

CONFLICT OF LAWS CONVENTIONS AND THEIR RECEPTION

ARGENTINE REPORT

by

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A. STATISTICAL QUESTIONS

1) Which Hague Conventions have been ratified by your country?

- Convention on Civil Procedures (1954)¹
- Convention concerning the Recognition of the Legal Personality of Foreign Companies, Associations and Institutions (1956)²
- Convention Abolishing the Requirement of Legalisation for Foreign Public Document (1961)³
- Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965)⁴
- Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970)⁵
- Convention on Law Applicable to Agency (1978)⁶
- Convention on the Civil Aspects of International Child Abduction (1980).⁷
- Convention on Law Applicable to Contracts for International Sales of Goods (1986)⁸

¹ Approved by Law 23.502 . Official Gazette 15/10/1987

² Approved by Law 24.409. Official Gazette 28/12/1994. It has not entered into force yet.

³ Approved by Law 23.458. Official Gazette 21/04/1987

⁴ Approved by Law 25.097. Official Gazette 24/05/1999

⁵ Approved by Law 23.480. Official Gazette 23/04/1987

⁶ Approved by Law 23.964. Official Gazette 19/09/1991

⁷ Approved by Law 23.857. Official Gazette 31/10/1990

2) Which CIDIP Conventions have been ratified by your country?

- Inter-American Convention on conflict of laws concerning bills of exchange, promissory notes and invoices (1975)
- Inter-American Convention on International Commercial Arbitration (1975).
- Inter-American Convention on Rogatory Letters (1975)
- Inter-American Convention on the Taking of Evidence Abroad (1975)
- Inter-American Convention on the Legal Regime of Powers of Attorney to be used Abroad (1975)
- Inter-American Convention on Conflicts of Laws Concerning Commercial Companies (1979)
- Inter-American Convention on Proof of and Information on Foreign Law (1979)
- Inter-American Convention on General Rules of Private International Law (1979)
- Additional Protocol to the Inter-American Convention on Rogatory Letters (1979)
- Inter-American Convention on Execution of Preventive Measures (1979)
- Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (1979)
- Addition Protocol to the Inter-American Convention on the Taking of Evidence Abroad (1984)
- Inter-American Convention on International Return of Children (1989)
- Inter-American Convention on Support Obligations (1989)
- Inter-American Convention on International Traffic of Minors (1994)

3) Did your State participate and send delegations to the diplomatic conferences where these Conventions were adopted?

Argentina has sent delegations to all the Inter-American Conferences and has been an active participant presenting projects which later on became Conventions.

Argentina is also a member of the Hague Conferences and has sent delegations to the diplomatic conferences where the Conventions were adopted.

4) How many Hague and CIDIP Conventions have been signed but not ratified. Please enumerate them.

Hague: Convention on Applicable Law to Succession to the Estates of Deceased Persons (1989)

CIDIP: None

B. CONFLICTS CONVENTIONS AND DOMESTIC LAW- A SUBSTANTIVE COMPARISON

5) Is the text of The Hague and CIDIP Conventions similar to norms in your domestic legislation?

6) Please explain similarities and differences

7) Has being a Party to any of the Conventions had an impact on domestic law?

Argentina does not have an International Private Law Statute or Act. The specific international private law rules are found throughout the national legislation.

However, there have been many attempts to create an International Private Law Code. The most recent one, and worth mentioning, was filed before the Congress for approval in 2003⁹

⁹ See Appendix, WEINBERG de ROCA, Inés, International Private Law, Lexis Nexis, 3rd Edition, Buenos Aires, 2004. Note that Professor Inés Weinberg de Roca was an active participant of the commission which elaborated the said project.

but there has been no deliberation. This project was highly influenced by the Conventions on International Private Law which Argentina had ratified. An example of this is that the articles relating to the international abduction of children refer expressly to the solutions stated by the Hague Convention on the Civil Aspects of International Abduction of Children. Another example of the influence of the international instruments on the Project would be that in the Section of Contracts, the Statute adopts the principle of the party's autonomy following the Hague Convention on the Law Applicable to Contracts of International Sale of Goods (1986).

The Hague Convention on the Civil Aspects of International Abduction of Children as well as the Inter-American Convention on International Traffic of Infants has had an impact on domestic law since, by introducing the institution of the Central Authorities, they shortened the terms for international restitution of abducted children.

Another example of the impact of international Conventions on domestic law is the interpretation by many authors who consider that the ratification of the the Inter-American Convention on General Rules of International Private Law caused the *organic derogation* of article 13 of the Civil Code. This article considers foreign law to be a fact and therefore establishes the need for the parties' allegation and proof. The Inter-American Convention on General Rules of International Private Law in article 2 states that judges will apply foreign law without the need of allegations. Since international Conventions have in Argentina – according to our Constitution - precedence over domestic law, it has been interpreted that the CIDIP Convention derogated article 13 of the Civil Code.

It is worth mentioning that international Conventions are implemented – after the process of approval by the Congress- by the publication of the Statute of Approval including the text of the Convention in question, in the Official Gazette. At that time the Convention enters into force for the country and becomes part of the legislation.

CONFLICTS BETWEEN CONFLICTS CONVENTIONS AND DOMESTIC LAW

- 8) Precedence of domestic law or international Conventions according to your Constitution.**

After the reform of the Argentinean Constitution in 1994, any doubt in relation to the precedence of domestic law or international conventions was dissipated.-

In Argentina international conventions prevail over domestic law.-

Article 31 of the Constitution states that:

This Constitution, the laws of the Nation, enacted by the Congress as a result thereof, , and treaties with foreign powers, are the supreme law of the Nation, and the authorities of every Province are bound to conform to it, notwithstanding any provision to the contrary which the Provincial laws or constitutions may contain, except, in the case of the Province of Buenos Aires, [for those provisions established by] the treaties ratified following the Pact of November 11, 1859.

Furthermore, in Section III of the Constitution, relating to the powers and faculties of the Congress, Article 75.22 gives international conventions constitutional status. We transcribe it as follows:

Article 75. *“The Congress shall have power:*

22. To approve or reject treaties entered into with other nations and with international organizations, and concordats with the Holy See. Treaties and concordats have higher standing than laws.

The following [international instruments], under the conditions under which they are in force, stand on the same level as the Constitution, [but] do not repeal any article in the First Part of this Constitution, and must be understood as being complementary to the rights and guarantees recognized therein: The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Optional Protocol; the [International] Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. They may only be denounced, if

such is to be the case, by the National Executive Power, after prior approval by two-thirds of the totality of the members of each Chamber.

Other treaties and conventions on human rights, after being approved by Congress, shall require the vote of two-thirds of the totality of the members of each Chamber in order to enjoy standing on the same level as the Constitution. “

Therefore, it can be concluded that, according to the wording of the Argentinean Constitution, Human Rights Conventions have constitutional status and international treaties and conventions relating to any other matter are below the Constitution but, they prevail over domestic law.

It is also worth mentioning that Argentina is party to the Vienna Convention of the Rights of the Treaties, which establishes the precedence of treaties over domestic law as well.

9) How are inconsistencies between domestic law and the Conventions resolved?

Before the 1994 constitutional reform, there was not an agreement concerning to the solving of potential conflicts between international law and domestic law. However, after two law cases solved by the Supreme Court of the Nation, in which the Court established the precedence of international law over domestic law, discussions on the matter started to diminish.¹⁰

After the reform of the Constitution in 1994, it was the text of the Constitution itself which stated the precedence of international law over domestic law.¹¹

C. IMPLEMENTATION OF CONFLICTS CONVENTIONS

10) How has the implementation of the Conventions ratified by your country taken place?

The negotiation process of an international convention, according to our Constitution, is performed by the Executive Branch of the Government. The Congress then evaluates the

10 CSJN "Ekmekdjian, Miguel Angel c/ Neustadt Bernardo y otros", 1/12/1988 . CSJN "Ekmekdjian Miguel Angel c/ Sofovich Gerardo y otros",07/07/1992. CSJN "Fibraca" and CSJN "Cafés La Virginia"

11 See Art. 31 and Art. 75.22 of the Argentine Constitution.

international instrument and, if its content is accepted, the very same Congress issues the Statute of Approval. The President, however, maintains his right to veto the Statute. The process of implementing an international instrument usually finishes with the publication of the complete text of the Statute of Approval and the international instrument in the Official Gazette.

11) Cite jurisprudence applying the Hague Convention of 1980 on the Civil Aspects of International Child Abduction and the Hague Conventions of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

Hague Convention of 1980 on the Civil Aspects of International Child Abduction

National Supreme Court of Justice, 14/06/1995, “Wilner, Eduardo Mario c/ Osswald María Gabriela”¹²

The parents, both Argentine citizens, got married on 3rd December 1985 in Buenos Aires and in March 1986 they moved to Canada. On 6th June 1990, their daughter was born in Guelph, Ontario. The family lived at a university residence for married students and the daughter attended kindergarden there.

In December 1994, the mother flew with the daughter to spend Christmas Holidays with her family. The father gave his consent to the trip as they were to return to Canada on 22nd January. However the conflicts arose when on 6th January the mother informed the father of her intentions to stay in Argentina with their daughter.

In February 1994, the father filed a request for restitution based on the Convention of International Child Abduction before the Central Authority of Ontario. On 7th March, the Court of Ontario granted the father with full custody of the daughter. On 21st March the Central Authority of Argentina filed the request for restitution before the local judge.

¹² LL 1996, A-260, DJ 2996-1, 387 and Fallos 318:1269

The judge as well as the Court of Appeal ordered the restitution of the daughter to the father based on the Convention.

The mother filed a complaint before the National Supreme Court, arguing that both of the above-mentioned decisions had violated International Treaties which had been ratified by Argentina, since they did not correspond with the child's superior interests. She has also sustained that the case in discussion was about the recognition of a foreign sentence wherein her right of defence and a fair trial had not been granted. This was said in relation to the custody being granted to the father by the Court of Ontario.

The Supreme Court's decision was adopted by the majority of its members¹³. The Court analyzed both arguments of the mother, which can be summarized as follows:

- In relation to her claimed right of not being able to defend herself in a trial held in a foreign State, the Court argued that the case subject of analysis was not the custody conflict, and it was not a matter of recognition of a foreign sentence, but a totally different procedure established in an international convention, which Argentina had ratified. The Court sustained that: *“the matter subject to decision is a request for the restitution of a child through a proceeding established in The Hague Convention of Civil Aspects of International Abduction of Children, adopted by The Hague Conference on 25th October 1980, approved by bill 23.857, in force in Argentina since 1st June 1991 and which aims to “guarantee the immediate restitution of children wrongfully removed or retained in any State party of the Convention (Art. 1, a)”*. It added: *“the right of the father to obtain the immediate restitution of the child to the place of her habitual residence before the wrongful retention had taken place, pre-existed any judicial decision in relation to custody and did not need any judicial intervention to prevail.”*
- In relation to the violation of international treaties which support the child's superior interests, the Court stated that the Convention of Civil Aspects of International Child Abduction was issued based on the assumption that the child's superior interest was to be returned to the *status quo* which existed before the wrongful removal and/or retention had taken place. The Convention preserves the

¹³ Judges C.S. Fayt, E. Moliné O'Connor and G.A.F. Lopez ruled against the restitution.

child's best interest by ordering the halting of wrongful removal and /or retention. The Court made a detailed analysis of the exceptions to the return of the child (art. 12 and 13 of the Convention) and agreed that any of the situations described in the Convention would be combined in the case, subject to analysis. The mother argued that the daughter's opinion had not been taken into account. However the Court sustained that it was not mandatory for judges to meet the child in person, but that the child had been heard either directly, or through her representative or an institution. In this case, three different minors's advisers had given their opinion.

Furthermore, the Court also stated that not returning the daughter to the father could mean that Argentina incurred a breach of the Convention of which it is a party member, and would bear all the consequences which may arise.

It is worth noting that although the process took approximately 5 years, the Court understood that the Convention should prevail and therefore ordered the immediate restitution of the daughter to her father in Canada.

Court of Appeal, H, 02/03/1995, "A.L. A. s/ Rogatory letter"¹⁴

The case consists of the request of restitution from the Spanish Central Authority made by the father of a minor who left Spain illegally with her mother and moved to Argentina. The parents were separated; both residing in Spain and the girl lived with her mother. In the divorce trial conducted in Spain, as a preventive measure, custody and guardianship of the girl was given to the mother in April 1991. In July 1991, the judge in Spain requested the delivery of the passports of both parents to prevent them from leaving the country without judicial authorization. The mother left Spain with the girl sometime between July and September 1991. As a result, the Spanish judge granted custody to the father.

The 1st Instance judge in Argentina declared the return request made by the father as inadmissible, deciding that the mother had left Spain while custody had been granted to her. The judge considered that it was not an illegal abduction in the terms of the Convention. In addition to this, the judge considered that, taking into account Article 13 par b of the

¹⁴ LL 1996, B-611, DJ 1996-1, 1185.

Convention, the minor would suffer great emotional damage in the case of restitution, since the girl was already used to her new environment in Argentina.

The Court of Appeal overturned the decision, deciding that the case met the requirements of Article 3 of the Convention.

On 29th August 1995, the Supreme Court confirmed the judgement of the Court of Appeal which ordered the girl's immediate restitution to her father¹⁵.

Court of 1st Instance, N.13, San Isidro, Prov. Buenos Aires, "P., P. v P.H. s/ Rogatory letter"¹⁶

The mother, born in Cuba and with a nationality from the United States, left Argentina with her three children, aged 10, 8 and 5, and headed to Florida, in the United States, without the consent of the father. The judges, who intervened in the custody proceedings initiated by the mother in the United States and by the father in Argentina, decided that the habitual residence of the minors and their parents was located in Argentina, despite the fact that the parents had a property in Florida and travelled frequently to the United States. Subsequently, in April 1992, the two youngest daughters moved back from Florida to Buenos Aires, Argentina, to be with their father.

The father requested the return of the eldest daughter to Argentina, but the request was rejected by the Court of Miami because they considered that the minor was rooted in Florida and in any case, she was refusing to return to Argentina. The judge considered that the girl had reached an age and maturity appropriate to take into account her opinions. He also believed that there was a serious risk that her return to Argentina would expose her to psychological harm or that it would put her into an intolerable situation.

Later, the mother asked the Central Authority of the United States for the restitution of the other two daughters. The Central Authority of United States faxed the request to the Central Authority of Argentina.

¹⁵ Fallos 318:1676

¹⁶ Unpublished but discussed in JA 1996-I, pp. 967-980

The Argentine judge decided to reject the petition for restitution because he believed that the move made by the father with two of the children had not been illegal since the mother had previously fled from Argentina with the three daughters.

The judge took into account the testimony of the mother before the Court of Miami in which she admitted that to move her three daughters to the United States without the consent of the father as required by Article 264 of the Argentine Civil Code, she had bribed the immigration official with the equivalent of \$300 USD.

The Central Authority of Argentina, upon receiving the request for Restitution from the Central Authority of the United States and sending it to the judge, advised against the restitution.

Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

Since Argentina is not party to this Convention, there is no jurisprudence applied to the matter.

12) Cite jurisprudence applying to the CIDIP III Convention of 1984 on Conflicts of Law in Adoption of Minors and the CIDIP IV Convention of 1989 on International Restitution of Minors.

CIDIP III Convention of 1984 on Conflicts of Law in Adoption of Minors.

Argentina is not a party of the said Convention and therefore there is no jurisprudence to be cited.

CIDIP IV Convention of 1989 on International Traffic of Minors.

SCBA¹⁷, 09/02/05, B. de S., D. c. T., E. v. Rogatory letter¹⁸

¹⁷ SCBA: Supreme Court of Buenos Aires Province

¹⁸ LLBA 2006, 36; LLBA 2005, 283.

The case starts with a rogatory letter from a judge from Brazil, requesting the restitution of a girl who had been allegedly abducted by her mother and was then living in Villa Gessel, Buenos Aires.

The judge of 1st instance, before executing the rogatory letter, decided to listen to the girl. After hearing her, considering many psychological and technical exams and taking into account the different rules of international private law, he decided to reject the request for restitution and established that the girl was to remain with her mother with flexible visits from the father.

The Court of Appeal reversed this decision based on the principle that international cooperation should prevail and that the judge who receives a rogatory letter from a foreign judge should limit his duty to check the formal requirements of the proceeding without revising the substantive reasons of the request and case.

The Supreme Court of Buenos Aires Province had to decide whether it was a case of restitution in the terms of the CIDIP Convention, and whether the Argentine judge could reject the restitution request from the judge from Brazil based on a revision of the substantive aspects of the case.

In a divided decision the majority of the judges decided that the mother had a right of custody and guardianship over the girl and therefore had not violated the CIDIP Convention, Article 4. The Supreme Court of the Province decided that the girl was to remain in Argentina with her mother and the restitution request should be rejected.