The phenomenon of the international abduction of minors. American and world legislation: an overview. Points of friction between America and Europe

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1. Introduction

The purpose of this paper is to provide European legal operators with the information necessary for understanding the criteria behind the interpretation and application of The Hague Convention of 1980 on Civil Issues of the International Abduction of Minors in Latin America.

The paper will aim to clarify all the elements required to understand the way in which we apply the convention in Latin America, which will include the Spanish- and Portuguese-speaking countries south of the River Bravo.

Firstly, all the countries of Latin America, except Bolivia, have ratified the 1980 Convention, whereby it is broadly applied on the continent, including when the applications for return are filed between countries in the region.

The Hague Convention of 1996 on the Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in the area of Parental Responsibility and Measures for the Protection of Children has been ratified only by Ecuador.

The following is an analysis of some of the issues that differ in relation to the application of the convention in Europe, related to the region's own instruments and the interpretation of the key concepts.

It is based on the supposition that greater knowledge of each continent's particularities is beneficial for improved international judicial cooperation to protect the rights of children and adolescents.

2. Inter-American Convention on the International Return of Children of 15 July 1989.

The Organisation of American States has organised the Inter-American Specialised Conferences on Private International Law (in Spanish, CIDIP), which have drafted various regional conventions,

including the agreement reached in Montevideo on 15 July 1989: the Inter-American Convention on the International Return of Children.

The convention has been ratified by and is in effect in Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Paraguay, Peru, Uruguay and Venezuela[1].

In general, it coincides with The Hague Convention of 1980 and, for example, the age of 16 years is maintained as the limit for its application.

With regard to the active legal capacity for applying for returns (article 5), the individuals provided in article 4 are eligible: "holders of custody rights that were exercised individually or jointly, tutors or guardians or whatsoever institution, immediately before the event took place in accordance with the laws of the minor's usual place of residence".

The solution is more restrictive than that provided in article 8 of The Hague, which refers to "all individuals, institutions and organisations".

The exception of article 13 b) provided in article 11 b) is also more restrictive, since it provides that the return may be denied when: "...there is a serious danger of the return of the minor exposing him to a physical and mental risk".

Removing the expression "anything which in whatsoever way places the minor in an intolerable situation", which limits the power of the required state judge for denying the return, since there are many problems associated with the interpretation of this concept due to the extensiveness of its scope.

2.1 Procedural issues

The substantial innovation of the American system with regard to that of The Hague is the establishment of a limited procedure for deciding on return applications.

A) Mediation

Article 10 provides that the competent authority (the required judge, the central authority or other authorities of the state in which the minor is located) shall adopt "in accordance with their law and

[1] Effectiveness according to the website of the Organisation of American States (OAS).

when they consider it convenient, all the measures appropriate for the voluntary return of the minor".

This opens a first instance for mediation, seeking the voluntary return.

B) First measures

If the voluntary return is not possible, once the application has been confirmed as compliant with the requirements of article 9 and with no further procedures, the competent authorities:

a) will hear the minor in person;

b) adopt the measures required to ensure his/her custody or provisional guardianship;

c) if necessary, order his/her return.

Measures must be adopted to prevent the minor from leaving the jurisdiction of the required authority.

C) Procedures for exceptions

The exceptions are similar to those of The Hague, in accordance with article 11, with the differences indicated above.

They must be presented within the term of eight business days after the moment when "the authority personally hears the minor and informs him/her of the party by whom he/she is being retained".

Several examples of case law in the signatory states determine that this term is peremptory and cannot be extended.

D) Decision within the term of 60 calendar days after the reception of the challenge

In order to issue the decision, the circumstances and evidence provided by the party challenging the situation for the basis of their challenge will be assessed. Consideration must be given to the applicable law and the administrative or case-law precedents of the state of usual residence, requiring the attendance of the central authorities and consular or diplomatic agents as necessary.

E) Enforcement

The return order must be enforced within the term of 45 calendar days after it has been notified to the requiring authority. If it is not

enforced, the return that is ordered is rendered ineffective and the writs are recorded.

Travel expenses are payable by the claimant (applicant); otherwise, they may be on the account of the requiring state, without prejudice to filing against the party responsible for illegal relocation.

Return does not imply whatsoever prejudgement regarding the final determination of the guardianship or custody.

After the return application has been heard, the authorities of the required state may not decide on the legal grounds of the guardianship: (a) until it is not shown that the conditions of the convention for the return have been met or (b) until a reasonable period has elapsed and no application for return as per the said convention has been filed.

D) Location (articles 18/20)

Guidelines and terms that are not included in The Hague Convention of 1980 are developed and determined.

When the location of the minor is not known, his/her location may be required.

Once he/she has been located, the requiring state has a term of 60 calendar days from when it receives notice of the location to file the application for his/her return.

Measures must be adopted to ensure the child's health and avoid him/her from being hidden or taken to another jurisdiction. The said measures may be rendered ineffective if the return application is not filed within the term of 60 calendar days after the notice of the location has been served. This does not prevent the return application from being filed after the said term.

E) Visits

The same legal concepts and procedural system applies in the case of the right to transnational visits as provided in article 3 paragraphs b), as comprising the following: *"...the power to take the minor for a limited period to a place other than his/her usual place of residence".*

2.2. Summary

The 1989 Inter-American Convention of Montevideo on the International Return of Children organises summary proceedings based

on short procedural terms. It provides that there should be no prejudgement on the legal grounds for the guardianship and that, in view of certain requirements, the rapid return of the child to the environment in which his/her all-round education is taking place must be ensured, i.e. his/her return to the state of usual residence.

The importance of this convention on a universal scale is as follows: *by establishing a procedure with clearly defined terms, except for internal procedures, judges often apply this procedure to the return applications in a secondary manner.*

3. Model bill of law

What is a Model Bill of Law?

- It is a project drawn up by experts from several party states that contains the basic principles provided in the return conventions and that can be taken as a general basis for drawing up the national legislation of each country.

- In short: it is a minimum standard for achieving the purposes of the conventions.

- Accordingly, it should be extensive and adaptable to each reality.

- *The need for a Model law*

- To guarantee the immediate return of the minors that have been relocated or retained illegally in any signatory state

- To ensure the observance of the visit and custody rights in effect in one of the signatory states by the other signatory states

Need to ensure compliance with the terms provided in the conventions: 60 calendar days (article 12 Inter-American) and six weeks (article 11 of The Hague)

- Article 1 of the Inter-American Convention on the Return of Children:

- To ensure the rapid return of minors whose usual residence is in one of the states and who have been illegally relocated from any party state or, after they have been relocated legally, have been retained illegally.

- Article 1 The Hague:

- The purpose of this convention also includes the observance of the exercise of the visiting and custody or guardianship rights by the holders thereof.

- *Background*

- National project of Uruguay, as part of the activities arising from the designation of the intermediate judge.

- The domestic procedural difficulties involved in ensuring a rapid and safe return.

- The need for adapting the national terms to those provided in the conventions.

- In Buenos Aires in September 2007, a model bill of law was agreed for the continent in the second meeting of governmental experts that was organised by the Inter-American Children's Institute and the Conference of The Hague on Private International Law. This involved countries from North America, Central America and South America.

Sources considered

- Regulations of the Council of the European Union Nos. 2201, 27 November 2003 on the jurisdiction, recognition and enforcement of judicial decisions in matrimonial issues and parental responsibility.

- Civil Procedural Act of Spain, Title IV, for provisional measures related to individuals (measures related to the return of minors in cases of international adoption).

- Executive Decree No. 222/2001 to regulate the law that adopts The Hague Convention on the Abduction of Minors.

- Decision issued by the Supreme Court of the Republic of Chile, dated 3/11/1998.

- Draft bill of Uruguay.

Principles that are to be maintained

- Swiftness.

- Immediacy.

- Concentration.

- The process taken at every instance.

- Proceedings involving the parties (official participation of the Public Prosecutor as a representative of the public cause).
- Contradiction.
- Protection of the child's right to be heard (article 12 of the Convention on Children's Rights).

The project (structure)

Stage one: Location and guarantee (in accordance with the Inter-American Convention), of a contingent nature since it is not necessary if the abducted child's address is already known.

Stage two or, depending on each case, the only stage: Return process

- Enforcement structure (similar to the executive process): after the application has been received, the return is ordered
- The abductor is notified and measures are adopted to guarantee his/her security during the process together with that of the child.
- The child is heard.
- If there is no opposition or if an agreement is reached, the return is ordered.
- The opposition must be based only on the exceptions provided in the convention.
- Test stage.
- Decision.
- Unique appeal before the tribunal superior.
- The decision does not provide for further appeals.
- The same system is applied to visits.

The main innovation of the project is the definition of the child's greater interest in a return process as provided in article 2 paragraph 2:

"The greater interest of the child is provided as a criterion for guiding the interpretation and, where applicable, the integration. For the intents and

purposes of this law, consideration is therefore given to the right to not being relocated or retained illegally and to the decision on his/her guardianship or custody being discussed before the judge of the state of his/her usual residence; to maintaining fluent contact with both parents and their families and to obtaining a rapid decision on the application for the return or international visits".

The criterion is that, when the situation is interpreted as subject to its decision, the legal operator considers that the main objective is to guarantee a rapid and safe return of the child, which seeks to reduce the room for discretion on the part of the interpreter.

State of situation: several countries have amended their national legislation, such as Chile and the Dominican Republic (by virtue of decisions issued by their Supreme Court) and other countries have bills that are based on the model law, which is at various stages of consideration, such as Brazil, Peru, Honduras and Uruguay, among others.

In Uruguay, it is currently being studied by the Senate of the Republic. The project has been developed by the Supreme Court of Justice and is based on the Institute of Private International Law and Procedural Law of the University of The Republic.

4. Network of judges and Contact Officer of The Hague Conference for the region. Other networks: Iber Red.

Article 21 of the Model Law, "Direct judicial notices", provides the following as a rule:

“An intermediate judge will be appointed with the mission of providing direct judicial communiqués on the affairs that are being processed and covered by this law between the foreign and national courts.

The consultations may be reciprocal and will be made by means of the intermediate judge and they will be recorded in the respective court records, with notices served to the parties".

The Network of Contact Judges of the Conference of The Hague in Latin America has grown significantly in recent times and, today, most countries have appointed a member of the network.

The possibility of configuring a regional area that integrates North America and Latin America, bringing together the Contact Judges of The Hague Network in the said area, is currently being discussed.

The appointment by The Hague Conference of a permanent representative for the region, Dr Ignacio Goicochea, has undoubtedly been a very significant factor in this development. The representative is a decisive reference in all matters that refer to the protection of children and is of great help for judges and central authorities alike, as well as for the other operators in the region.

Iber Red is also in operation in the Ibero-American area, with its organisation and civil and criminal points of contact. A recent meeting of experts held by the European Union and The Hague Conference on

International Private Law in Brussels on 15 and 16 January of this year included the following conclusions and recommendations:

> "The different networks should complement each other in a coordinated way in order to achieve synergies and, as far as possible, they should fulfil the same safeguards in relation to direct judicial notices.
>
> The member states of IberRed that have not appointed a specialist in family law as a point of contact, but which have appointed a judge for The Hague network are invited to consider the appointment of the same judge or judges as points of contact for the IberRed".

In May, a meeting of IberRed points of contact was held in Chile to discuss the results of the meeting held in Brussels in January 2009 on the complementary and coordinated operation of the networks operating in the same geographical area, based on the speciality of each network and the principle of complementarity.

The limitation was made to consider the specialist family judges that make up The Hague Network as points of contact, in accordance with Provision 13 of the IberRed Regulations[2].

In Uruguay and as a result of a decision issued by the Supreme Court of Justice, the author of this text acts as the Contact Judge of The Hague and, additionally, with IberRed in accordance with a

[2] **Provision 13. Judicial networks and international organisations**

1. In order to fulfil its objectives, the IberRed aims to maintain contacts and exchange experiences with other networks of judicial cooperation and international organisations that foster legal cooperation on an international scale.

2. Insofar as it is so provided in their respective national legislation, the points of contact may carry out operative functions in relation to points of contact or correspondents from other organisations.

decision issued by the Supreme Court of Justice. This shows that it is viable to constitute the coordinated operation of both networks in the region.

5. Fundamental concepts

It can be said that the co-parenting model predominates in the region, i.e. the parental authority is exercised jointly by both parents, regardless of whether the children were born in or out of wedlock.

The joint exercise of the said authority is maintained beyond the parents' separation or divorce.

This means that although the parents are separated, the custody is exercised by both the father and the mother jointly, as provided in article 4 of the Inter-American Convention.

Consequently, the decision on the place of residence of children under the age of 16 years is inherent to the joint exercise of the parental authority that requires the participation of both parents.

If no agreement is reached, the judicial authority will decide the matter by issuing a decision within the framework of an appropriate legal process.

Accordingly, in every country in the region, both parents should provide their agreement for the cross-border relocation of their children.

As part of his/her parental authority, the parent who does not live with the family has visiting rights and the right to contact his/her children when they are being looked after by the other parent.

5.1 Custody right. Patria potestas

In view of the foregoing general comments, the legal solutions of certain countries in the area can be categorised with regard to, for example, the content and exercise of the right to custody.

There would be at least three categories of legal systems:

Category one

The joint exercise of the parental authority based on the cohabitation of the parents and, in the absence thereof, the exercise of the said authority by the parent to whom the children's custody is awarded in this category is to be found in Argentinian law (article 264 C.C.), Bolivian law (articles 251[3], 253[4], 254[5] and 146[6] of the Family Code and Article 31 of the Children's Code 1999[7]) and Peruvian law (articles 419[8], 420[9] and 421[10] C. C.).

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[3] Article 251 of the Bolivian Family Code: (EXERCISE OF THE AUTHORITY OF THE PARENTS). The authority over the children in common is exercised during the marriage by the father and the mother. The acts taken by only one of them and justified as in the interest of the child are presumed to involve the consent of the other parent..."

[4] Art. 253: "(FREE CONJUGAL UNIONS). The foregoing provisions may also apply to free conjugal unions during the life in common".

[5] Art. 254: "...In the case of the divorce or separation of the spouses, their authority over children is exercised in accordance with article 146 and also during the invalidity of the marriage. The same provision may also apply to free conjugal unions when the life in common comes to an end".

[6] Article 146 of the Bolivian Family Code: "(AUTHORITY OF THE PARENTS, VISITING RIGHTS AND SUPERVISION). Each parent exercises the authority that corresponds to him/her over the children under his/her charge. If the guardianship is entrusted to the ascendants or brothers of the spouses or to 1/3 party, the rules of guardianship are applied to the holders thereof. Notwithstanding the foregoing, the father or mother that has not obtained the guardianship has the right to visit the children under the conditions set by the judge and to supervise the education and maintenance of the children in accordance with article 257".

[7] Article 31 of the Children's Code: (PARENTS' AUTHORITY). "The authority of the parents exercised under the same conditions by the

Argentina

In Argentina, article 264 of the Civil Code provides the following with regard to the exercise of the patria potestas:

1. In the case of children born in wedlock, the parent and the mother together, as long as they are not separated or divorced and as long as their marriage has not been annulled. It shall be presumed that the acts carried out by one of the parents is done so with the other's consent, except in the cases provided for in article 264, quater or in the case of express opposition thereto;

 2. In the case of de facto separation, personal separation, binding divorce or nullity of marriage, it shall correspond to the father or mother that legally exercises the custody, without prejudice to the other's rights to appropriate communication with the child and the supervision of his/her education;

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mother or by the father, guaranteeing for either one thereof, in the case of this agreement, the right to resort to the competent judicial authority to solve the difference". Conc. Art. 197 C.P.E.- art. 18 inc. 1 C.D.N.

[8] Article 419 of the Peruvian Civil Code: Joint exercise of the patria potestas "The patria potestas is exercised jointly by the father and the mother during the marriage, where the legal representation of the child corresponds to both".

[9] Art. 420: Unilateral exercise of the patria potestas: "In the case of the judicial separation, divorce or the invalidation of the marriage, the patria potestas is exercised by the spouse to whom the children are entrusted. Meanwhile, the exercise of the other parent is suspended.

[10] Art. 421: Patria potestas of children born out of wedlock. "The patria potestas of the children born out of wedlock is exercised by the parent or the mother that has recognised the said children as his/her own. If both parents have recognised the child, the minors judge determines the parent to whom the patria potestas corresponds, in accordance with the age and gender of the child, the circumstance of whether the parents are living together or separated and, in all cases, the interests of the minor..."

 3. In the case of death of one of the parents, absence with presumed death, loss of the patria potestas or suspension of the exercise thereof, to the other;

 4. In the case of children born out of wedlock, recognised by only one of the parents, the parent that has recognised the children as his/her own;

 5. In the case of children born out of wedlock recognised by both parents, to both parents if they live together and, if they do not, to the parent to whom the guardianship has been awarded conventionally, judicially or as recognised by means of summary information;

 6. The person judicially declared as the father or mother of the child if the said status has not been recognised voluntarily.

In turn, article 264 quater of the Civil Code provides the following:

"In the cases of paragraphs 1, 2 and 5 of article 264, the express consent of both parents will be required for the following acts:

... 4. To authorise the child to leave the Republic..."

In the Republic of Argentina, the separation of the parents determines the unilateral exercise of the guardianship or care of the child; however, from the point of view of the concept of "right to custody" provided in the 1980 Convention, the fact that the child can leave the country only with the authorisation of both parents

determines that both parents, even when they are separated, maintain the right to custody. The parent that does not live with the family has the right to have contact with his/her children as well as to the right arising from the patria potestas to authorise his/her child to leave the country.

This right is lost only in the case of loss, suspension or limitation of the patria potestas.

Category two:

A kind of paternal preference is established for the cases in which the parents do not agree the joint exercise of their authority.

In the case of separation, the exercise of the authority is awarded to the parent to whom the personal care of the child or his/her tuition is awarded. This is the regulation of parental responsibility in Chilean law (arts. 244[11] and 245[12] of the C. C.).

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[11] Art. 244: "The patria potestas will be exercised by the father or mother or jointly by both, in accordance with an agreement recorded as a public document or a certificate issued before any officer of the Civil Register, which will be noted in the margin of the registration of the child's birth within the term of 30 days after it has been issued. If no agreement is reached, the father is responsible for exercising the patria potestas. Whatever the case, when it is essential in the interest of the child, at the request of one of the parents, the judge may award the exercise of the parent that did not have the said exercise or award it to only one of the parents in the case where it was being exercised jointly. Once the decision has been enforced, it will be registered in the term provided in paragraph one…".

[12] Article 245 of Chile: "If the parents are separated, the patria potestas will be exercised by the parent that is responsible for the personal care of the child, in accordance with article 225. However, by agreement of the parents or a decision based on the interest of the child, the patria potestas may be attributed to the other parent...".

However, in Chilean law, the authorisations for travelling when the parents are separated is awarded by the father in exercise of the patria potestas. However, if a visiting system has been agreed, the parent in favour of whom the patria potestas has been awarded may present his/her opposition to the child travelling abroad in accordance with article 49 of Act No. 16618.[13]

Article 49 of Act No. 16618:

"Once the right referred to in article 229 of the Civil Code (visits) has been regulated by a judicial sentence or an agreement approved by the

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[13] **Art. 49.** The exit of minors from Chile must be subject to the regulations provided in this article, without prejudice to the provisions of Act No. 18703 (*a reference that must be understood in relation to act 19620 on adoption)*. If the child's tuition has not been awarded by the judge to any of his/her parents or to a third party, the child may not leave without both parents' authorisation or the authorisation of the parent that has recognised him/her as his/her own child, where applicable.
Once the judge has awarded the tuition to one of the parents or to a third party, the child may not leave the country without the authorisation of the party to whom the tuition has been awarded.
Once the right referred to in article 229 of the Civil Code has been regulated by a judicial sentence or an agreement approved by the court, the authorisation of the father or mother in whose favour the right has been awarded will also be necessary.
The permission to which the foregoing paragraphs refer must be given by virtue of a public or private deed authorised by a Notary Public. The said permission will not be necessary if the minor leaves the country accompanied by the individual or individuals who are to give the said permission.
If it cannot be awarded or if the authorisation is denied without due cause by one of the individuals by whom, by virtue of this article, the authorisation is to be awarded, it may be awarded by the minors judge that corresponds to the jurisdiction in which the minor holds his/her residence. In order to authorise the minor to leave the country in these cases, the benefit that may fall to the minor will be taken into consideration and the time for which the authorisation is awarded will be indicated.
After the term referred to in the foregoing paragraph, if the minor unjustifiably fails to return to the country, the judge may decree the suspension of the alimony that may have been awarded.
In the other cases, for a minor to leave the country, the authorisation of the family judge of his/hers jurisdiction will be necessary.

court, the authorisation of the father or mother in whose favour the right has been awarded will also be necessary".

In principle, the child may leave the country with the authorisation of the parent that exercises the patria potestas. If his/her parents are separated and if the other parent has been awarded visiting rights, the child must leave with the authorisation of both parents.

However, regardless of the parent to whom the custody right has been awarded, the other parent to whom a visiting system has been awarded must provide his/her consent to his/her child leaving the country.

Category three

Countries that make no distinction for the exercise of the parental authority between parents who live together or are separated and maintain the family power in both regardless of the cohabitation. This is the option chosen by Paraguayan legislation (art. 70 of the Childhood and Adolescence Code of Paraguay-2001[14]), Brazilian legislation (art. 21 of the Statute on Children and Adolescents of Brazil and arts. 1631-1632 CC[15]) and Uruguayan legislation (arts. 252 and 275 CC).

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[14] Art. 70 of the Childhood and Adolescence Code of Paraguay, as far as it is of interest here, provides the following: "The father and the mother exercise the patria potestas over their children under equal terms and conditions. The patria potestas implies the right and main obligation to educate, feed, bring up and guide their children".

[15] Article 21 of the Statute on Children and Adolescents of Brazil provides that the patria potestas will be exercised under equal terms and conditions by the father and the mother as provided in civil legislation, guaranteeing either one of them the right, in the event

This is also the case of El Salvador, where article 207 of the Family Code provides that: "The exercise of the parental authority corresponds to the father and to the mother jointly or to one of them in the absence of the other. It shall be understood that the father or the mother is absent not only in the event of his/her death or the declaration of his/her presumed death, but also when he/she is absent from the national territory, his/her whereabouts are not known or when he/she is prevented from carrying out his/her parental responsibilities.

Brazil

Article 1631 of the Civil Code provides that, during the marriage or stable union, the patria potestas will be exercised by the parents, which is maintained even after the separation, divorce or dissolution of the stable union.

This is the principle recognised in article 21 of the Statute on Children and Adolescents.

However, article 84 of this code provides that, in the event of travel abroad, the judicial authorisation will not be necessary when the child travels with both parents in the exercise of the patria potestas or when he/she travels with one of his/her parents with the express authorisation of the other.

In short, the authorisation of the child to leave the country is an attribute of the patria potestas.

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of disagreement, to appeal to the competent judicial authorities to solve the disagreement".
For its part, article 1631 of the Civil Code provides that during the stable union or marriage, the family power corresponds to the parents and, in the event of whatsoever absence or impediment affecting one of them, it will be exercised by the other exclusively...
Article 1632 provides the exercise of parental responsibility in the event of the breakup and states that: "the judicial separation, divorce and dissolution of the stable union do not alter the relations between parents and children...".

Costa Rica

This is the case of Costa Rica with regard to children, based on article 140 of the Family Code (from the year 1973), which regulates the matter of parental responsibility, referred to in the said code as patria potestas or parental authority, making a distinction in the exercise thereof depending on whether it is in relation to children born in wedlock or otherwise. Accordingly, the conception of this institution is part of the classic tradition, which holds it as an area that falls exclusively to the father and the mother in general.

With regard to the children born in wedlock, the patria potestas is exercised jointly, in accordance with article 151 of the Family Code[16].

With regard to children born out of wedlock, the patria potestas is exercised by the mother and may also be awarded to the father as an exception, in accordance with article 155 of the same code[17].

Article 143 points to the guardianship of the children as one of the elements of parental responsibility. The said code does not provide details of the system for the said guardianship, since it is mentioned only in the aforementioned article 143 and again in article 152, when it refers to the cases of divorce, nullity of marriage or judicial separation, where the content of the decision must refer to the guardianship and bringing-up of the children.

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[16] "... The father and mother exercise the parental authority over the children born in wedlock with the same rights and duties."

[17] "... Even when the mother is a minor, she will exercise the patria potestas over the children born out of wedlock and will have full legal personality for the corresponding intents and purposes".

The Childhood and Adolescence Code (from the year 1998), based on article 30, develops the right of the minor to family life, which includes the guardianship or care provided by the father and the mother.

Article 33 speaks of the minor's right to remain with his/her family and article 35 refers to a generic right to maintaining contact with the family when he/she has been separated from it.

In other words, we can conclude that, in Costa Rica, the guardianship or care of the children is an element of parental responsibility that is not covered by legislation regarding the rules that are to be applied for the exercise, concession and development thereof. Furthermore, there are no references to the incorrectly called "visiting system", as an element that arises from the exercise of the guardianship or care, which suggests that it is construed on the level of case law and on the basis of article 9 of the Convention on Children's Rights and article 35 of the Childhood and Adolescence Code.

The concept of leaving the country was changed in 2006 by a reform of article 16 of the Childhood Code and by regulations that were published in the official gazette on 23 April 2008. Parents must award their permission and the procedure is processed by the National Infancy Board, which must notify the Migration Department.

Uruguay

By virtue of Act No. 17823, dated 7 September 2004, the Childhood and Adolescence Code came into effect in Uruguay and replaced the former Children's Code and part of the Civil Code.

With regard to the custody of children and adolescents, the division is maintained between legal guardianship, which is a right that arises from the patria potestas and comprises the power of both parents to decide certain fundamental issues of their children's lives, such as education, health, the provision of an authorisation for marriage or travelling abroad, etc.

In addition, there is recognition of the material guardianship or custody, which comprises the determination of the parent with which the children are to stay in the event of separation.

Custody is regulated by articles 34 to 37, which provide the allocation thereof by agreement of the parties; otherwise, the judge decides with the guarantees of the due proceedings (articles 34 and 37).

The following powers of the family judge are established: a) assigning the child to the parent with which he/she has lived for the longest period of time, as long as it is in his/her favour: b) preference is given to the mother when the child is younger than two years of age, as long as it is not damaging for him/her; c) the child must always be heard.

This reduces the preference in favour of the mother until the child is five years of age, as provided in article 174 of the Civil Code, and provides the obligation of hearing the child or the adolescent, which obviously applies to the applications for the international return as a result of a violation of the right to custody (in accordance with article 13, penultimate paragraph, of the Convention).[18]

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[18] Article 34. (Custody of the parents).

1) When the parents are separated, the way in which the custody is to be exercised will be determined by mutual agreement (article 177 of the Civil Code).

2) If no agreement is reached by and between the parents, the custody will be decided by the family judge, who will dictate the measures that are necessary for the fulfilment of his/her decision.

Article 35. (Powers of the family judge). If no agreement is reached by and between the parents, the judge will decide on the basis of the following recommendations:

A) The child will remain with the parent with whom he/she has lived for the longest period of time, as long as it is in his/her favour.

Finally, the possibility of a third party applying for the custody is established.

The same code provides as a requirement for the authorisation to leave the country the concurrence of both parents in the exercise of the patria potestas (when they travel together or when they have a passport in which the authorisation has been stamped).

The authorisation of both parents, even when they are divorced, is required when the children travel alone or in the company of third parties.

If a conflict arises, the matter must be decided by the competent judge.[19]

B) Preference will be given to the mother when the child is younger than two years of age, as long as it is not damaging for him/her.

C) In accordance with his most serious functional responsibility, the judge must always hear and take into account the opinion of the child or adolescent.

Article 36. (Custody of third parties).

1) Any interested party may apply for the custody of a child or adolescent as long as the purpose of the application is the greater interest of the said child or adolescent. The competent judge, in accordance with his most serious functional responsibility, must assess the family environment offered by the interested party.

2) The individual exercising the custody of a child or adolescent must undertake to provide him/her with the protection and care required for his/her all-round development.

3) The individual who does not feel capable of continuing with the custody must inform the family judge, who will decide on the situation of the child or adolescent.

[19] Article 191. (Company of the parents or responsible parties). The children and adolescents do not need the authorisation to travel when they leave the country in the company of the parties exercising the patria potestas.

Article 192. (Use of the passport-legal age). The authorisation is not necessary when they travel with a valid passport authorised by those who exercise the patria potestas or when they are of legal age.

Article 193. (Authorisations). The children and adolescents who travel alone or in the company of third parties outside the country need the consent of both parents or their legal representative, where applicable.

In the case of the parents' separation or divorce, the authorisation of both parents will be necessary.

In the above cases, if a conflict arises for the awarding of the consent between those responsible for the said award, the family judge will decide and establish the details of the stay abroad.

Contrary to the positions maintained by certain Spanish decisions, when article 191 of the Childhood and Adolescence Code of Uruguay provides that the children and adolescents do not require authorisation when they travel in the company of the party exercising the patria potestas, it is not sufficient for the child or adolescent to travel with one of the parents.

In Uruguay, the patria potestas has always been exercised by both parents unless, with regard to the children born out of wedlock, one of them has not recognised the child or with regard to all the children the other parent cannot exercise the patria potestas due to the suspension, limitation or loss thereof.

The authorisation on the passport authorises the person to lead the country but not for the purpose of setting up his/her domicile abroad, since this depends on the express authorisation of the other parent or a judge in the event of discrepancy between the parents in the exercise of the patria potestas.

CUSTODY RIGHT: in Latin America, except Chile, with the above exception, the parent exercising the patria potestas always exercises the right to authorise his/her child to leave the country. Therefore, in all the countries that have been examined and in the other countries on the continent, the power for setting up a domicile abroad is an attribute of the patria potestas. The said right is constituted as a final custody right in accordance with the terms and conditions of The Hague.

However, in the case of Chile, the solution is similar: the parent with the contact right has the right to authorise or prevent the child

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The incidental process procedures will apply as provided in the General Procedural Code, where the Public Prosecutor will be heard in a hearing to which he/she must attend in accordance with his/her official responsibility.

The challenge of the first-instance decision will not have whatsoever suspensory effect and the first-instance family judge will issue a certificate of the decision with no further procedures required immediately after the corresponding hearing has been held.

from leaving the country. The custody right is exercised in accordance with the terms and conditions of the 1980 Convention.

5.2 Access rights

In paragraph 23 of her report on paragraph 126 of the 1980 Convention, Prof. Elisa Pérez Vera states the following:

"... the organisation and protection of the effective exercise of the access rights are still considered by the Convention as an essential function of the central authorities. Accordingly, section one consolidates two important points: on the one hand, the freedom of the individuals to appeal to the central authority of their choice; and, on the other, the purpose of the claim addressed to the central authority may be the organisation of access rights, in other words, the establishment thereof or the protection of the exercise of access rights that have already been determined. However, especially when the application is addressed to the organisation of the presumed right or when the exercise thereof is challenged by the holder of the custody, the recourse to legal proceedings will very often be the case; accordingly, section three of the article considers the possibility for the central authorities of starting or favouring the said proceedings directly or through intermediaries".

Access rights: having consulted the Guide to Good Practices for the Exercise of the Access Rights, presently available only in English, it can be seen that one of the points that needs to be decided is whether or not article 21 of The Hague Convention can be invoked by the party with access rights recognised by law, but with regard to which a specific visiting system has not been established either by agreement of the parties or by virtue of court decision; in other words, the way in which the said right is actually exercised.

I understand that a parent who does not live with his/her child who is living abroad can invoke article 21 of The Hague Convention to claim visits that have not been regulated by a court or laid down by agreement of the parties, but which are recognised in law.

Accordingly, the bill of Uruguay provides two hypotheses for applying article 21 of The Hague Convention when collaboration is required of the national courts: whether or not there is an established system, applying different procedures in the understanding that, in both cases, international legislation applies[20].

One friction point with Spain is that the central authority of the said country understands that there must have been an illegal retention or suspension for article 21 of The Hague Convention to be invoked.

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[20] **Article 21. Visits.** The application whose aim is to enforce the access rights by the parties that hold the said right in the cases provided in the International Conventions on Return will follow the procedure provided in this law.

The access rights will comprise the right to take the child for a limited period of time to another country other than that in which he/she holds his/her usual residence.

The existence of a prior illegal relocation or retention or the existence of a previously established visiting system is not a requirement for the request for visits to be fitting within the framework of the International Conventions on Returns.

21.1. The national court whose intervention is required, in the case of the existence of a visiting system established in a decision that has been enforced or by virtue of an agreement approved by a court, may also modify the said system if necessary.

It will intervene in the matter of the visits, in the exercise of its natural jurisdiction, as the nearest jurisdiction; and, without prejudice to the original jurisdiction of the judge of the usual state of residence; either when the return application has been refused or in the cases in which, when the litigation has been solved by the parties involved, the voluntary return is obtained.

When the application or claim has been received, it will be processed in the term of six business days and a hearing will be announced in which a decision will be issued.

A decision will be issued on the visiting system; always with notice served to the parties on the fact that the breach thereof will imply that the party in breach has committed an illegal relocation or retention, for the intents and purposes provided by The Hague Convention and the Inter-American Convention.

I do not share the said interpretation, which reduces the application of the Convention to a minimum and whose direct effect is to remove all protection from the party that has access rights as provided in law or recognised by a court or by agreement of the parties.

Article 21 of the convention provides the possibility of a parent in the said conditions being able to claim the said right even when the relocation is not illegal.

This is provided in article 9.3, which states that:

"The member states will respect the child's right when he/she is separated from one or from both parents to maintain personal relations and direct contact with both parents on a regular basis, unless it is contrary to the greater interest of the child".

Article 10.2 of the same convention provides that: "The child whose parents live in different states will have the right to maintain regular personal relations and direct contact with both parents, except under exceptional circumstances".

Consequently, it is also a question of the child's right, which is often overlooked and which the states are obliged to observe not only for illegal retentions or relocations (article 11), but also in every case, as provided in the articles transcribed above.

The Hague Convention must not be interpreted in such a way as to limit the protection of the child's right to have contact with both parents.

6. Conclusions

Article 5 of The Hague Convention of 1980 defines the key concepts.

"The custody right" will comprise the right related to taking care of the minor and, in particular, to deciding on his/her place of residence.

The "access rights" will comprise the right to take the child for a limited period of time to another country other than that in which he/she holds his/her usual residence.

Having analysed the legal systems in effect in Latin America, the conclusion can be drawn that the matter must be resolved on the basis of the exercise of the patria potestas and that the system for the shared exercise thereof prevails in the countries under analysis, except in Chile.

Custody

The concept of custody as provided in article 5 of The Hague Convention of 1980 must always be interpreted in accordance with the law of the minor's usual place of residence before the illegal retention or relocation. This places importance on familiarity with the systems in place in the different countries that have signed the said convention.

With regard to the separation of the parents, certain countries opt for the exercise of the patria potestas by the parent with whom the child lives, the parent in whose care the child is and who can establish his/her domicile in one way or another.

However, at the same time, all the countries that provide the said systems require the presence of both parents to authorise the child to leave the country.

The matter is whether or not it can be considered that there is a custody right with all the consequences arising from the application of the Convention of 1980 if these cases are interpreted under the light of the said convention.

If both parents exercise the patria potestas, there is no doubt that both exercise the custody right under the terms and conditions of the Convention of 1980, a decision that is ratified by the Inter-American Convention when it refers to the joint exercise of the custody right (article 4).

If a parent exercises the patria potestas, he/she also holds the custody. Special mention must be made of the case of Chile, where, if the access rights have been awarded, the parent assumes what is called the right to veto over the relocation of his/her child out of the country. Consideration must also be given to the effective exercise of the custody right. In short, the solution is similar.

Consequently, the same conclusion is also drawn with regard to the point made in the Seminar regarding Spain and the United States of America on the effective exercise of the custody right, held in Madrid on 24 and 26 January 2006:

"The concept of custody as provided in article 5 of The Hague Convention of 1980 must always be interpreted in accordance with the law of the minor's usual place of residence before the illegal retention or relocation.

It must be understood that the right to decide on the place of residence is an element that characterises the custody right and that it may also be held by an individual who only exercises the access rights".

Visits

I understand that a parent who does not live with his/her child who is living abroad can invoke article 21 of The Hague Convention to claim visits that have not been regulated by a court or laid down by agreement of the parties.

The prior existence of an illegal retention or relocation is not necessary for article 21 of the Convention of 1980 to be invoked.

Furthermore, it must be pointed out that it is necessary to extend the regulation of the protection of the access rights on an international scale, for which an additional protocol of the Convention of 1980 should be adopted.

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