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FRANCE

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

The Hague Convention on the Civil Aspects of International Child Abduction [hereinafter the Convention] was adopted on October 25, 1980.¹ Its objectives are to combat international parental abduction and wrongful retention of children under 16 years of age and to ensure the effective exercise of visitation rights across international borders. The Convention sets forth a procedure designed to restore the *status quo ante* existing prior to a child's wrongful removal or retention. Once it has been established that the removal or retention was wrongful within the meaning of the Convention,² the court, hearing a petition for return, is obliged to return the child to his country of residence where disputes about custody rights will be heard. The duty to return is absolute unless the defendant establishes one of the exceptions provided for in the Convention.³

Some 1500 children are abducted by a parent in France every year. The Convention offers only a partial solution to this difficult issue, as a great number of abductions are outside its scope. For example, many of the partners in binational couples living in France comes from the Maghreb countries (Algeria, Tunisia, and Morocco) which have not ratified the Convention.⁴ Even in instances where the Convention applies, there are still difficulties and obstacles to overcome, such as locating the abducted children, the length of the proceedings, and the bias of some national courts.⁵ The top five contracting states which filed applications with France under the Convention are Germany, Italy, Great Britain, the United States, and Canada. The United States has approximately 21 cases pending before the French authorities. Of these 21 cases the United States is seeking the return of children in 10 of them, the other 11 deal with access rights.⁶

¹ See <http://www.hcch.net/e/conventions/menu28e.html>.

² In accordance with art. 3, the court will verify that the removal or retention of the child is in breach of custody rights attributed to the applicant, rights arising by operation of the law of the state in which the child was habitually resident immediately before the removal, or by reason of an agreement having legal effect under the law of that state, or by reason of a judicial or administrative decision.

³ Art. 12 provides that the court is not obligated to return the child when return proceedings are commenced a year or more after the removal or retention, and it is demonstrated that the child is settled in his new environment.

Art. 13 provides three exceptions: (13a) the person claiming the breach of custody rights was not exercising his custody rights or had subsequently acquiesced to the removal or retention; (13b) return of the child would expose him to physical or psychological harm or would place him in an intolerable situation; and (13c) a mature child objects being returned.

Art. 20 allows a court to refuse to order the return of a child if such return "would not be permitted by the fundamental principles of the requested states relating to the protection of human rights and fundamental freedoms."

⁴ Council of Europe, Parliamentary Assembly, *International abduction of Children by one of the parents*, Doc. 9476 of June 3, 2002, available at <http://assembly.coe.int/Documents/workingDocs/doc02/EDOC9476.htm>.

⁵ *Id.* France, for example has often accused Germany of failing to apply the Convention. A special binational mediation parliamentary commission was created in Oct. 1999 to help resolving the conflicts.

⁶ See http://travel.state.gov/2003_June_Hague_Attach.html.

I. Domestic Laws and Regulations Implementing the Hague Convention

The Convention was published by Decree No. 83-1021 of November 29, 1983, and became effective on December 1, 1983, at first only between France, Portugal, and Canada.⁷ Under French law, treaties have an authority superior to that of ordinary laws and are automatically incorporated into domestic law, provided that they have been correctly ratified and published and that each agreement is applied reciprocally.⁸ The Convention came into force between the United States and France on July 1, 1988, following the enactment of the International Child Abduction Remedies Act by the United States.

The Ministry of Justice, and more specifically, the *Bureau de l'entraide judiciaire en matière civile et commerciale*, has been designated as the Central Authority for France to carry out the duties imposed by the Convention.⁹ Upon receipt of an application for return, the Central Authority will check that it satisfies Convention criteria and is accompanied by the proper documentation. This authority will consider only those applications which are drawn up in French or are accompanied by a translation into French.¹⁰

The file is then forwarded to the *Procureur de la République* (public prosecutor) attached to the civil court of general jurisdiction in the jurisdiction where the defendant resides. This court, known as the *tribunal de grande instance*, has exclusive jurisdiction over family matters. Initially, the parties are systematically encouraged by the Central Authority to reach an agreement; if necessary, an experienced mediator will be involved.¹¹ An International Mediation Mission for Families was created at the Ministry of Justice in April 2001. It provides mediation services either at the request of the parents or of the competent authorities. The mediation will address issues, such as the exercise of parental authority, the residency of the child, and the effective visitation rights of the non custodial parent. The Mission is comprised of judges, social workers, and a psychologist. Since its creation, the Mission has been involved in about 100 cases.¹²

All necessary measures will be taken to locate a child, protect his well-being, and prevent the child from being abducted or concealed before the final disposition of the case (interdiction to leave the French territory, inscription of the child name in the missing children registry).¹³ If mediation fails, the petition for return will be heard before a specialized judge, the *juge aux affaires familiales* (family affairs judge). However, the judge may decide to remand the case to a panel of three judges. Such remand is mandatory if it is requested by one of the parties.¹⁴ The decision rendered by the judge or the court is appealable.

⁷ Journal Officiel [hereinafter J.O.], Dec. 1, 1983, at 3466.

⁸ 1958 CONST. art. 55.

⁹ Ministère de la Justice, Direction Des Affaires civiles et du Sceau, Bureau de l'entraide Judiciaire, en matière civile et commerciale 13, Place Vendôme 75042 Paris Cedex 01 Téléphone: 33 1 44 86 14 66, Fax: 33 1 44 86 14 06.

¹⁰ This is in accordance with the provisions of art. 42 and pursuant to art. 24, ¶ 2 of the Convention.

¹¹ Letter 002630 of Apr. 8, 1999, from the French Central Authority in response to an inquiry from the Law Library of Congress.

¹² See http://www.diplomatie.gouv.fr/francais/familles/enlevements/mots_utiles03.html.

¹³ *Supra* note 11.

¹⁴ Code Civil (C. CIV.) art. 247, (Ed. Dalloz 2003) & Code de l'organisation judiciaire (C. ORG. JUD.) art. L.312-1 (Ed. Dalloz 2003).

Provisional enforcement pending the appeal may be granted, but the court is not compelled to do so.

Alternatively, the petitioning parent may choose to bypass the Central Authority and instead proceed directly to the *tribunal de grande instance*. This option was confirmed by the *Cour de Cassation* (the highest judicial court in France) in 1995.¹⁵ The petitioning parent's attorney will use an emergency procedure known as *référé*. The opposing party is informed of it. Application for a *référé* is made by an *assignation en référé*, which is similar to an emergency writ of summons. Special sessions for the hearing of *référé* applications are usually held once a week (sometimes more often in the larger cities), or in cases of extreme urgency, immediately at a fixed time, in court or at the residence of the judge, even on public holidays. Bypassing the Central Authority may save time, but the public prosecutor services will not be available, and a local attorney experienced in dealing with the Convention will be required. In addition, when the child's whereabouts are unknown, the prosecutor can ask the police to investigate further. Such help will not be so easily obtainable if the parent goes directly to court.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

The Penal Code contains several provisions covering parental child abduction and withholding access rights from a person entitled to such rights. The offenses are listed in the Code under the heading “Encroachment on the exercise of parental authority.” They are as follows:

- Withholding access rights from a person entitled to these rights is punishable by a 1 year prison term and a €15,000 fine (approximately US\$ 16,500);¹⁶
- Failure by the person with whom the child habitually resides to give notice within one month of any change in the child's residence to whoever has access rights to the child resulting from a judicial decision or an agreement approved by a court is punishable by a 6 month prison term and a €7,500 fine (approximately US\$ 8,250);¹⁷
- Abduction of a minor by a legitimate, natural or adoptive parent either from a person with parental authority or from a person he was placed with, or from a person with whom he habitually resides, is punishable by a 1 year prison term and a €15,000 fine (approximately US\$ 16,500);¹⁸
- Abduction of a minor without fraud or violence by a person other than the persons mentioned in the previous article from a person with parental authority, from a person he was placed with, or from a person he habitually resides with, is punishable by a 5 year prison term and a €75,000 fine (approximately US\$ 83,000).¹⁹

¹⁵ Cass. 1^{ère}., June 7 1995, Bull.civ. I, No. 234.

¹⁶ CODE PÉNAL (C. PEN.), art. 227-5 (ed. Dalloz, 2003).

¹⁷ *Id.* art. 227-6.

¹⁸ *Id.* art. 227-7.

¹⁹ *Id.* art. 227-8.

The penalties imposed by articles 227-5 and 227-7 will be increased to a 3 year prison term and a € 45,000 fine when either one of the following occurs : (1) the child is retained for more than 5 days and information with regard to the child's whereabouts is withheld; (2) the child is taken out of the territory of the French Republic;²⁰ (3) the guilty party has lost parental authority.²¹

Criminal prosecution may result in a formal judicial investigation conducted by an investigating judge. This judge has broader investigatory powers than a civil judge. Prosecution may also be used as a negotiating tool with the abductor, and in some cases has a dissuasive effect. However, in other cases, prosecution may impede any chance of reconciliation, as it tends to exacerbate the situation. Therefore, recourse to criminal prosecution is decided on a case-by-case basis.²²

B. Parental Visitation

Parental rights and duties referred to as *autorité parentale*²³ are vested jointly in parents at the birth of the child.²⁴ Divorce or separation of the parents do not in principle affect the relationship of rights and duties of former spouses in relation to their children.²⁵ It is customary for joint parental authority to continue while one parent is awarded custody, unless this is deemed to be contrary to the child's interests. Parents should continue to decide together which school the child will attend, matters relating to health, and relationships with third parties. Therefore, a non-custodial parent will retain access rights and the right to influence major decisions affecting the child.

In case of disagreement, the *juge aux affaires familiales* has full authority to take any measure guaranteeing the continuity and effectiveness of the relationship between a child and each of his parents. He may, for example, order an entry on the parents' passports stating that the child cannot be taken out of the French territory without the authorization of both parents.²⁶ To determine how parental authority will be exercised, the judge may take into account any agreement between the spouses, reports prepared by social workers, and wishes of the child (provided that the child has a sufficient degree of understanding).²⁷ Parents are free to seek the modification of an order if a change in circumstance has occurred.

Article 16 of the Convention prohibits a court from making substantive custody decisions during the proceedings. Therefore, only provisional measures in the best interests of the child will be taken by the judge. When return of the child to the country of habitual residence is denied, parental authority will be decided according to the rules stated above.

²⁰ *Id.* art. 227-9.

²¹ *Id.* art. 227-10.

²² LES PETITES AFFICHES, Françoise Thomas-Sassier, *La soustraction internationale d'enfants*, Oct 1, 1997. (Ms. Thomas-Sassier was one of the judges in charge of the application of the Convention at the French Central Authority).

²³ *Supra* note 14, art. 371-1.

²⁴ *Id.* art. 372.

²⁵ *Id.* art. 373-2.

²⁶ *Id.* art. 373-2-6.

²⁷ *Id.* art. 373-2-11.

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

France has a dual system of courts: judicial and administrative courts. Judicial courts have two functions, civil and criminal. They carry distinct names depending on which function they exercise. This report discusses only the judicial courts which may be involved in handling Hague Convention child return proceedings.

As seen above, *the tribunal de grande instance* is the court of first instance which will hear the application for return. Such courts are located in each *département*,²⁸ though some larger departments have more than one. They are competent to hear all civil disputes, apart from disputes which are expressly attributed to another court by reason of their nature or the amount involved. The *tribunaux de grande instance* are the ordinary courts for family matters (marriage, divorce, affiliation, and nationality), as well as for property, patent matters, and civil liability.²⁹ They usually sit as a three-judge panel,³⁰ although specialized judges, sitting alone, such as the *juge aux affaires familiales*, adjudicate ordinary cases.³¹ In principle, the *tribunal de grande instance* of the defendant's residence has territorial competence.³² When exercising its criminal jurisdiction, the *tribunal de grande instance* is referred to as the *tribunal correctionnel*. Offenses regarding parental abduction listed above in Part II would be heard before the *tribunal correctionnel*.

Appeals of both civil and criminal decisions of the *Tribunaux de grande instance* go to the *Cour d'appel* (court of appeals). Their territorial jurisdiction generally covers three *départements*. The court of appeals sits in panels with a minimum of three members. They re-examine the facts and the legal points of a case. The courts review the files as presented by the lower courts and order additional investigations if necessary.³³

The supreme judicial court is the *Cour de Cassation*. The court currently has six chambers: three *chambres civiles*, a *chambre commerciale et financière*, a *chambre sociale*, and a *chambre criminelle*. The Court is referred to as the guardian of the law. It decides whether the rule of law has been correctly interpreted and applied by the lower courts. Usually, it does not substitute its own decision for a lower court's judgment with which it disagrees, but merely quashes the judgment and remits the case for rehearing by another court of the same rank. This lower court is not bound to accept the *Cour de Cassation's* view of the law, but will ordinarily do so. If it refuses to do so, and its decision is in turn appealed to the *Cour de Cassation* on the same grounds as before, the court will sit as an *assemblée plénière* (full court). If the court again quashes the lower court decision, it will either remit the case to a third lower court which will this time be bound by the *Cour de Cassation's* interpretation of the law, or it may decide the case itself.³⁴

²⁸ France is divided into 22 regions and there are 96 *départements* within these regions.

²⁹ C. ORG. JUD. art. L 311-2.

³⁰ *Id.* art. L311-18.

³¹ *Id.* art. L312-1.

³² NOUVEAU CODE DE PROCÉDURE CIVILE (N.C.PR.C.), art. 42.

³³ C. ORG. JUD., arts. L212-1 and R211-1.

³⁴ *Id.* arts. L111-2 and R121-3.

In most cases it appears that the French courts have ordered the return of the children.³⁵ The two defenses most often raised are (a) the lack of custodial rights of the petitioner, or (b) a grave risk of harm/intolerable situation. As to the first defense, the Court of Appeal of Aix en Provence and the *Cour de Cassation* on two occasions have concluded that a person having visitation rights, the legal right to be consulted, and the right to consent to any change in the child's residence, had rights of custody within the meaning of the Convention.³⁶

For a grave risk/intolerable situation defense to be successfully raised, the *Cour de Cassation* requires that the grave risk of harm or the intolerable situation be evaluated in regard to the conditions that the child will find upon his return and not in regard to past facts.³⁷ The Court, for example, denied the return of a child who had been kidnapped by his mother when he was 6 months old, and, at the time of the court decision, she was the only person he had ever known. The court held that such a return would subject him to a grave risk of psychological harm. The doctor who conducted the mental examination of the child had concluded that returning the child to his father would expose him to a psychological danger, not because bringing him closer to his father, but because of his young age, the separation from his mother, with whom he had lived alone would be for him the equivalent of a bereavement.³⁸

Under the same line of reasoning, the court denied the return of two children to the United States 4 years after their kidnapping by their mother. She had taken them to France when they were respectively 2 years old and 3 months old.³⁹ Finally in a 1999 case, the court ruled that separating a 3 years old child from her mother and from her brother would result in an imminent psychological danger for both children. It denied their return to the United States.⁴⁰

Over the past 3 years there have been a number of cases where the parents who kidnapped their children from Israel to France raised the issue before the French courts that Israel was a war zone and therefore the return to Israel would expose them to physical and mental harm or otherwise place them in an intolerable situation. In each instance, the court rejected the argument, and the children were returned.⁴¹ In a recent case, for example, the family law judge of the Marseilles *tribunal de grande instance* found that the situation in Israel has been tense since the creation of the state in 1948, and that this climate did not dissuade the defendant and his wife from taking their residence there with their six children. As to the crisis known as the second Intifada, which began in September 2000, it did not prevent the defendant from waiting until April 2002 to remove five of his daughters, thereby separating the

³⁵ See Hubert Bosse-platière, *l'application par les tribunaux Français des Conventions visant à lutter contre les déplacements illicites d'enfants, l'enfant et les conventions internationales*, at 413 (Presse Universitaire de Lyon, 1997), and Jacqueline Rubellin-Devichi, *DROIT DE LA FAMILLE*, at 659, (Ed. Dalloz, 1999). The authors state that only three decisions have denied the return of the children. Since the publication of these books, the *Cour de Cassation* rendered one additional decision in 1999 denying the return of the children. The 1999 decision is reviewed above in the report.

³⁶ Hubert Bosse-Platière-platière, *l'application par les tribunaux Français des Conventions visant à lutter contre les déplacements illicites d'enfants, l'enfant et les conventions internationales*, at 417.

³⁷ *Id.* at 420, 421.

³⁸ Cass. 1^{ère}, July 12, 1994, Bull.civ. I, n° 248.

³⁹ Cass. 1^{ère}, Nov. 21 1995, Bull.civ. I, n° 415.

⁴⁰ Cass. 1^{ère}, June 22, 1999, Bull.civ. I, n° 206.

⁴¹ E-mail dated Nov. 26, 2003 from the Office of the State Attorney, Ministry of Justice of Israel, in response to an inquiry from the Law Library of Congress.

siblings. The judge further held that although it is indisputable that random and unpredictable suicide attacks are perpetrated in this country, risk must be strictly assessed.⁴²

The courts will consider the wishes of the children who have reached the "age of understanding" (generally from the age of 10 or 11 years old). These children may be assisted by their own attorney (who will be always appointed on legal aid). The judge will hear the child separately with only the child's attorney present.⁴³

IV. Law Enforcement System

Judgments are enforceable only after they have been given *force de chose jugée*, i.e., where they are not subject to appeals suspending their enforcement, or where appeals have not been made within the time limits.⁴⁴ In principle, judgments cannot be enforced until an *expédition* (first authentic copy of the judgment which contains the *formule exécutoire* (enforcement formula)) is delivered to the successful party. This enforcement formula specifically requires all *huissiers de justice*,⁴⁵ public prosecutors and commanders and officers of the police force, to lend their assistance when it is requested. The judgment must be then served on the defendant unless provided otherwise.⁴⁶

French law possesses no law of contempt of court for the enforcement of civil judgments and other court orders. Therefore, in the absence of voluntary compliance with a judgment or court order, there is no other option than the *exécution forcée* (forced compliance).⁴⁷ Orders requiring the return of a child under the Hague Convention or orders concerning visitation rights will be enforced with the assistance of the public authorities as specified in the enforcement formula contained in the judgment.

French courts have also developed the technique of *astreintes* designed to induce compliance with court orders. An *astreinte* is a specified amount of money that the court orders to be paid for every day, week, or month during which a person fails to perform its order.⁴⁸

V. Legal Assistance Programs

France made the following reservation to article 26 of the Convention:

In accordance with the provision of article 42 and pursuant to article 26, paragraph 3, the Government declares that it will assume the costs referred to in paragraph 2 of article 26

⁴² See http://www.hiltonhouse.com/cases/BenSaid_France.txt.

⁴³ C. Civ. art. 388-1.

⁴⁴ N.C.P.R.C., arts. 500 & 501, (Ed. Dalloz, 2003).

⁴⁵ The *huissiers de justice* have the exclusive right to notify all procedural acts in relation to legal proceedings and they are responsible for the enforcement of court orders and judgments.

⁴⁶ N.C.P.R.C., art. 502.

⁴⁷ *Supra* note 11.

⁴⁸ Law 91-650 of July 9, 1991, art. 33, N.C.P.R.C, Voies d'exécution at 1145.

only insofar as those costs are covered by the French system of legal aid.⁴⁹

When the person seeking the return of the child uses the services of the Central Authority and of the public prosecutor, no fee will be incurred. The public prosecutor is a civil servant, and he appears in court on behalf of the state. His service is justified on the ground that compliance with international conventions on judicial cooperation is in the public interest. However, a person bypassing the Central Authority will incur costs (although civil litigation is considerably less expensive in France than in the United States) unless he qualifies for legal aid.

Subject to a means test, legal aid is available in France either for legal advice or for litigation. It is available in all civil, criminal, and administrative litigation to plaintiffs, as well as defendants. An application must be filed with specially constituted bodies, known as *bureaux d'aide juridictionnelle*, which are composed of judges, lawyers, public officials, and “consumers.” These bureaux are found in each *tribunal de grande instance* and the *Cour de Cassation*. They may grant partial or full legal aid, depending on the means of the applicant. Legal aid is available to French citizens, nationals of the Member States of the European Community, foreign nationals residing habitually in France, minors whatever their status may be, and, exceptionally, to a person who “does not fit into any of these categories but whose situation is of a particular interest due to the subject of the litigation or the foreseeable cost of the trial.”⁵⁰

It may be also possible for the winning party to recover some of the costs. French law addresses the recovery of costs incurred in civil litigation as follows:

The Code of Civil Procedure provides for a list of expenditures known as *dépens*, which include expenses incurred by witnesses, remuneration of experts, court fees, emoluments of *officiers publics*,⁵¹ and attorneys fees where recourse to an attorney before the court in question is compulsory.⁵² In principle, the loser of a case pays the *dépens* of the other side, as well as his own, but the court has discretion to place all or part of them on another party to the litigation.⁵³

The costs which are not counted as *dépens* (for example, attorney fees when resorting to an attorney is not compulsory), may be also recovered by the winning party. In principle, the person who is ordered to pay the *dépens* is also ordered to pay any other costs. However, taking into account what is equitable, the court may in its discretion decline to make such an order or make only a reduced one. In addition, if the losing party has been unfair or vexatious, then he may be liable for the loss this causes any other party to the litigation.⁵⁴

⁴⁹ See <http://www.hcch.net/e/status/stat28e.htm>

⁵⁰ Law 91-647 of July 10, 1991 as amended, N. C. P. R. C., Appendice at 1323.

⁵¹ This expression covers various categories of practitioners (such as, for example, the *huissiers de justice* as seen above) who have obtained from the administration the exclusive right to perform certain legal acts and/or execute certain legal instruments.

⁵² N. C. P. R. C., art. 695.

⁵³ *Id.* art. 696.

⁵⁴ *Id.* arts. 32-1 (dilatory or abusive suit); 559 (dilatory or abusive appeal); 628 (abusive *pourvoi en cassation*).

VI. Conclusion

Based upon the available information and the reported cases, it appears that France has been in compliance with the Convention, and French courts have applied the Convention strictly and without national bias. The Convention has been viewed as a major breakthrough and as an effective tool when applied in good faith.⁵⁵ French authorities, however, have expressed concerns that the national reflexes and protectionism of some foreign courts have undermined its effectiveness and resulted in an increase in the number of kidnappings.⁵⁶ They argue that only true political will to comply with the terms of the Convention by the Central Authorities of such countries will change the courts' attitude.

To complement and reinforce the system created by the Convention, at least within the EU, France made the adoption of a regulation ensuring that decisions on access rights be directly enforceable in another Member State and ensuring the prompt return of the child one of its priorities. The EU Council of Ministers approved such a Regulation on October 3, 2003. It will be applicable in March of 2005.⁵⁷ All decisions on parental authority rendered in a Member State will be directly enforceable in another Member State without the need for an intermediate procedure (exequatur procedure). The regulation will make mandatory the hearing of the victim parent by the judge of the state where the child has been unlawfully taken. This judge will have 6 weeks to render a decision as to the return of the child. The only judge competent to decide on the issues concerning the child, such as custody, visitation rights, and administration of the child's property will be the judge of the habitual residence of the child.

Prepared by Nicole Atwill
Senior Legal specialist
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⁵⁵ *Supra* note 22.

⁵⁶ *Id.* Ms. Thomas-Sassier notes that abductions by German parents have increased because of the unwillingness of German courts to return children to France.

⁵⁷ News Press, Adoption d'un reglement concernant le droit de la famille et les enlevements d'enfants, Oct. 3, 2003, Lexis/ Presse.