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CHILE

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Convention), adopted on October 25, 1980, was ratified by Chile¹ on February 23, 1994. Chile made a special declaration stating that article 3 of the Convention will be interpreted in accordance to its domestic legislation regarding child custody, which applies until a child reaches 18 years of age.² This means that, if an 18 year old with permanent residence in Chile, is wrongfully taken abroad, the Central Authority or courts of that country will have to interpret such an action as illegal, under the Convention, despite the child being older than 16 years of age.³

Chile acceded to the Convention in accordance with article 38; the accession has effect only with regard to the relations between Chile and other countries that have declared their acceptance of the accession.⁴

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Convention in Chile is the *Corporacion de Asistencia Judicial de la Región Metropolitana* of the Ministry of Justice.⁵ The Convention became effective in Chile in June of 1994, and the *Auto Acordado*⁶ of the Supreme Court, which provides for the domestic procedural rules applicable for the implementation of the Convention, was issued on November 3, 1998. Between June 1994 and November 1998, the rules applicable to summary procedures provided in the Law on Minors⁷ were applied to implement the Convention.

According to Supreme Court⁸ decisions rendered during that period of time, article 11 of the Convention should be interpreted as being for the courts of each member country, where the child is

¹ Decree 386 of Mar. 30, 1994 in Diario Oficial (D.O.) June 17, 1994.

² *Id.* Introduction. The Convention applies only to children under the age of 16.

³ L Astorga Ibarra and M.J. Ávila Rivera, "Efectos Civiles del Secuestro Internacional de Menores," Memoria de Título para optar al grado de Licenciado en Ciencias Jurídicas de la Escuela de Derecho de la Universidad Central de Chile, at 97.

⁴ <http://www.hcch.net/e/authorities/caabduct.html>.

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⁶ AUTO ACORDADO SOBRE PROCEDIMIENTO APLICABLE AL CONVENIO DE LA HAYA RELATIVO A LOS EFECTOS CIVILES DEL SECUESTRO INTERNACIONAL DE MENORES, CORTE SUPREMA DE JUSTICIA, in D.O. Nov. 3, 1998 as amended by AUTO ACORDADO of May 7, 2002, available at <http://www.pjud.cl/0.8/noticias/venot.php?id= 251>.

⁷ LEY DE MENORES, 16618 of Feb. 3, 1967 in D.O. Mar. 8, 1967, arts. 34-37.

⁸ Poder Judicial de Chile, Excelentísima Corte Suprema, Oct. 24, 1997 in Rol de Corte No. 33097.

located, to provide an “urgent” procedural treatment under their domestic law. The Convention does not determine which procedures to apply; instead, the Convention allows each country to determine what summary or urgent procedure will be applicable within their jurisdiction. A Chilean Supreme Court decision stated that article 11 of the Convention requires that the domestic court apply an expedited procedure to solve return cases under the Convention, but not to grant the petition without hearing the side of the abducting parent or without considering any evidence. This would constitute a clear violation of the due process of law guaranteed under the Chilean Constitution,⁹ which provides that any court decision should be based on a prior due process.¹⁰

A. Return Requested from Abroad

The Central Authority has only administrative and informational functions, as the judiciary will always decide on the return of the child. Once an application for return has been received, the procedure before the Central Authority is governed by the Convention’s provisions. Compliance with all the requirements provided for under the Convention will be verified by the Central Authority.

If a child’s return is not possible during the preliminary stage, the petition must be submitted to the competent court. The Central Authority will provide the competent court with a general background on the petition and will also offer its assistance to the court during the proceedings.

Once the judicial stage has been established, the Central Authority will assist the Court and will be at the parties’ disposal to provide any information necessary for the implementation or application of the Convention in order to secure the best interest of the child.

The implementing provisions issued by the Supreme Court in November 1998 and amended in 2002¹¹ provide specific rules for the application of the Convention in Chile. The procedure begins with a petition before the Minors’ court of the alleged domicile of the minor.¹² The Minors’ court will take all the measures necessary to locate the child.¹³ The court should not request any additional formality or certification of documents, except for an official translation of the documents submitted with the petition if they are not in Spanish and all the require documents set forth in article 8, such as identification documents for the child, the petitioner, and the person allegedly retaining the child.¹⁴ As soon as the petition is entered, the court should secure that the minor be located and once located not be moved.¹⁵

Action on the petition needs to be taken within 24 hours of its submission, setting up a hearing for the individual retaining the child and the petitioner and his attorney within 5 days of the notice being served by the *Carabineros* (Chilean Police) or a Court officer. The child must also be present and heard

⁹ Constitución Política de la República de Chile, Editorial Conosur, Santiago, 2001, art. 19.3.

¹⁰ *Id.*

¹¹ *Supra* note 6.

¹² *Id.* art. 1.

¹³ *Id.* art. 2.

¹⁴ *Id.* art. 3.

¹⁵ *Id.* art. 4.

at the hearing.¹⁶ If the service of notice is not successfully performed through this procedure, the petition must be assigned to the Public Defender, who will then assume the representation of the absentee party.¹⁷

The objective of the hearing is to determine if the child is in the country and if there are any grounds, based on those listed in the Convention, for rejecting the release of the child.¹⁸ Evidence should be produced during the hearing. However, the court may order further investigation for more evidence, and this must be submitted within 15 days otherwise the petition will be rejected.¹⁹ The evidence so produced will be interpreted by the court according to *conciencia* (according to common sense based on the capacity to distinguish right and wrong.)²⁰

A final decision must be rendered within 5 days of the hearing or the completion of the evidence period.²¹ This decision may only be appealed within 5 days of its notice.²² The Court of Appeals will make a decision, without hearing arguments, within 5 days. All other court resolutions may not be appealed.²³

When the minor's residence has not been located, the Chilean Central Authority will inform Interpol, the agency in charge of locating the minor in question.

B. Return Requested from Chile

The petitioner must submit a completed application of return to the Central Authority. These forms include all the information necessary to locate the child, such as identification 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 probable location of the child. A copy of the judicial decision or agreement on the custody of the child may also be attached. 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 must be submitted in English and Spanish.

The Central Authority will evaluate the viability of the petition, once all the required documents have been submitted. 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 will depend on the domestic regulations of the other country's 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 qualify under Chilean law to receive free legal advice and also become eligible for such assistance abroad.)

¹⁶ *Id.* art. 5

¹⁷ *Id.* art. 6.

¹⁸ *Id.* art. 7, as amended by Auto Acordado of May 7, 2002.

¹⁹ *Id.*

²⁰ R. Quijada, *DICCIONARIO JURÍDICO*, Editorial Consur, Santiago, 1994, at 117.

²¹ *Supra* note 6, art. 8, as amended by Auto Acordado of May 7, 2002.

²² *Id.*

²³ *Id.*

The petitioner will be kept informed by the Chilean Central Authority about the status of his case, since both Central Authorities will contact each other on a continuing basis to follow up on the case.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

Under the Civil Code,²⁴ the parent who does not have the custody of his or her child may not be deprived of the right, nor exempt of the obligation, of having direct and regular contact with the child. Parental visitation rights will be exercised according to a schedule agreed upon by the parent who has custody or according to a court established visitation schedule convenient to the child.²⁵ This right may only be suspended or restricted when a court has established that it is in the best interest of the child.²⁶

Once custody has been judicially assigned, the parent who has taken the child must surrender his or her custody. If he refuses to do so within the judicially determined time frame, or if he infringes on the other parent's visitation rights, judicially established under article 229 of the Civil Code, he may be arrested for up to 15 days or be subject to a proportional fine.²⁷ The arrest may be extended for up to 30 days in case of recidivism.²⁸

The Law on Minors²⁹ also provides specific requirements for a minor to leave the country. If the custody of the child was not judicially assigned to one of the parents or a third person, then, the minor may not leave the country without both parents' authorization, or the authorization of the parent who recognized the child.³⁰

If the custody of the child was judicially assigned to one of the parents or a third person, the child may not leave the country without his authorization.³¹ If visitation rights were judicially determined under article 229 of the Civil Code, the parent whose visitation rights were so determined will also have to authorize the child's travel.³²

The authorization required will have to be instrumented in a public instrument or a private document duly notarized.³³

²⁴ CÓDIGO CIVIL, Anotado y Concordado, Editorial Jurídica Conosur, Santiago, 2001.

²⁵ *Id.* art. 229.

²⁶ *Id.*

²⁷ CÓDIGO DE PROCEDIMIENTO CIVIL, Anotado y Concordado, Editorial Jurídica Conosur, Santiago, 2001, art. 543 and *Infra* note 27, art. 66, last ¶.

²⁸ *Id.*

²⁹ LAW 16618 LEY DE MENORES, Feb. 3, 1967 in D.O. Mar. 8, 1967.

³⁰ *Id.* art. 49, ¶¶ 1 and 2.

³¹ *Id.* art. 49, ¶ 3, and *supra* note 24.

³² *Id.* art. 49, ¶ 4.

³³ *Id.* art. 49, ¶ 5.

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

When the return request originates outside of Chile and there is no voluntary return of the child, the competent court for return proceedings under the Convention will be the Minors' court with jurisdiction in the presumed child's residence.³⁴ Only the final decision may be appealed to the respective Court of Appeals and, if admissible, to the Supreme Court.³⁵

The Chilean courts have applied the Convention in a number of cases. But they reached the Supreme Court in only a few cases. One such case³⁶ involved two girls born in 1998 and 1999, daughters of Chilean nationals living in Sweden. While divorce proceedings were underway in a Swedish court and the children were in both parents' custody, according to Swedish law, the mother requested court authorization to travel with the girls to Chile. The father opposed the authorization, requesting at the same time exclusive custody of the children. However, without any authorization and without the court's decision on the matter, the mother traveled with the girls to Chile. Immediately thereafter, the Swedish court granted the exclusive custody to the father.³⁷

The Minors' court concluded that the purpose of the procedure set forth in the Convention is not to assign legal custody of children, but to determine if the children were illegally taken from Sweden by the mother and if there were any grounds under article 13 of the Convention that prevented the children from returning to their permanent residence. The return of the children was ordered, because it was concluded they had been taken from Sweden to Chile by the mother without any authorization from the court and with the opposition of the father and pending a court's decision on custody. The mother appealed before the Supreme Court, which reversed³⁸ the lower court's decision and refused to grant the return of the children. The decision stated that it was in the best interest of the children to remain in Chile with their mother, because of their very young age and their psychological and social connection with their maternal grandparents, as well as the cultural environment. It concluded that the children's return to Sweden would "expose them to psychological and physical risks" under article 13 of the Convention.

According to some scholars, this decision does not provide a correct interpretation of the purpose of the Convention, which is, the immediate return of the child to his permanent residence, whose courts are competent to decide on the custody of the children when they have been illegally taken abroad by one of the parents.³⁹ The decision rejects the children's return by granting custody of the children to the mother, which is clearly not the purpose of the Convention.⁴⁰

³⁴ *Supra* note 12.

³⁵ *Supra* note 23.

³⁶ Fallo de 1a Instancia, 80 Juzgado de Menores de Santiago, ZULOAGA HORMAZÁBAL, RAUL c/ ESCOBAR ORELLANA, XIMENA ANDREA s/ restitución de menores, of Oct. 8, 2001.

³⁷ *Supra* note 3, at 150.

³⁸ *Id.* at 152.

³⁹ *Id.* at 158.

⁴⁰ *Id.*

In another decision,⁴¹ the Minors' court of Santiago, confirmed by the Court of Appeals of Santiago,⁴² ordered the return of a minor who was taken by his mother to Chile from Argentina, where he was a permanent resident. His mother violated an Argentine court order prohibiting his removal from the country. This court order was issued in a domestic violence proceeding involving both parents.⁴³ Both the lower court and the court of Appeals agreed to grant the return request based on the mother's clear violation of the visitation rights and the judicial order prohibiting the removal of the minor from Argentina.⁴⁴

The same lower court, in another case, refused to order the return of children to France, where they were residing with the mother after her divorce. Although the divorce decree decided that the custody of the children was to be shared by both parents, they agreed that the children would reside with the mother with a specific visitation schedule for the father. However, the court also decided that in the event the mother decided to reside in Chile, she should request the court's authorization. She did so, and although this authorization was rejected, she moved to live permanently in Chile with her children.⁴⁵ Taking into account the "best interest of the children" and their refusal to return to France, the lower court decided that, despite the children being illegally taken from France to Chile, it was in their best interest to remain in Chile, where they were already well-adjusted to their family and social environment.⁴⁶

IV. Law Enforcement System

According to the Chilean Central Authority, from November 1994 to December 2003, the following requests were handled:

Return requests (outgoing)		Return requests (incoming)	
Pending:	12	Pending:	12
Closed:	33	Closed:	105
TOTAL:	45	TOTAL:	117

⁴¹ *Entrega Inmediata del Menor Juan Virgili Ovalle*, 8 JUZGADO de Menores de Santiago, Feb. 27, 2001, in *supra* note 3, at 161.

⁴² *Id.* Corte de Apelaciones de Santiago, Apr. 24, 2001 in *supra* note 3, at 162.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 164.

⁴⁶ *Id.* at 167.

Visitation requests (outgoing)		Visitation requests (incoming)	
Pending:	1	Pending:	6
Closed:	1	Closed:	6
TOTAL:	2	TOTAL:	12

On June 11, 2003,⁴⁷ a 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 the Internet and will include all the information needed to locate them and to check on the status of the search.⁴⁸

Both parents are required under the law not only to authorize the minor's travel abroad, but also to authorize the issuance of a passport to a minor. The withdrawal of a passport, as well as the denial or restriction 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, to the border authorities. Administrative measures and court orders may become ineffective if the border controls in the country are not duly carried out. This is true in the case of land boundaries, because of their length. However, border controls are highly effective with regard to air carriers and ferries.

When a court issues an order prohibiting travel outside the country, the order is given to border authorities, including the Federal Police, Immigration, Interpol, and Aeronautic Police.

V. Legal Assistance Programs

The Chilean Central Authority provides free legal assistance to the public at large, without considering their financial status. The Ministry of Justice, through their *Corporaciones de Asistencia Judicial*⁴⁹, also provides legal assistance to low income individuals.

The *Corporaciones* have a website⁵⁰ providing contact information. In addition, some non-governmental organizations, such as the Chilean chapter of Missing Children,⁵¹ are operated in Chile by the *Policía de Investigaciones de Chile*, which has a webpage to provide assistance to parents whose children are missing. The webpage provides a comprehensive multilingual database, which also includes the picture of the missing children, as well as their progressive age picture, which because of new technology shows how a child could have aged or changed his physical appearance, based on the latest

⁴⁷ Law 25746 of July 1, 2003 in B.O. July 2, 2003 regulated by Decree1005/2003 of Oct. 30, 2003 in B.O. Oct. 31, 2003.

⁴⁸ *Id.* arts. 1 and 2.

⁴⁹ Law 17995 in D.O. May 8, 1981. These are: *Corporación de Asistencia Judicial del Norte*, *Corporación de Asistencia Judicial de la región de Valparaíso* (www.cajval.cl), *Corporación de Asistencia Judicial de la Región Metropolitana* (www.cajmetro.cl -under construction) and *Corporación de Asistencia Judicial de la región del BíoBío*.

⁵⁰ <http://www.cajval.cl> and <http://www.cajmetro.cl> (under construction).

⁵¹ <http://cl.missingkids.com/>.

available picture. It also provides the identification and physical descriptions of the missing children.⁵² There are other local Non-Governmental Organizations, such as *Corporación Ayúdame*, which also provide information and support to parents of missing children.

VI. Conclusion

In spite of the criticism of the Convention, especially regarding its applicability in visitation rights cases, it appears to be a huge advancement for international cooperation in the protection of children, particularly in expediting the return of minors. The main asset of the Convention has been the standardization of procedures in countries around the world to address the same problem. One of the major challenges of the application of the Convention in Chile has been the interpretation of the exceptions to the return under article 13 b) of the Convention, which provides that the return of the child may be rejected if there is serious risk for the child's physical or psychological well-being in doing so. It is contrary to the essence of the Convention for the domestic courts to engage in the decision as to which parent should be assigned custody of the child, since this is clearly a decision to be taken by the court in the jurisdiction of the child's permanent residence. By making this decision, the requested country would be intruding on the jurisdiction of another country, in clear violation of the reciprocity principle, which has been the base for the application of any international agreement.

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⁵² *Id.*