

(1) The role and functioning of Central Authorities

1. Certain difficulties when applying Article 7 of The Hague Convention have been noticed, such as:

Certain CA (Central Authorities) do not keep up a fluent communication and therefore, they do not provide updated information on cases falling within the scope of The Hague Convention

2.- Difficulties have been met when trying to get information from some Central Authorities as regards (1) domestic law applicable to the Convention, as well as (2) providing a lawyers' list, since in many cases it has been necessary to turn to our Embassies and/or Consulates to avoid delays.

3.- In order to achieve a voluntary return, this Central Authority transmits the parent who wrongfully removed or retained the child a letter explaining the Convention's mechanism and goal, the Central Authority's role and the advisability of contacting this Authority, within a period not exceeding ten days, so as to reach a voluntary return agreement. The letter also explained that his/her non appearance shall make the institution of judicial proceedings intervene, which will be harmful for the child's welfare.

It should be noted that such letter will be sent provided that the parent requesting the return gives his/her consent. In case he/she refuses to do so for reasons implying a possible removal of the child to another country, the respective judicial proceedings will be initiated.

4. This Authority supplies information on The Hague Convention functioning and application to all those persons who require it, whether persons involved in cases under the Convention, officers from different areas, academicians, students, etc.

Likewise, the Argentine Central Authority has a web site in Internet, the objective of which is to inform on the Convention, indicating that in case of any doubt this Authority may be contacted through the channels therein mentioned. This site has been prepared in the Spanish and English languages. (www.menores.gov.ar).

Legal Assistance

- Foreign Jurisdiction:

Assuming that the applicant who requests the return cannot afford the costs and expenses arising from the participation of a legal counsel in the State to which the child has been removed or in which he is retained, this Central Authority will, provided that such participation were necessary, this Central Authority will ask advice to its correspondent one in order to know the mechanism for obtaining Legal Aid in such country and thus comply with the requirements established by its legislation.

If the applicant is an Argentine citizen he will be able to obtain a subsidy granted by the National State provided that certain requirements set forth in the domestic legislation (Decree No. 891/95) are complied with.

- National Jurisdiction:

A foreign applicant who cannot afford a legal counsel of the domestic trial bar, may be represented by a public defender from the Attorney General's Office who will represent him free of charge throughout the stage of proceedings. The lack of economic means shall be evidenced according to the legislation in the applicant's country of residence. When a public defender is appointed, this Central Authority shall directly transmit him the return application, enclosing a letter in which the Convention guidelines and the obligations for an expeditious return are set forth. Likewise, the public defender shall, upon his request, be furnished with any type of information or that one supplied by the requesting Central Authority.

5.- The Argentine Central Authority does not represent the parents in the judicial proceedings. Notwithstanding, it advises on the Convention application when required by any person involved in the process, namely: the parties, the parties' lawyers, the public defender, the official counsel for minors and the judge.

6.- If this Central Authority becomes aware that there exists the risk that the child could suffer abuse or violence at the moment he/she is returned, it shall advise the relevant party as regards the different judicial or extrajudicial course of action in our country.

Furthermore, this Central Authority would, where necessary, give the informant the assistance needed in order to (i) contact the corresponding agencies, or (ii) make the accusations before the competent authorities.

As regards the undertakings, this Central Authority is not empowered to enforce them in the country. The competent judicial authority will be able to enforce them. This Central Authority shall facilitate that the party requiring the execution of undertakings within the domestic jurisdiction may have access to courts.

7.- In case of an application coming from another State, this Central Authority advises the applicants and facilitates the obtaining of legal aid as well as the applicant's access to court.

Likewise, this Central Authority advises the parents on the convenience of voluntarily re-establish the rights of access by the same procedure described for the return, when answering question 3 in this part (1).

As regards the procedure applied by this Central Authority for enforcing the rights of access regime (Art. 21), it is similar to that of the return of minors as previously explained (see answer to questions 3 and 4 in this part (1)).

This Central Authority cooperates with those applicants who wish to modify an existing rights of access order.

In addition, it should be pointed out that our law has provided for criminal matters (Act 24270) that when the parent who is living with the child does not allow that the other parent who is not living with the child to contact the minor, penalties set forth in the aforesaid act shall be applied. Such penalties shall be also applied to persons who try to avoid the child contacting his/her parents.

8.- Statistics submitted this year have been elaborated on our database, which will be modified according to the requirements demanded in the new forms furnished by the Permanent Secretariat.

9. Conclusions in footnote 11 are shared. The appropriate faculties granted to the CA, its qualified personnel as well as a satisfactory and modern infrastructure will facilitate communications, preventing discrepancies when applying the Hague Convention.

It is understood that the domestic legislation establishes the scope of the functions provided for in the Convention.

As regards footnote 12, which refers to children's protection and their best interest, we understand that as to Argentine domestic legislation and the functioning of the different agencies involved, those conclusions mentioned in this footnote would be fulfilled.

10.- The possibility to make recommendations compatible with our State's domestic laws is being analyzed.

(2) Judicial Proceedings, including appeals and enforcement issues, and questions of interpretation.

1.- In the Argentine Republic, every Judge competent in civil matters (including family matters) is able to deal with return applications on the basis of this Convention.

2.- No specific agreements exist as to concentration of jurisdictions in respect of returns under the Convention.

3.- These cases are executed according to those formalities established for the expedited summary proceeding, where the terms are summarized for both its execution and producing of evidence.

The Court of Appeals shall urgently execute the application in order to comply with the Convention's objectives, observing the procedural terms arising from the domestic rules.

4.- The Judge may, to his discretion, hear the child's view if he/she considers that the minor has attained enough degree of maturity to be able to express himself/herself, as established in paragraph 2, Article 12 of the Convention on the Rights of the Child.

5.- Pleas based on Article 20 have not been submitted in our country. As regards pleas under Article 13, they include delays in the return process due to the production of the relevant evidence. The onus of proof is the responsibility of the party who submitted such pleas.

6.- Within our jurisdiction, a judgement is by itself compulsory and does not demand a separate order for its enforcement. The Judge who issued the return order is empowered to enforce it.

7.- As regards items a), b),c), d) and e), we consider that it would be advantageous to concentrate jurisdiction. It is also important to keep fixed timetables as a help to carry out an expeditious proceeding to achieve the Convention's objectives.

In respect of item f), we must make clear that in our country the "serious risk" is restrictively construed according to the Supreme Court of Justice's interpretation, which has correctly construed the Convention.

As regards item g) of same question, we believe that it would be convenient to elaborate, between the States Parties, a standard proceeding in order to reach the effectiveness needed to achieve the Convention's objectives.

8.- Judgement on the case "Wilner vs. Osswald" issued by the Argentine Supreme Court is enclosed herewith.

(3) Issues surrounding the safe and prompt return of the child (and the custodial parent, where relevant)

1.- Our considerations in connection with the undertakings are as follows:

Under the Convention, the Judge hearing the return of the child is limited to decide whether the return does or does not correspond, and if applicable, such judge may order how the return to the habitual residence of the child shall be carried out.

Notwithstanding the aforesaid, the Judge's jurisdiction does not extend to the child's country of habitual residence, where the Judge of such place shall have the authority to order, recognize and enforce any type of act related to the child.

We believe advisable to analyze every undertaking separately, because many of them could not be recognized by our country's courts.

2.- Now we shall explain what would happen in our country in case of the non-fulfilment of those undertakings arising from: (i) a return order issued by the Judge who ordered the return, and (ii) an extrajudicial agreement between the parties.

(i) The foreign judge's order should be recognized by a domestic Judge, in accordance with the recognition and enforcement of judgements procedure set out in the applicable Convention, or in case of no Convention, in accordance with the Civil and Commercial Procedure Code in force in the place where such measures should be applied.

It is clear that in no way the Judge ordering the return would be accepted to decide on issues that according to the Argentine law he had no international jurisdiction to decide on.

(ii) The Convention must be submitted to the Judiciary for its implementation.

3.- (i) Safe harbour and (ii) mirror orders.

(i) We refer to item 2.- (i)

(ii) In order to obtain an identical order as that issued by the Judge ordering the return, the foreign judgement could be recognized as expressed in item 2. (i), or by submitting a request to the Argentine competent Judge as it was submitted to the Foreign Judge.

4.- Argentina is not a party to such Convention.

5.- No case with the characteristics described in this question has been filed so far.

6.- (a) Between Argentina and Chile a case in which the mother had removed her daughter to Chilean territory was arisen; she refused to return her daughter on the grounds that the Argentine Judiciary had initiated criminal actions against her because she had prevented the child's contact with the father.

Chilean Judiciary, when rendering judgement, considered the situation invoked by the mother (among others) not to return the minor to her habitual place of residence.

(b) In a case with the USA, a mother who was primary caretaker, wrongfully removed the girl to Argentina. The USA Judge granted the custody to the left behind father and issued a warrant against the mother. The Argentine Judge ordered the return and the girl went back to the USA. Some years later, the mother, to again contact her daughter in USA, tries to file a rights of access application. The warrant remains in force and the mother cannot travel to the USA because she would be arrested. The National Center does not render assistance to the mother in setting aside the warrant because it understands that criminal matters are beyond the Convention.

7.- We are not aware of communications between judges from different jurisdictions.

8.- At present, communications among different States are exclusively carried out through Central Authorities.

9.- This Central Authority provides information on the proceedings to be initiated and which the competent Court to hear the proceedings is.

As in any legal proceedings the parties must be represented by a legal counsel, they are informed that in case of no economic means, they may be legally advised by a Public Defender appointed by the Attorney General's Office.

10.- Family civil matters are not final, therefore they can be reviewed upon application of the abducting parent.

11.- a) Argentina is not a party to such Convention.

b) We consider advisable to carry out an exhaustive analysis of each undertaking before supporting or rejecting this proposal.

c) We agree to this principle.

d) We approve the objective, but it is difficult to set out modifications to those criminal proceedings in force in each country.

e) We understand that Central Authorities are obliged to perform this role.

f) We refer to item e).

(4) Procedure for securing cross-frontier access/contact between parent and child.

1.- This Central Authority provides the same kind of advise or, if appropriate, legal aid to both applicants requesting rights of access and those requesting the return of a child.

2.- As regards access rights, Argentine courts exercise jurisdiction to fix or modify access rights orders taking into account the child's place of residence.

3.- Foreign judgements may be recognized and enforced in the Argentine Republic, provided that they comply with the requirements specified whether in conventions concluded to such end with other countries or, in case of no conventions, in the domestic law. (Code of Procedure)

As it was previously informed Argentina is not a party to the Convention of October 19, 1996.

4.- There are no special proceedings for visitation applications under The Hague Convention. Such applications shall be governed by the Code of Procedure of the place where the child is.

5.- In cases of rights of access, this Central Authority applies the voluntary decision proceeding mentioned in part (1), question 3.

6.- As a general rule, every parent has the right to be in contact with his/her children. The obligation of observing the rights of children to maintain an appropriate relationship with both parents is fulfilled. However, according to circumstances and the judge's criteria, that right of contact may be restricted, obviously in the best interest of the child.

7.- The judge shall determine the conditions under which the rights of access shall be carried out according to each case. Generally, the judge shall adopt the necessary measures to prevent the child from being removed again.

8.- We refer to question 9, part 3.

9.- The most important problems identified by this Central Authority to materialize access orders, both in our jurisdiction and in foreign jurisdictions, are still present:

- In many cases the problem is that the parent who is not living with the child cannot afford travel expenses.
- In cases where parent and child have not had contact for a long period, sometimes the child does not want to see him/her, and it becomes very difficult to determine whether such refusal arises from a coercion exercised by the parent who is living with the child or it is the child's own free decision.
- Once the access order has been fixed, whether by agreement of the parties or by judicial judgement, it has been noted that generally several months go by until holidays when the child has to travel, arrive. At that moment, the parent who is living with the child usually makes excuses resulting in the non-fulfilment of the access order. In such a view, the parent who is not living with the child shall have to submit new judicial appeals demanding the enforcement of the access orders. Said proceedings imply considerable delays that in a number of cases may postpone the real contact for months and/or years, coming, in some cases even to the minor's sixteenth birthday when this Convention is no longer applying.

10.- When it is judicially brought up, the Judge is entitled to adopt the appropriate measures, depending on the case, in order to guarantee a sure access. We are not

aware of cases where financial guarantees have been asked. Some records indicate that passports were asked in order to prevent a wrongful removal.

11.- Once the access order is fixed, the judge will enforce it with no separate enforcement proceeding.

12.- We recommend an exhaustive consideration of ruling access rights to easily apply a standard proceeding in every jurisdiction, thus avoiding those delays pointed out in item 9.

(5) Securing state compliance with Convention Obligations

1.- Some problems identified by this Central Authority are still present:

- Some difficulties as to comply with the provision of information among Central Authorities. Some Central Authorities do not inform the latest news on the cases as they should, both as regards search of children and return proceedings.
- The delay to appoint Central Authorities in the new acceding countries' makes that the purposes of the Convention cannot be complied with in time.

2 and 3.- Our State is interested in drawing up a standard questionnaire which may serve as the basis for the rest of the States to be sure that a new State acceding to the Convention may comply with the obligations therein assumed and may guarantee its proper operation. We suggest that such questions include issues related to the applicable domestic laws, operation and designation of a Central Authority sufficiently empowered to implement the Convention.

4.- At this point we believe that the Special Committees, as well as those dealing with specific issues, would be of great importance. In addition, being these committees allowed to clarify blind spots, establish general guidelines and train those people attending, they would also lead such people to spread their knowledge within their territories.

5.- a), b) and c) We consider advisable a Permanent Bureau's leading role in monitoring the operation of the Convention. This would mean open a channel through which any Central Authority could pose those problems with other State when applying the Convention; the Bureau would be able to assess the problem and, if appropriate, make the relevant proposals to the Central Authority of the country in which the problem came up.

The Permanent Bureau's assistance could be as follows: (i) facilitate the intercommunication between Central Authorities acting as mediator in the conflict between them; (ii) give its view as to the correct interpretation on the articles of the Convention, on the basis of international jurisprudence and case-law gathered by INCADAT or facilitate information in order that judicial or administrative authorities clarify those blind and ambiguous spots likely to arise from the interpretation of the Convention; and (iii) the Permanent Bureau should evaluate in case of serious violations whether they may be solved by rendering due assistance, or in case of unreasonable reiterated violations whether some sanction or the like mechanism is applicable to the State which fails to meet the obligations.

(6) MISCELLANEOUS AND GENERAL

1.- We consider appropriate the wide range of activities carried out by the Permanent Bureau.

2.- We consider advisable a Bureau's further active role in monitoring the application of the Convention in the different countries as well as an effective intercommunication between the Central Authorities.

3.- We accept the proposal. Our country has no problem whether they are published, provided that such forms respect and reserve the involved minors' first and last names.

4.- We accept the proposal.

5.- We consider important that the Permanent Bureau contacts the authorities of non-member countries, in order to inform on the functioning of the Convention in the world, as well as the benefits achieved according to the supplied statistics.

6.- Our country has no bilateral agreements with non-party States to the Convention. Although our country is open to assess and, if appropriate, sign such agreements, we prefer those countries to accede to the Convention rather than to negotiate different Bilateral Agreements in order to achieve a greater judicial standardization.

7.- We support this proposal and in addition we can say that on many occasions we have met with abducting parents who said they had been forced to a wrongful abduction due to the unreasonable refusal of foreign courts to change the residence of the child.

TRANSLATED FROM SPANISH. Buenos Aires, March 14, 2001.

h:menores/haya