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ITALY

HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Introduction

Italy ratified and implemented the Hague Convention on the Civil Aspects of International Child Abduction (hereafter the Convention), on October 25, 1980, through Law No. 64 of January 15, 1994.¹ Following ratification, the Convention entered into force in Italy on May 1, 1995.²

I. Domestic Laws and Regulations Implementing the Hague Convention

According to article 3 of Law No. 64, the Central Office for Juvenile Justice at the Ministry of Justice has been designated the Italian Central Authority pursuant to article 6 of the Convention. In the discharge of its responsibilities, the Central Authority avails itself, whenever necessary, of the assistance of a state attorney (*Avvocatura dello Stato*), as well as of the Juvenile Services of the Justice administration (*Servizi minorili*). It may further request the cooperation of any public administrative body, the police, or any agency or authority whose objectives correspond with the functions entrusted to the Central Authority under the Convention.

Any judicial documents for the implementation of Law No. 64 in the judicial proceedings initiated at the request of the Central Authority are free of any charge or fee, including the stamp duty and registration tax.

Applications for the return of a removed child or for securing the effective exercise of the rights of access are filed through the Central Authority pursuant to articles 8 and 21 of the Convention; however, the interested party may apply directly to the appropriate authorities, according to article 29 of the Convention.³

According to Law No. 64, the Italian Central Authority, having made the necessary preliminary investigations, must expeditiously send all documents to the public prosecutor attached to the Juvenile Court where the minor was found, to make an urgent request to this court to order the return of the minor or the effective exercise of the rights of access. The date of the hearing in chambers is set by the presiding judge and is communicated to the Central Authority. The applicant is informed by the Central Authority of the date of hearings so that he may appear, being responsible for his own expenses, and may be heard. The Court should issue a decision within 30 days from the date the application was received. The person caring for the minor, the public prosecutor, and, when appropriate, the minor must be heard.

The decree of the Court is immediately enforceable. The filing of an appeal to the Supreme Court (*ricorso per Cassazione*) does not stay its enforcement. The public prosecutor, with the cooperation of

¹ GAZZETTA UFFICIALE DELLA REPUBBLICA ITALIANA [official law gazette of Italy, G.U.] No. 23 of Jan. 29, 1994, Ordinary Supplement.

² G.U. No. 97 of Apr. 27, 1995, Ordinary Supplement.

³ Law No. 64, art. 7.

the Juvenile Services of the Justice Administration when needed, provides for the enforcement of the decisions of the Court and immediately informs the Central Authority.

II. Domestic Laws Regarding Child Abduction and Parental Visitation

A. Child Abduction

Under Italian penal law, removing a child under the age of 14 from the custodial parent, a guardian, or from anyone having supervision or custody of a child, or detaining a child against the will of those persons, constitutes a crime punishable (on complaint of the offended party) by imprisonment from 1 to 3 years. Removing or detaining a minor who has attained the age of 14 without the minor's consent entails the same punishment.⁴

The crime may be committed by anyone, including the parent who does not have custody rights over the minor, and by either one of the two parents, inasmuch as parental authority is exercised by mutual agreement of both parents, according to article 316 of the Civil Code.⁵ Furthermore, when the removed or retained child is also deprived of his personal freedom, the perpetrator of the crime may also be subject to the provisions of article 605 of the Penal Code on abduction (*sequestro di persona*) and may be subject to more severe punishment.⁶

B. Parental Visitation

Family relations and the resulting rights and obligations, whether the parents are married or unmarried, as well as guardianship, adoption, separation, and divorce, are regulated by numerous provisions of the Civil Code and by special legislation.⁷

Parental authority is exercised by the mutual agreement of both married parents.⁸ The same criterion applies to unmarried parents who live together. When unmarried parents do not live together, parental authority normally belongs to the parent with whom the child resides, but the judge, in the exclusive interest of the child, can provide otherwise. The judicial authority can also exclude both parents, whether married or unmarried, from the exercise of the parental authority and provide for the appointment of a guardian.⁹

Civil courts (*tribunali*) deciding cases of separation or divorce provide for the custody of children. They also provide for access rights for the parent not entitled to custody and adopt any other measure relating exclusively to a child's moral and material interests. The courts establish the extent and the manner of the non-custodian parent's contribution to the support, education, and rearing of the child. The

⁴ See art. 574 of the Italian Penal Code, in T. Padovani, ed. CODICE PENALE (Milano, Giuffrè, 1997).

⁵ *Id.* at 2089 and 2091.

⁶ *Id.* at 2091 and 2179.

⁷ See Law No. 184 of 1983, as amended, on Adoption and Custody of minors; and Law No. 898 of 1970, as amended, on the Dissolution of Marriage, in F. Galgano, B. Inzitari, ed. CODICE CIVILE E LEGGI COMPLEMENTARI [Civ. C.] (Padova, CEDAM, 2002/2003).

⁸ *Id.* Civil Code, art. 316.

⁹ *Id.* Civil Code art. 155, 317, 317 *bis*, 330, and 343.

parent may petition the court if he deems that decisions prejudicial to the interest of the child have been adopted.

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

Competence in matters pertaining to family relations, guardianship, adoption, and custody of minors, as well as to separation and divorce, belongs to Juvenile Courts (*Tribunali per i minorenni*), to Civil Courts (*Tribunali ordinari*), and to Guardianship Judges (*Giudici Tutelari*). In a few special situations pertaining to suspension or loss of parental authority in connection with penal matters, competence belongs to the Penal Courts. Appeals are heard in the Court of Appeals.

Applications for the enforcement of the provisions of the Convention are submitted, according to Law No. 64 (see Part I) to the Juvenile Courts, which are part of the Italian judicial system. Ordinary magistrates, as well as honorary magistrates selected from among citizens for their expertise in the fields of biology, psychiatry, criminal anthropology, education, and psychology, and who have distinguished themselves in community service, sit on these courts.

These Courts avail themselves of the cooperation and assistance of the Juvenile Services of the Justice Department and of the welfare services instituted at the local government level for all the needs of minors, for their support and protection, as well as for emotional and psychological assistance to them.

IV. Law Enforcement System

Enforcement of Italian court orders in Hague Convention cases is carried out by the Public Prosecutor (see Part I). It has been pointed out that in the event that an abductor refuses to comply with the order, it becomes the duty of the Chief Public Prosecutor in the region of the child's residence to ask the police Minor Division for assistance in removing the child, usually with the support of social services.¹⁰

Under the provisions of the Italian System of Private International Law,¹¹ any judicial rulings by foreign authorities relating to the existence of family relations are effective in Italy if they have been issued by the authorities of the state to which reference is made in the Italian law, provided that they do not conflict with the requirements of public policy and provided that the fundamental rights of the defense have been complied with.

Regarding determinations pertaining to the custody of a child, a recent ruling of the Italian Supreme Court (*Corte Di Cassazion*) needs to be considered.

In 1997, the Italian Supreme Court decided an appeal in a case of removal of a child by his father from Australia to Italy, and upheld a Juvenile Court's decision that ordered the immediate return, in application of the Convention, of the removed child to his mother, who had been assigned custody of him by an Australian family court.¹²

¹⁰ See A. Hutchinson and H. Straight, *INTERNATIONAL PARENTAL CHILD ABDUCTION*, (Family Law, Reunite, 1998) at 135.

¹¹ Law No. 218 of May 31, 1995, G.U. No. 128 of June 3, 1995, Ordinary Supplement.

¹² Corte Di Cassation, Decision No. 507 of January 18, 1997, in *RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE*, No. 1 (1998), at 145-149.

The Supreme Court rejected challenges of constitutional illegitimacy of Italian Law No. 64 implementing the Convention, on the consideration that the Convention aims at the protection of minors from the wrongful behavior of their parents or relatives independently of any control over the merits of the case by the authorities of the requested contracting state.

Having acknowledged the Convention's primary purpose, namely the protection of the minor from the harmful effects of wrongful removal or retention in breach of custody rights, the Court underscored the fact that the main objective in such cases is to discourage any form of "legal kidnapping" by a parent or relative. This is done by providing forms of protection that attempt, above all, to re-establish the pre-existing conditions and to neutralize any interest of the perpetrator of the removal or retention to obtain through wrongful behavior any beneficial effect from forum shopping.

The Court excluded any conflict with article 30 of the Constitution, which pertains to parents' rights and obligations to support and educate their children, on the basis of two considerations: that the Convention is a duly accepted international instrument, whose function is the effective protection of minors against wrongful behavior of parents or relatives; and that the limitations imposed on the requested state's judicial authority pertaining to any control over the merits of the case are not applicable when it is determined that a serious risk exists, that the child would be exposed to physical or psychological harm or would be placed in an intolerable situation upon his return.

The Court stated that only in the presence of such a risk may Italy's judicial authority refuse to restore custody and review the merits of the case. The existence of a situation of risk, the Court observed, was not invoked by the removing parent, and the condition that allows the judicial authority to ascertain whether or not the child objects to being returned was not met.¹³

The Court went on to clarify that in the Italian system the decision to return the child, as such, is not even potentially capable of conflicting with the decision to be issued in the separation case between the two parents pending before an Italian court.

In the same decision, the Court also confirmed that Hague Convention-related cases are adjudicated by the court at the place where the minor is found, pointing out that such a legislative solution regarding territorial competence is not a novelty, but rather is found in the Law on Adoption as well.¹⁴

V. Legal Assistance Programs

Legislation enacted in 2002 contains provisions on legal aid in criminal, civil, administrative, and tax related proceedings.¹⁵ There is no automatic right to legal aid. It is granted, upon request, only to individuals who are able to prove that they have minimal income. The law applies to citizens, and to foreigners legally residing in Italy, as well as to stateless persons. Article 25 of the Convention applies.

¹³ The Convention, art. 13.

¹⁴ *Supra* note 7.

¹⁵ G.U. No. 139 of June 15, 2002.

VI. Conclusion

With the ratification and implementation of the Convention, Italy has provided its legal system with an instrument whereby it can confront situations of great social relevance, such as abduction of minors, frequent in modern industrialized societies.¹⁶

The Italian implementing legislation has fully adhered to the principles contained in article 2 of the Convention, which requires the use of the most expeditious procedures available in cases of abduction of minors. The implementing legislation mandates proceedings in chambers, imposes a short term for deciding the case, and limits appeals to a petition to the Court of Cassation (Supreme Court). Such a petition, however, does not stay the enforcement of the lower court's order.

Judging from the decision discussed in Part IV of this report, and subsequent ones,¹⁷ it appears that the rulings of Italian courts strictly adhere to the spirit of the Convention, which is aimed at the protection of children, a concern of paramount importance in matters relating to their custody.

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¹⁶ According to information provided by the Italian Central Authority, in the first semester of 2003 Italy had a total of 63 cases, of which 38 were activated by the Italian Central Authority (10 towards the U.S.) and 25 activated by foreign authorities (2 by the U.S.), at www.Giustizia.it.

¹⁷ *Supra* note 12. See also the following decisions of the Corte di Cassazione: No.10090 of 1997, in RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE (RDIPP) No. 4 of 1998; No.70 and No. 3767 of 2001(RDIPP No. 1 of 2002); No. 11999 and No. 13823 of 2001(RDIPP No. 2 of 2002); No. 2748 of 2002(RDIPP No.3 of 2002); No. 299 of 2002(RDIPP No.1 of 2003).