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COLOMBIA

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 Colombia¹ on December 22, 1994 and came into force on March 1996, after the deposit of Colombia's adhesion instrument² in The Netherlands. The Convention was promulgated by Presidential Decree 517/1996.³

I. Domestic Laws and Regulations Implementing the Hague Convention

The Central Authority for the Convention in Colombia is the Instituto Colombiano de Bienestar Familiar (ICBF)-Subdirección de Intervenciones Directas (Colombian Institute of Family Welfare).⁴ According to the ICBF website:

The ICBF is a public administrative agency, with legal and administrative autonomy and autonomous resources, affiliated to the Ministry of Health.

The ICBF main objective is to promote and to strengthen the integration and harmonious development of the family, to protect the children and to guarantee their rights.

The ICBF is led and managed by a Board of Directors and a General Director who heads, organizes, and carries out the welfare service. The decentralized ICBF structure is made up of the National Headquarters, 28 Regional Offices, 5 additional State Agencies, and 199 Zonal Centers at city levels. ...

Each Regional Office has Zone Centers currently located in 199 cities. There, professionals from different disciplines (law, social work, sociology, psychology, nutrition, pedagogy and others) permanently advise children, youth and parents applying for service and whose situation demands social, psychological, legal and nutritional assistance and counseling.⁵

The Hague Convention is a self-executing treaty. After its promulgation by the President, it has been applied in Colombia without any specific implementing legislation. However, the Central Authority

¹ LAW 173 of Dec. 22, 1994 in DIARIO OFICIAL (D.O.) Dec. 22, 1994.

² Dec. 13, 1995.

³ Decree 517 of March 14, 1996 in D.O. Mar. 18, 1996. In Colombia, an international treaty does not become effective until its promulgation by the Executive.

⁴ DECREE 2041 of Nov. 27, 1995 in D.O. Nov. 27, 1995.

⁵ Instituto Colombiano de Bienestar Familiar, <http://www.bienestarfamiliar.gov.co/ingles/home.asp>.

legal counsel⁶ reported that the ICBF is preparing an amendment to the Minors Code⁷ to include specific provisions for the judicial procedure applicable if the return cases under the Hague Convention need the court's intervention. This is a much needed reform since the lack of these regulatory provisions has caused a number of problems, ranging from uncertainty as to which is the competent court to undesirable delays in the processes.

With respect to the administrative procedure, the Central Authority has issued a resolution⁸ that provides for the rules that will apply to internal return procedure before the Central Authority. According to these rules, the petition so submitted will have to include all the documentation required under the Convention with the pertinent translation into English or French, as appropriate, as well as a form that the Colombian Central Authority will provide.⁹ In case the petition is not complete, it will be returned to the petitioner with instructions as to what needs to be amended or completed.¹⁰

A. Return Requested from Abroad

In the absence of any specific norm, as to the competent court for Hague Convention return cases, the Code of Civil Procedure¹¹ assigns “residual” competence to the *jueces de circuito en primera instancia* in cases where no specific assignment of competence has been made. Return proceedings under the Hague Convention have not been assigned any specific judicial venue, therefore art. 16.9 of the Code of Civil Procedure becomes applicable. The *jueces de circuito* have decided these cases since the Hague Convention became effective in Colombia.

Under the provisions of the Hague Convention, the Central Authority has to take all necessary measures to locate the child. To this end the *Departamento Administrativo de Seguridad* (DAS), Interpol Colombia, or of any other public authority is called to assist in locating the child in Colombia.¹²

Once the child is located, the regional director of the Central Authority where the child has been located will designate a *defensor de familia* (public defender in matters of domestic relations) to guarantee that the rights of the child are protected according the Minors Code.¹³ The public defender is required to direct an immediate investigation of the situation of the child, will promote a voluntary return, attempt a reconciliation between the parties, and in the event the child is at risk, to adopt precautionary protective measures as applicable under the Minors Code.¹⁴

⁶ Dra. Lorena Padron

⁷ CÓDIGO DEL MENOR, Cooperativa Editorial Magisterio, Bogota, 2000.

⁸ RESOLUTION 1399 OF THE MINISTRY OF HEALTH, INSTITUTO COLOMBIANO DE BIENESTAR FAMILIAR, SUBDIRECCIÓN DE INTERVENCIONES DIRECTAS, May 18, 1998.

⁹ *Id.* art. 3.

¹⁰ *Id.* art. 4.

¹¹ CÓDIGO DE PROCEDIMIENTO CIVIL, Señal Editora, Medellín, 2003, art. 16.9.

¹² *Supra* note 8, art. 5.

¹³ *Supra* note 7, arts. 57.1, 57.2 and 57.3.

¹⁴ *Supra* note 8, art. 7.

In case there is no voluntary return or a reconciliation is not reached, the public defender will seek the return through judicial proceedings¹⁵ and provide legal counsel throughout the judicial process without charge.¹⁶

Under the applicable verbal procedure,¹⁷ parties are interrogated at a hearing,¹⁸ after which they will have 10 days to provide evidence. The court will render its decision after all evidence has been produced and parties interrogated. Since in most cases, the petitioner will be abroad, he may be exempted from attending the hearing and may act through his attorney.¹⁹ This decision may be appealed.²⁰

Once the return has been ordered by the court, the Central Authority will notify its counterpart abroad and provide all necessary means for the child's travel if the parties cannot afford it.²¹ However, the abductor might be obligated to pay for the travel expenses derived from the illegal retention of the child.²²

The Hague Convention is not applicable when the child reaches 16 years of age. However, if the child turns 16 during the return procedure, the process will continue until it is completed.²³

A child, 16 years of age, who has been taken into Colombia in exercise of visitation rights that have been illegally prolonged may request, by himself or through his legal representative, that the Central Authority in Colombia assist in his return to his permanent residence.²⁴

B. Return Requested from Colombia

When the Colombian Central Authority is the requesting party, once the return or visitation petition is received with regard to a child who has been taken to a country party to the Hague Convention, the documentation is translated as appropriate and is sent to the competent Central Authority abroad.²⁵

The petition must include all the information available 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

¹⁵ *Id.*

¹⁶ *Supra* note 8, arts. 10.h. & 12.

¹⁷ *Supra* note 11, art. 435, ¶ 1.5.

¹⁸ *Id.* art. 439, ¶ 2.

¹⁹ *Supra* note 8, art. 11.

²⁰ *Supra* note 11, art. 439, ¶ 5.

²¹ *Supra* note 8, arts. 14 and 17.

²² *Id.*

²³ *Supra* note 8, art. 15.

²⁴ *Id.* art. 16.

²⁵ H.A. Torrado, *CÓDIGO DE FAMILIA*, 1st Edition, Ediciones Librería del Profesional, Bogotá, 2000, at 752.

reasons for claiming the return; and information on the presumptive domicile of the child.²⁶ Once all documents have been submitted, the Central Authority will seek to locate the child with the assistance of the competent authorities and try, if possible, to find a friendly solution to the case. If this is not possible, judicial proceedings will be instituted to reconstitute the child back to Colombia or to reinstate the effective visitation schedule.²⁷

The proceedings abroad, of course, will depend on the internal regulations of the respective Central Authority and the procedural norms applied by the competent courts. This procedure is generally available free of cost. However, since some countries require the intervention of a private attorney, the petitioner may provide evidence of qualifying for free legal advice and become eligible for such assistance abroad.²⁸

The Colombian Central Authority, as the requesting authority, will follow up on the proceedings abroad and will keep the petitioner informed at all times about the case.²⁹

II. Domestic Laws Regarding Child Abduction and Parental Visitation

The National Constitution³⁰ provides for the fundamental rights of children including the right to a family and not to be separated from it.³¹ This provision was the main legal basis for the Constitutional Court's assertion that the Hague Convention was compatible with Colombian constitutional principles, especially art. 44.³²

The Civil Code³³ also provides that the parent who is deprived of the custody of a child will still have the right to visit him with the frequency and flexibility determined as appropriate by the court.³⁴ In addition, the Minors Code³⁵ provides for rules for permission for children to leave the country when their parents or a guardian so requests it.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ CONSTITUCIÓN POLÍTICA DE COLOMBIA, Biblioteca Jurídica Dike, Medellín, 2002.

³¹ *Id.* art. 44.

³² Sentencia N0. C-402/95 Tribunal Constitucional, at http://www.secretariassenado.gov.co/leves/SC402_95.HTM.

³³ G. Contreras Restrepo, A. Tafur Gonzalez and A. Castro Guerrero, CÓDIGO CIVIL COLOMBIANO COMENTADO, Leyer, 9th Edition, 2001, art. 256.

³⁴ *Id.*

³⁵ *Supra* note 7, arts. 337-348.

In order to guarantee the protection of the child's rights, when the child needs to leave the country with one of the parents, a written and notarized authorization from the parent not traveling needs to be submitted before the child may leave the country.³⁶ According to the ICBF website:

If the parents do not agree (or in case an agreement is not reached among the people with the custody and personal care of the child), the Family Judge, the Family Comprehensive Judge or the Municipal Judges will allow the child to leave the country.³⁷

The ICBF Family Defender at the ZONAL CENTER from the area where the child lives, will provide the child permission to leave the country in certain cases. These are when the child does not have legal representatives, if nobody can attest to the location of his representatives, if they are not in conditions to provide the permission, or in case they suffer mental illness or severe psychiatric anomaly (certified by Legal Medicine or by the office of mental health of the Secretary of Health in the respective territorial entity).³⁸

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

Cases under the Hague Convention are handled by *jueces de circuito en primera instancia* (judges from the court of first instance) according to the provisions of the Code of Civil Procedure.³⁹

The application of the Hague Convention in Colombia has been quite successful, although difficulties have been encountered from the lack of domestic regulation of the applicable procedure. Extremely lengthy processes have occurred, such as a case that took 5 years to be decided.⁴⁰

In another case, decided by the Constitutional Court,⁴¹ a 4-year old child who was residing with his parents in the United States was taken into Colombia after the parents were separated. An agreement on the custody and visits was reached by the parents, who were granted joint custody of the minor. However, the father took the child for his annual vacation to Colombia and once there, he communicated to the mother that he was not returning. The mother filed a return petition under the Hague Convention, and after more than 2 years, the Constitutional Court decision confirmed the lower courts, Court of Appeals, and Supreme Court decisions, ordering the immediate return of the child to his permanent place of residence, as the removal by the father was illegal.⁴²

³⁶ *Id.* art. 338.

³⁷ *Id.* art. 348.

³⁸ *Id.* art. 340.

³⁹ *Supra* note 10, art 4.

⁴⁰ ESTADO ACTUAL DE LA APLICACIÓN DE TRATADOS O CONVENIOS INTERNACIONALES EN MATERIA DE NIÑEZ Y FAMILIA EN EL ICBF, Case of Melissa Bustamante. *Supra* note 6.

⁴¹ SENTENCIA T-412/00 at <http://bib.minjusticia.gov.co/jurisprudencia/CorteConstitucional/2000/Tutela/T-412-00.htm>.

⁴² *Id.*

IV. Law Enforcement System

Both the Central Authority and the courts have requested assistance from the DAS and Interpol to locate children and secure the enforcement of authorities' orders. According to the Colombian Central Authority, since the Convention came into force on May 1, 1996, Colombia has received the following number of Hague Convention petitions:⁴³

1996: 4	2000: 20
1997: 11	2001: 31
1998: 21	2002: 31
1999: 15	2003: 43
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Total	177

From this total, 162 petitions were for return of children, and 15 of the petitions were for visitation.

The number of petitions have increased remarkably. For example, in 2001, petitions increased 45% from 2000 and 45% in 2003 from prior years.⁴⁴ According to the director of the ICBF, mothers are responsible for 80% of these cases. Even when in Colombia there is no crime of child abduction by a parent as such, the wrongdoers may be subject to a number of other criminal penalties under other provisions of the Criminal Code.⁴⁵

Currently, Colombia is a requesting country in 115 cases principally with the United States, Venezuela, Spain, and Argentina. It is a requested country in 62 cases mainly from the United States, Argentina, Italy, and Spain.⁴⁶ Statistics on the number of completed cases are as follows:⁴⁷

- judicial decisions: 14
- voluntary agreements: 37
- withdrawals: 44

Statistics on open cases as of December 31, 2003 are as follows:⁴⁸

- return requests: 74

⁴³ *Supra* note 40.

⁴⁴ *Id.*

⁴⁵ VEINTICINCO CASOS DE SECUESTRO INTERNACIONAL DE MENORES EN 2003 EN COLOMBIA, July 1, 2003, at <http://mundial2002.terra.cl/actualidad/articulo/html/act157375.htm>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

- visitation requests: 8
- administrative phase: 57
- judicial phase: 25

V. Legal Assistance Programs

According to the ICBF website, the public defenders of the ICBF “renders assistance to children and family in situations that require specialized support for their rights to be warranted by judges and the corresponding authorities. (sic) (i.e. alimony, custody, and personal care, visiting rights, recognition and paternity impunity, loss or suspension of parents’ rights, etc.)”⁴⁹ This includes the Hague Convention return administrative and judicial proceedings.

The Central Authority provides current information on its assistance programs on its webpages as follows:

Central Authority:

Instituto Colombiano de Bienestar Familiar
Subdirección de Intervenciones Directas
Avda. 68 No. 64-01
Bogota
Colombia
PBX 4 377630 Ext. 2135/2107
<http://www.bienestarfamiliar.gov.co/ingles/accionesint.asp>

VI. Conclusion

The increase in the number of return cases in Colombia may be the result of an increasing number of Colombian families who have left the country because of the political situation. Overall, the application of the Convention in Colombia has shown a considerable improvement, even though the lack of internal procedural rules at the domestic level have deprived the return process of one of its main objectives: the rapid return of children illegally taken from their place of residence. The missing legislative measures are to be submitted before the Legislature soon and are expected to become effective in the near future.

Prepared by Graciela I. Rodriguez-Ferrand
Senior Legal Specialist
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⁴⁹ <http://www.bienestarfamiliar.gov.co/ingles/accionesint3.asp>.