitution, its judicial powers are vested in the Federal Supreme Court (*Supremo Tribunal Federal – STF*), in the Superior Court of Justice (*Superior Tribunal de Justiça (STJ)*), in the Federal Regional Courts of second and first instance, as well as in the Special Courts (Labor, Electoral and Military) of second and first instance. The sole paragraph of this same article states that the STF and the STJ have their seat in Brasilia (Federal Capital) and their jurisdictions over the entire Brazilian territory.

The Constitution defines the competency of the Federal Courts in articles 106 - 110. In the first instance, the federal judges act in the Judicial Sections (*Seções Judiciárias*), with seats in the capital of each state of Brazil, as well as in some states, the Federal Courts of first instance (*Varas Federais*), with jurisdiction over specific municipalities. The second instance, with 5 Federal Regional Tribunals (*Tribunais Regionais Federais (TRFs)*), located in Brasilia, DF; Rio de Janeiro, RJ; Sao Paulo, SP; Porto Alegre, RS; and Recife, PE, oversees the first instance.

When Brazil is the requested country under the Convention, and there is no voluntary return of the minor, the competent courts for the return proceedings are the Federal Regional Courts of first and second instance.⁴⁵ Before Brazil became a party to the Convention,⁴⁶ judicial petitions were decided by the ordinary State Courts (Family Courts) in Brazil.⁴⁷

⁴⁰ *Supra* note 37, arts. 1631 – 1634.

⁴¹ *Id.* at 717, *Joint Custody*, *Superior Tribunal de Justiça* - STJ 101, and STJ 102.

⁴² *Supra* note 20, art. 35.

⁴³ *Supra* note 41, and RT 685/139.

⁴⁴ *TJSP* – 1ª Cam. Cível, Emb. Infr. No. 59912 – Sao Caetano do Sul, Relator: Des. Rangel Dinamarco, j. 09.09.1986. Also available at <http://www.palegal.net/textoimprime.asp?rvTextoId=-236521748>.

⁴⁵ *Supra* note 19, arts. 108.II and 109.V. Also, additional information is available at http://www.cjf.gov.br/Institucional/Inst_JF.asp.

⁴⁶ Effective in Brazil on Jan. 1, 2000.

⁴⁷ In STJ, CC 63/PR No. 1989/0007159-9, Rel. Min. Jesus Costa Lima, DJ of Sept. 11, 1989, where it was decided that under conflict of court competence, if Brazil had not yet signed the Hague Convention on the Civil Aspects of International Child Abduction, the State Court was the competent court in Brazil to decide the case of international child trafficking and abduction. Decision available at http://www.oabsp.org.br/lexonline/default_fr.html.

In 2001, the judge of the Federal Court of Santos granted the first court decision⁴⁸ in Brazil under the Convention that called for the return of a child to his habitual residence in Sweden, making it a leading case in the matter in the country.⁴⁹ The parents of the child lived in Brazil until January of 1996, and the child was born in September 1991 in the city of Santos, Brazil. The couple separated in 1999 under the laws of Sweden, their country of residence at the time. The alternate custody rights of the child were granted to both parents under the Swedish legislation. In 2000, mother and the 9-year old child traveled to Brazil with authorization from the father. However, the mother retained the child in Brazil after the expiration of the authorized travel period, ignoring the custody decision already established by the Swedish court. The father of the child filed a judicial return petition before the Brazilian court on the grounds of the Convention, informing the Brazilian judge of the custody decision determined by the competent court in Sweden.

The Brazilian federal judge granted a verdict favorable to the return of the child to the country of his habitual residence (at the time of his removal), and the decision considered that the retention of the child in Brazil by his mother was illegal, applying articles 3 and 4 of the Convention. The child returned to Sweden on the same day that the federal judge issued the court order to return the child (June 23, 2001). No records of appellate remedies have been found in this case, and no records of other cases in the appellate level have been found at this time.

IV. Law Enforcement System

To locate children and to secure and enforce orders, the Central Authority, as well as the Judicial Courts, have requested the assistance of the local police⁵⁰ and Interpol. Both play an important role in the prevention of child abduction and the protection of children's rights.

In an effort to prevent international child abduction, the Brazilian government requires valid documentation to identify the minors and the persons who are accompanying them in and out of the country, as well as judicial authorization under special circumstances.

The ECA emphasizes that only when the minor is accompanied by both parents, or by the guardian,⁵¹ or if traveling with one of the parents, with the express authorization of the other (stated in a document that holds the official signature of the absent parent),⁵² the authorization to travel abroad may be granted. Also, a minor that was born in the national territory of Brazil may only leave the country with express judicial authorization, if in company of a foreign resident or a person domiciled abroad.⁵³

⁴⁸ Decision available at <http://convencaodehaia.com/juridico/retornoasuecia.htm> and at <http://www.conjur.com.br>, in *Retorno à Suécia – Direito de guarda paterna não deve ser violado*, *Revista Consultor Jurídico*, of July 17, 2001.

⁴⁹ For more information on this subject, see http://www.convencaodehaia.com/juridico/haia_01.htm.

⁵⁰ *Supra* note 12, “Some Brazilian States have police departments responsible for missing people which includes children, adolescents, and adults. Others have specialized service in locating missing children. An example of it is the Parana State Police Department’s service called SICRIDE “Serviço de Investigação de Crianças Desaparecidas” (missing children investigation service), which acts exclusively on missing children’s case from newly born to 12 years old.” Additional information on this issue may be found in the same document.

⁵¹ *Supra* note 20, art. 84.I.

⁵² *Id.* art. 84.II.

⁵³ *Id.* art. 85.

If Brazilian judicial courts issue a prohibition for the child or adolescent to leave the country, all cross-border authorities are advised of such a determination.

V. Legal Assistance Programs

The Constitution of Brazil establishes that “the state shall provide full and free-of-charge legal assistance to all who prove insufficiency of funds”⁵⁴ and that “the Public Legal Defense is an essential institution to the jurisdictional function of the state and is responsible for the judicial guidance and the defense, in all levels, of the needy, under the terms of article 5, LXXIV.”⁵⁵ Also, according to the ECA, article 206 states that “full and gratuitous judicial assistance will be rendered to all in need of it,” and article 111.IV states that the adolescents are ensured, among other things, “gratuitous and full legal assistance to those in need, according to the terms of the law.”

Law No. 1060/50⁵⁶ establishes rules for the concession of judicial assistance to those in need in Brazil. The Law determines in article 4 that legal assistance must be provided for the person who demonstrates the need for legal aid simply through an assertion in the initial petition that he cannot afford to pay for the legal expenses and lawyer’s fees without affecting the financial ability to support his own family. Under the Law, those who affirm such a condition, until it is proven contrary, are considered to be under this needy status.⁵⁷ Article 5 establishes that the judge must decide the legal aid request within a period of 72 hours, and if the state does not have judicial assistance available, the Brazilian Bar Association (through its regional sections) will be responsible and designated by the judge to provide for such legal aid.

The Federal Court Council (*Conselho da Justiça Federal - CJF*) designated the gratuitous legal assistance in the Federal Courts of first instance through Approval No. 210/81.⁵⁸ The Approval determines that the Direction of each Judicial Section (*Seção Judiciária*) of the Federal Courts organizes the lists of lawyers annually for each respective section of the Brazilian Bar Association to provide pro bono services to needy persons.

The Brazilian Bar Association and the State of Brazil provide for gratuitous legal assistance to those in need of it, and such aid may be provided for any type of legal question or judicial battle, as long as proof of financial necessity is demonstrated. For instance, the Brazilian Bar Association, Sao Paulo Section, has a Legal Assistance Committee⁵⁹ that may be reached through assistencia.judiciaria@oabsp.org.br, and has a comprehensive set of information on the issue, including legislation, and other assistance programs available through it.

It appears that there is no current partnership or agreement available between the Central Authority and any other institution in Brazil with regard to legal assistance programs at this time. However, under

⁵⁴ *Supra* note 19, art. 5.LXXIV.

⁵⁵ *Id.* art. 134.

⁵⁶ Law No. 1060 of Feb. 5, 1950 in D.O.U. of Feb. 13, 1950, as amended, available at <https://www.planalto.gov.br>.

⁵⁷ *Id.* art. 4.1

⁵⁸ CJF Approval No. 210 of May 28, 1981; available at <http://www.cjf.gov.br>.

⁵⁹ See http://www.oabsp.org.br/comissoes/comissoes.asp?id_comissao=15&opcao=3.

its administrative and informative roles, the Central Authority may promptly direct interested persons to the available legal assistance sources in the country.

A. Information Resources

There is no national system⁶⁰ in Brazil that supports parents in their search for their missing children. There are, however, visible government and private-oriented efforts on the matter.

There is a Federal Government website,⁶¹ where official placement information of missing children is possible, which is later submitted to the Specialized State Police Departments in the country. The Sector of Missing Kids (*Setor de Crianças e Adolescentes Desaparecidos*),⁶² a service of the State Secretariat of Social Assistance and Development of the State of Sao Paulo,⁶³ in partnership with *Computer Associates do Brasil (CA)*, focuses on family reintegration of missing children, as well as provides for information and parental orientation through specialized professionals to prevent child abduction. The Sector is also structured to provide parents of missing children with digitally enhanced photos that show how their child would physically age, in order to assist in the search. The website works on an integrated basis with Missing Kids websites in more than 10 countries, and it receives, on a daily basis, more than 2 million visits.⁶⁴

The State Secretariat of the Social Action (*Secretaria do Estado de Ação Social (SEAS)*) of the Government of the Federal District of Brazil maintains a service called *SOS Criança*,⁶⁵ which functions 24 hours a day, 7 days a week through a hot line (61) 346-1407 that receives information on alleged cases of children's rights violations in the Federal District. The *SOS Criança* receives around 800 calls per month, including around 5 missing children calls per month.⁶⁶

Non-profit organizations also play an important role as a complementary source in the fight against violation of children's rights. NGOs, such as *Mmes. da Sé*,⁶⁷ located in the city of Sao Paulo, have been dedicated to fighting child abduction for many years, and there is comprehensive information available in their website for parents of missing children.

⁶⁰ With the support of the Ministry of Justice, the Special Secretariat of the Human Rights, through its Sub-secretariat of Promotion of the Children's Rights and Adolescents, is implementing the National System of Identification of Missing Children and Adolescents (*Rede Nacional de Identificação e Localização de Crianças e Adolescentes Desaparecidos*), available at <http://www2.mj.gov.br/desaparecidos/>.

⁶¹ This website www2.mj.gov.br/desaparecidos was created in Dec. 2002.

⁶² See <http://www.missingkids.com.br>.

⁶³ The SEADS is located at Rua Guaianazes, 1.385 – Térreo – Campos Eliseos, São Paulo, S.P., Brazil.

⁶⁴ Information available at <http://www2.uol.com.br/JC/1998/2609/lf2309z9.htm>. Also, in *Cresce o número de sites para encontrar desaparecidos*, Jan. 7, 2003, available at <http://idgnow.terra.com.br/idgnow/internet/2003/01/0009>.

⁶⁵ Located at *Via L2 Sul, SGAS 614, lote 104, Brasília*.

⁶⁶ *Supra* note 62.

⁶⁷ See <http://www.maesdase.org.br>.

Specifically, there is the Hague Convention Center for Brazil (*Centro da Convenção de Haia – Brasil*),⁶⁸ a website that examines the application and enforcement of the Hague Convention on the Civil Aspects of International Child Abduction in the country. There is substantial material on this issue, including cases and studies, as well as local and international legislation on the subject that are available in Portuguese and, in some cases, in English as well.

There is also an international peace organization called Children in Brazil (*Crianças no Brasil*),⁶⁹ with offices in Brazil and in the United States, created to assist parents of American abducted children taken from their habitual residence to Brazil. All the materials on their website are available in Portuguese and English, and it discloses pictures of missing children to the public. Upon special request, it may also provide assistance to parents of non-American children abducted to Brazil

VI. Conclusion

Local legislation, judicial, and administrative authorities, as well as government and private-funded organizations, are demonstrating visible support of the terms of the Convention, which is surely an example of international protection of children's welfare. Brazil appears to be implementing the Convention correctly; it is, however, a fairly new member to the Convention, and it might be, perhaps, too soon to draw any further conclusions on the outcome of the application of the Convention in the country.

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⁶⁸ See <http://www.convencaodehaia.com/index.htm>.

⁶⁹ See <http://www.criancasnobrasil.com/PHomex.html>.