

“MODEL LAW ON PROCEDURE FOR THE APPLICATION OF THE CONVENTIONS ON INTERNATIONAL CHILD ABDUCTION”¹

For the purpose of securing the prompt return of children who have been wrongfully removed or retained and ensuring that rights of custody and access under the law of one State are effectively respected in the National State, measures shall be implemented so that domestic rules of procedure be subject to the following Draft Law.

Brief decision periods - aimed at the protection of the best interests of the child - contribute to compliance with the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1989 Inter-American Convention on the International Return of Children, as well as to the better preservation of the right of the child not to be wrongfully removed to or retained in a State and of the rights of access in those cases in which the adults connected with the child live in different countries.

Section 1.- Objects. The purpose of the procedure regulated herein shall be to determine whether a child has been wrongfully removed and/or retained, whenever it is in breach of custody rights, and to safeguard the rights of access. Furthermore, such procedure is intended to ensure that the treatment of the case is in compliance with the principles laid down in the conventions mentioned above, as well as to guarantee the expeditious determination of cases, and, where the return takes place, that the safe return of the child is secured.

Notwithstanding the *nomen juris* adopted by domestic law, for the purpose hereof, "rights of custody" shall include rights relating to the care of the person of the child and the right to determine the child's place of residence -including his/her removal to a foreign country- under the law of the State of the child's habitual residence. Such right may arise by operation of law, by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of such State.

Such right must be actually exercised, either individually or jointly, by parents, guardians or institutions, immediately prior to the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

Consequently, the child must have been wrongfully removed from the center of his/her habitual life to a different State.

Any decision on the merits of rights of custody is expressly excluded, as it falls exclusively within the scope of Jurisdiction of the State of the child's habitual residence. While the process of application for return is pending, such proceedings aimed at a decision on the merits of custody rights as may be pending shall be stayed.

For the purpose of this procedure, a "child" shall be any person, either male or female, under the age of sixteen years.

¹The Model Law was developed by an expert group gathered by the Hague Conference of Private International Law and the Inter-American Children's Institute. The expert group was co-ordinated by Dr. Ricardo Pérez Manrique (Uruguay) and participants were: Dra. María Lilian Bendahan Silveira (Uruguay), Dr. Eduardo Cavali Asole (Uruguay), Dra. Raquel Gonzalez (US), Dra. Graciela Tagle (Argentina), Dr. Dionisio Nuñez Verdín (Mexico), Dra. Delia Cedenios Palacios (Panama), and Dra. Luz María Capuñay Chavez (Peru).

Section 2.- Rules of procedure and interpretation criteria. The procedure shall be governed by the Constitution, such international treaties on International Child Abduction as may have been ratified by the State, this Law, domestic laws on the protection of children and adolescents, and rules of procedure.

The guiding criterion regarding interpretation and - where applicable - integration, shall be that of best interests of the child, which, for the purpose hereof, means the right of the child not to be wrongfully retained or removed and to have the issue of the rights of custody determined before the Court of the State of his/her habitual residence, to remain in close contact with both parents and the families thereof, and to obtain a speedy determination of return or international access applications.

Section 3. Jurisdiction. Jurisdiction shall be established in accordance with general rules, especially, on the basis of the principles of concentration and specialization, both at first instance and on appeal.

Section 4. Standing to Sue. Such parent, guardian, or such other person, institution or body, as may hold custody rights in accordance with the legal system of the country of the child's habitual residence, immediately prior to the removal or retention, shall have standing to sue.

Section 5. Standing to Be Sued. Such person as may have been denounced by the party having standing to sue, as such a person who has wrongfully removed or retained the child whose removal-retention constitutes the grounds for the application, shall have standing to be sued.

Section 6. Assistance or representation of the child. Pursuant to the protection laws in force, Legal Counsel may be appointed for the purpose of the assistance and representation of the child on the basis of the evolution of his/her judgment, on the advice of the court hearing the case.

Section 7. Participation of the representative of the Public Prosecutor's Office . Notice shall be served upon the Public Prosecutor's Office representative, who shall appear before the court in order to learn about the results of the proceeding and exercise the actions for which he/she is responsible. Failure to appear shall cause no delay in the proceedings.

Section 8.- Police Authority. The Police Authority shall immediately cooperate where so requested.

Section 9.- Central Authority. For the purpose of carrying out the natural obligations and functions entrusted thereto under article 7 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and article 7 of the Inter-American Convention on the International Return of Children, the Court shall report to the Central Authority on the relevant proceedings and formalities, to which the latter shall be granted free access.

Section 10. Preliminary stage. The application or petition for return, which shall be subject to the requirements laid down in article 8 of the Hague Convention on the Civil Aspects of International Child Abduction and article 9 of the Inter-

American Convention on the International Return of Children, may be filed directly before the Court of competent jurisdiction, by letter rogatory, or by filing a request with the Central Authority (art. 8 of the Inter-American Convention).

The court of competent jurisdiction shall immediately take notice of the case, adopting such urgent measures as may be necessary for the purpose of finding out the whereabouts of the child and protecting him/her, as the case may be.

Upon verification of the whereabouts of the child, the court shall immediately serve notice upon the requesting State through the Central Authority or such body as may be acting in its capacity.

The Central Authority of the State shall request or adopt all measures conducive to the voluntary return of the child.

Upon service of such notice, in the event that the discovery of the whereabouts of the child has been requested, a 30-day period shall begin to run for the purpose of the filing of the application or petition for return, absent any prior filing. Upon expiration thereof, such measures as may have been adopted *in limine* shall expire by operation of law.

The documents attached to the application or petition for return in order to show the standing to sue of the applicant (substantive laws, copy of judgment or court-approved agreement, etc.) and other formalities, shall be accompanied by their relevant translations, where necessary, no legalization being required (art. 23 of the Hague Convention).

Section 11. Procedure. Upon the filing of the application or petition for return, the court shall determine the fulfillment of the requirements regarding admissibility and standing to sue, in accordance with the definitions contained in sections 1 and 4 of this Law.

For the purpose thereof, the applicant shall prove the admissibility of his/her right, summarily showing in the initial submission that he/she is exercising custody rights, in accordance with the provisions under section 1.

The filing of the application or petition for return before the court of competent jurisdiction for the country where the child is shall constitute the date of commencement of the proceedings for the purpose of article 12 (1) and (2) of the Hague Convention and article 14 of the Inter-American Convention.

Art. 12.1.- Appeals may be lodged against Court decisions rejecting the application or petition for return *in limine* within the term of three days upon service of notice thereof.

12.2.- Once the petition has been admitted, within the period of 24 hours, the court shall issue a Return order; call the respondent to raise defenses within a time limit of ten days; adopt such preventive measures as may be necessary in order to protect the child –preventing the child from leaving the country-, or else, modify or maintain the measures originally adopted; appoint a Guardian or Legal Counsel for the child; appoint Legal Counsel or representative for the applicant in the event that, for financial reasons duly evidenced in the application, he/she is unable to travel to the foreign country; and serve notice of its decision upon both the Public Prosecutor's Office and the Central Authority.

No previous issues, incidental proceedings or counterclaims which may hinder the prosecution of the case shall be admitted.

Section 13. Defenses. The respondent shall file an answer by means of a well-founded written submission, which shall be accompanied by all such evidence as he/she wishes to rely on. Defenses shall be valid provided they state and show the following:

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;
- b) there is a grave risk that his/her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;
- c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his/her views.

Moreover, the return of the child may be refused where it would be manifestly in violation of the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

Any defense other than those listed in this section shall be dismissed by the court without further proceedings.

Section 14.- No defenses having been raised, the return order shall become final, and the court shall order that such return be effectively made by serving notice upon the Central Authority.

In the event that defenses have been raised, notice thereof shall be served upon the applicant for a period of six days.

Section 15.- Upon the filing of an answer to the petition or expiration of the time limit, a hearing shall be called within three days of the case having been set for decision to such effect. Such order shall include the opinion of the court on the evidence offered by the parties, rejecting *in limine* all such evidence as may be inadmissible, unconvincing or manifestly irrelevant.

The decision admitting or rejecting the furnishing of evidence shall be subject to no appeal.

The number of witnesses shall be limited to three for either party.

Section 16.- The hearing, which shall be presided over by the court, shall be held despite the absence of such persons as may have been summoned.

In the course of such hearing, a settlement shall be attempted. In such event, the settlement reached shall be entered on record and approved by the Court. Otherwise, the representative of the Public Prosecutor's Office shall be heard, and such procedural matters as may hinder the adoption of a final decision, if any, shall be resolved. Then, the matters in dispute shall be established, and the evidence furnished shall be submitted, for which purpose the hearing may be extended by up to seventy-two hours.

In the event that, in the court's view, the child has sufficient judgment, the child shall be heard. In addition, the parties shall be briefly heard, as well as the Public Prosecutor's Office representative, if present.

For the purpose of adjudicating the case, the court may extend the hearing by up to twenty-four hours.

Section 17.- Appellate Stage. Appeals may be lodged against Final Judgments within three days from the issuance thereof. Notice of such appeal shall be served upon the parties, the Public Prosecutor's Office representative and the Legal Counsel for the child, if any, during the same time limit.

In the event that the Appeal be admitted, the judgment shall be stayed².

The case shall be brought to the knowledge and decision of the Appellate Court within the period of twenty-four hours of the relevant service of notice.

The Appellate Court shall issue a decision within the term of six days, either in the context of a hearing or as a preliminary decision.

The appellate stage shall proceed within the maximum periods set in the articles of the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1989 Inter-American Convention on the International Return of Children.

Section 18.1. Contents of the judgment. Return shall be ordered whenever the child is under the age of 16 years, and has been wrongfully removed or retained in breach of custody rights effectively exercised at the time of the removal or retention in the country of the child's habitual residence.

18.2. Safe return. The court cannot refuse to order the return of a child on the basis of the provisions of article 13 (b) of the 1980 Hague Convention and article 11 (b) of the 1989 Inter-American Convention, if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

18.3. Even where a period exceeding one year has elapsed between the date of the application or petition for return and the wrongful removal or retention, the court may also order the return of the child, depending on the circumstances of the case, unless it is demonstrated that the child is now settled in his/her new environment, and, in the court's view, permanence therein is beneficial to the child's best interests. Otherwise, the court may always order the return (art. 18 of the Hague Convention and article 17 of the Inter-American Convention).

Section 19.- Objections. Appeals may be lodged only against Judgments ordering *in-limine* rejection –in which case the appeal is subject to no further proceedings- and Final Judgments.

During the appellate stage, a hearing may be called or a preliminary decision may be adopted, in which case a motion for clarification may be filed within a period of 48 hours and determined also within 48 hours.

No appeal or motion shall be admitted against a judgment issued by an appellate court.

Section 20.- Rights of Access. Any application to make arrangements for organizing or securing the effective exercise of rights of access by the holders thereof provided for in the International Conventions on Return shall follow the procedure set forth herein.

"Rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

² The staying effect is justified by the short term given to the Court of Appeal to render final judgment. Nevertheless, each State at the time of passing internal legislation on this matter, can establish the non-staying effect of an appeal in case of considering that under the existing procedural system it would be impossible for a Court of Appeal to render judgment within the short term established in the Model Law.

For the access application to be admissible within the framework of the International Conventions on Return, no previous wrongful removal or retention or visitation plan is required.

Section 21. Direct judicial communications.

A Liaison Judge shall be appointed for the purpose of facilitating direct judicial communications on the matters at issue governed hereunder between Foreign and Domestic Courts.

Consultations may be reciprocal, and shall be made through the Liaison Judge and entered on record in the relevant files. Notice thereof shall be served upon the parties.