



# Argentina: Domestic Laws and Regulations Implementing the Hague Convention

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## ARGENTINA

### Domestic Laws and Regulations Implementing The Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction was ratified by Argentina by Law 23857<sup>1</sup> entering into effect on June 1<sup>st</sup>, 1991. The Central Authority for the Convention in Argentina is the *Dirección General de Asuntos Jurídicos-Dirección de Asistencia Judicial Internacional*- of the Ministry of Foreign Affairs, International Commerce and Cult.<sup>2</sup>

#### A) Restitution requested from Abroad when the child was taken into Argentina

The Central Authority has only administrative and informational functions since it is always the Judiciary who will decide on the restitution of the child or the visitation schedule. Once an application for restitution has been received, the Central Authority verify that the petition complies with all the requirements provided for under the Convention. Prior approval of the requesting parent, the Central Authority would contact the requested parent demanding the child's restitution or voluntary visitation.

If the child's restitution or voluntary visitation schedule does not take place at this first stage, the petition will have to be submitted by a private attorney before the competent court. The Central Authority will provide the pertinent court with a general background of the Convention and will also offer the assistance to the court during the proceedings.

However, the Central Authority does not provide legal assistance to private individuals during the proceedings before Argentine courts. Therefore, a private lawyer will have to be hired to carry out the judicial part of the request. Those who cannot afford a private lawyer and qualify for it may request the assistance of a Public Defender.

#### B) Restitution requested from Argentina to a foreign country where the child has been taken

The petitioner will have to fill out a standard set of forms from the Central Authority and will have to return them to the Central Authority completed with three copies. This form request for all the necessary information to locate the child, that includes identity information of the child and the person who has taken the child; date of birth of the child; reasons to claim for the restitution; information on the presumptive domicile of the child. A copy of the judicial decision or agreement on the custody of the child may also be attached.<sup>3</sup> It is recommended to have legal advice 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 will have to be submitted both in English and Spanish.

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<sup>1</sup> Law 23857 of October 19<sup>th</sup>, 1990 in *Boletín Oficial* (B.O.) October 31<sup>st</sup>, 1990.

<sup>2</sup> Law 24190 *Ley de Ministerios*, art. 17 inc.11 and Decree 488/92 and Ministerial Resolution 203/94.

<sup>3</sup> *Infra* 4. At 1032.

Once all documents have been submitted, the Central Authority will evaluate if the case qualifies with all the requirements of the Convention. If the case is admitted, the Central Authority will send the restitution and visitation petition to the Central Authority of the requested country. The proceedings abroad, of course, will depend on the internal regulations of the pertinent Central Authority together with the procedural norms applied by the pertinent courts. In many cases the petitioner will have to hire a private attorney in the requested country. If this is unaffordable for the petitioner, he or she may probe that they qualify under Argentine Law to receive free legal advice and therefore become eligible for such assistance abroad.

The petitioner will be kept informed by the Argentine Central Authority about the status of his or her case since the both Central Authorities will be in permanent contact about the case.

### **Domestic Laws regarding Child Abduction and parental visitation during Hague return proceedings and when return has been denied**

Under the Criminal Code<sup>4</sup>, anyone who takes and hides a minor of 10 years of age or younger from the control of his or her parents, guardian or person in charge of him or her is punished with imprisonment of 5 to 15 years. <sup>5</sup> It is not clear among the scholars' opinions if this crime includes the parent who takes a child from the other parent.<sup>6</sup> However, a number of court decisions <sup>7</sup>have decided that any parent may commit this crime by taking and keeping the child out of the control of the other parent who has been judicially assigned with the custody of the child.

Law 24270<sup>8</sup> created the crime of "*Impedimento de Contacto de Hijos Menores con sus Padres no Convivientes*" (Impediment to have contact with minor children of the parents who do cohabit with such child). Therefore, the parent or a third person who illegally prevent or obstruct the contact between the minor and his or her parents not living with him or her will be punished with imprisonment of one month to one year. If the child is younger than 10 years of age or handicapped the punishment is imprisonment o<sup>9</sup>f six months to three years.

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<sup>4</sup> O. y Florit, *Codigo Penal de la Republica Argentina*, Editorial Universidad, Buenos Aires, 1997.

<sup>5</sup> Id. art. 146.

<sup>6</sup> Id. at 347.

<sup>7</sup> Camara Nacional Criminal y Correccional, Sala II, December 3, 1987 in *Boletin de Jurisprudencia Camara Nacional Criminal y Correccional*, 1987, No 4, at 1680; Sala III, May 27, 1992 in *Boletin de Jurisprudencia Camara Nacional Criminal y Correccional*, 1992, No. 2, at 141; Sala I, June 28, 1994 in *Boletin de Jurisprudencia Camara nacional Criminal y Correccional*, 1994, No 2, at 77.

<sup>8</sup> Law 24,270 of November 3, 1993 amending the Criminal Code published in *Boletin Oficial*, November 25, 1993.

<sup>9</sup> Id. art. 1.

The same sanctions would apply to the parent or third person who, in order to prevent the parent not living with the child to contact him or her, takes the child to another domicile without judicial authorization. If, with the same purpose, such person takes the child out of the country, the punishment would increase up to double the minimum and half of the maximum.<sup>10</sup>

In such cases, the court will have to take all the necessary measures to restore the parents contact with the child in no more than ten days.<sup>11</sup> The court, will also have to establish a provisional visitation schedule to be applied for not more than three months or if there is already a visitation schedule, enforce it.<sup>12</sup>

Although articles 5 and 21 of the Convention guarantee some type of visitation schedule during the restitution proceeding, the courts have interpreted these provisions in a restricted way, considering that the Convention does not expressly require member countries to establish or enforce a visitation schedule during the conventional procedure.<sup>13</sup> There are some scholarly opinions on the contrary. Some authors<sup>14</sup> have interpreted the Convention as very clear in requiring Central Authorities to file petitions for visitation as well as restitution purposes. According to J.C. Arcagni, the Convention does not require as a precondition to enforce parental visitation rights to the issue of abduction itself. According to this author, the restrictive interpretation that the courts have adopted may be due to the fear that if visitation rights, which may require to take the child out of his or her habitual residence or domicile, may create an abduction conflict.<sup>15</sup> However, and in order to avoid these conflicts, the Central Authorities will have to play a very important role to secure the conditions and timing of the visits through a permanent and effective control of the minors.<sup>16</sup>

According to sources from the Argentine Central Authority, Dr. Ignacio Goicoechea, so far, all Argentine courts have waited for the court deciding on the issue of the custody of the child to establish the visitation schedule provided for under art. 21 of the Convention. However, in many cases a voluntary agreement between the parties have been reached during the return proceedings.

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<sup>10</sup> Id. art. 2

<sup>11</sup> Id. art. 3.1

<sup>12</sup> Id. art. 3.2.

<sup>13</sup> Jose Carlos Arcagni, *La Convencion de la Haya sobre los Aspectos Civiles de la Sustraccion Internacional de Menores y el Derecho Internacional Privado Tuitivo*, Revista Juridica Argentina La Ley, Vol 1995-D, Sec. Doctrina, Buenos Aires, 1995, at 1034-1035.

<sup>14</sup> Id. At 1035.

<sup>15</sup> Id.

<sup>16</sup> Id.

## **Competent court in child return proceedings, visitation and enforcement of related orders**

When there is no voluntary restitution of the child, being Argentina the requested country, the competent court for return proceedings under the Convention either the civil ordinary courts in the Federal Capital and national territories or the provincial courts, which may be family courts in those provinces that have such or the civil courts. The case may be appealed to the respective Court of Appeals and if admissible to the Supreme Court. So far, there has been only one case that reached the Supreme Court<sup>17</sup>. In this case, the Supreme Court finally ordered the restitution of the child who was illegally taken from Canada to Argentina by her mother. The child went back to Canada after an extremely long process (more than a year), under the Convention's standards (not more than six weeks).

## **Law Enforcement System**

Both the Central Authority and the courts have requested the assistance of the police and INTERPOL to locate the child and secure the enforcement of the authorities' orders.<sup>18</sup>

According to the Argentine Central Authority, until April 12<sup>th</sup>, 1999, there have been 181 requests, including restitution and visitation, based on the Hague Convention. From those 181, 46 children who were illegally transferred or kept out of their habitual residence have been returned.

## **Legal Assistance Programs**

Not available. A private attorney has to be hired if a voluntary restitution fails and judicial proceedings need to be started. However, a public defender may be available if the claimant can prove that he or she cannot afford a private attorney.

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<sup>17</sup> Supreme Court, June 14-1995-"Wilmer, E.M. c/ Oswald, M.G", La Ley, 1996-A, 260.

<sup>18</sup> Soraya Nadia Hidalgo, *Restitucion Internacional de Menores en la Republica Argentina*, Revista Juridica Argentina La Ley, Vol 1996-C at 1393, Buenos Aires, 1996.