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**NATURE AND STRUCTURE OF THE INTERNATIONAL  
RECOVERY OF CHILD MAINTENANCE IN ARGENTINA AND  
SOME OF MERCOSUR COUNTRIES**

Patricia Kuyumdjian de Williams  
Victoria Granillo Ocampo

**A. ARGENTINA**

**1. INTERNATIONAL LAW**

**1.1. The New York Convention on the Recovery Abroad of Maintenance, 1956**

This Convention, approved within the framework of the United Nations, was ratified by our country by means of Law 17,156 Official Gazette 10/2/1967, and article 1<sup>st</sup> thereof was later modified by Law 19,739. This presently relates us to 64 countries<sup>1</sup> .

The Transmitting and Receiving Agencies for this Convention in Argentina is the Ministry of Justice and Human Rights, General Board of Legal Affairs, International Legal Cooperation Area (*Dirección Nacional de Asuntos Internacionales, Departamento de Cooperación Internacional en Materia Civil*).

At present, the Ministry of Justice is dealing with 402 cases, 142 of which are incoming applications and 260 of them are outgoing cases.

The countries involved are mainly Chile and Spain, followed by Brazil, Colombia (in these last two countries the number of cases is increasing significantly), México, Germany, Italy and Switzerland, to a lower extent.

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<sup>1</sup> Algeria, Germany, Australia, Austria, Barbados, Belarus, Belgium, Bosnia-Herzegovina, Brazil, Burkina Faso, Cabo Verde, Chile, Cyprus, Colombia, Croatia, Denmark, Ecuador, Spain, Estonia, ex Yugoslavian Republic of Macedonia, Finland, France, Greece, Guatemala, Haiti, Hungary, Ireland, Israel, Italy, Kazakhstan, Kyrgyzstan, Liberia, Luxemburg, Morocco, México, Monaco, Montenegro, Nigeria, Norway, New Zealand, Pakistan, The Netherlands, Philippines, Poland, Portugal, Central-African Republic, Republic of Moldova, Check Republic, Romania, United Kingdom of Great Britain and Northern Ireland, Holy See, Serbia, Seychelles, Slovakia, Slovenia, Sri Lanka, Sweden, Switzerland, Suriname, Tunisia, Turkey, Ukraine and Uruguay. <http://treaties.un.org/>

Of this total, 70% of the cases require the determination of support; 20% of them refer to the execution of an already determined support and the remaining; 10% relate to an increase in the support amount, to letters rogatory, and requests for localization and acknowledgement of filiation. It should be noticed that these last two matters are not covered by the New York Convention of 1956, but in practice they are accepted by Argentina's Transmitting and Receiving Agencies, in the light of The Hague Convention of 2007 guidelines.

This comprehensive interpretation of legal cooperation as regards support has enabled to reach agreements in 80% of the cases, which even if they are not provided for in this instrument, they are included in The Hague Convention of 2007.

This Convention is the most used for maintenance cases in Argentina, but presents some difficulties:

1. Expenses of the documents translation and legalization. In spite of the existence of multi-lingual application forms, in cases where the execution of a support claim is pursued, it is necessary to translate and legalize foreign orders and accompanying documents, as well as agreements that need to be entered for recognition.
2. International transfer fees. Although Argentine Banks charge no commission to receive deposits related to support payment, many banks in other countries do, as also do private agencies.

### **1.2. The Inter-American Convention on Support Obligations, 1989**

This Convention, prepared in the framework of OAS was ratified by Argentina in September 2002 and relates us to 13 countries, all of them Latin-American countries.<sup>2</sup>

The Central Authority in Argentina is the Ministry of Foreign Affairs and Worship, International Legal Assistance Department.

It settles the guidelines for international jurisdiction and applicable law.

The creditors may choose the judicial authority who will hear the claim and the applicable law.

It's rarely used because:

1. Many of the state parties had problems designating the central authorities.
2. It has not been very effective promoting cooperation.

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<sup>2</sup> Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, México, Panamá, Paraguay, Peru and Uruguay. <http://www.oas.org/juridico/spanish/firmas/b-54.html>

3. It hasn't solved the problems of the New York Convention regarding costs and money transfers.
4. It only applies for child support execution.
5. There are other civil cooperation instruments that turn out to be more efficient in achieving execution of a judgement or the determination of precautionary measures, such as Las Leñas Protocol, effective among Mercosur countries.

### **1.3. The 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance**

Argentina has not yet ratified this Convention or its Protocol, particularly on account of difficulties arising in the determination of the central authority: either the Ministry of Justice, as in the case of The New York Convention or the Ministry of Foreign Affairs and Worship, which is the Central Authority for the Inter American Convention on Support Obligations and which has always been the central authority in issues related to The Hague Convention.

However, on August 10<sup>th</sup>, 2017, a bill was agreed upon which will be presented before the National Congress for approval and ratification of the convention.<sup>3</sup>

It must be pointed out that this document does not anticipate which the central authority will be and this omission might bring about a problem in the future for its effective application, even after ratification thereof, as it has been the case in other countries.

The bill provides that Argentina will extend application to other support obligations: filiation, matrimony or affinity, including obligations towards vulnerable persons.

The bill describes the Central Authority's<sup>4</sup> obligations, and guarantees effective access to the procedures provided by free legal assistance<sup>5</sup>, including execution and appeal.

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<sup>3</sup> Reference: *Ex2017-16325808-APN-DDMEAPYA#MRE-CONVENIO s/COBRO INTERNACIONAL d/ALIMENTOS p/NIÑOS Y OTROS MIEMBROS DE LA FAMILIA (AGREEMENT re/ INTERNATIONAL COLLECTION of SUPPORT for CHILDREN AND OTHER FAMILY MEMBERS)*

<sup>4</sup>“ Central Authorities will provide assistance and shall transmit and receive assistance applications, initiate or assist in the initiation of procedures, help localize the debtor or creditor, facilitate the securement of pertinent information regarding the debtor's or creditor's income and other economic facts, including localization of goods, promote a friendly solution of differences in order to obtain voluntary payment of support, assist in the collection and fast transfer of support payment, facilitate the procurement of documentary evidence or other type of evidence, provide assistance in determining filiation, initiate or facilitate the initiation of the procedures required to obtain the necessary territorial temporary measures destined to guarantee the result of a pending support application and they will assist in serving notice of documents.”.

At the time of ratification, the bill anticipates that Argentina will include a reservation regarding Article 20.1.e.<sup>6</sup>

Furthermore, the bill provides that execution may be partial<sup>7</sup> and may be denied in the following cases: *“if: it were expressly incompatible with public order in the required State, it had been obtained by means of fraud, if litigation between the same parties and for the same purpose were pending before an authority of the required State, if the decision were incompatible with another decision issued for the same parties and for the same object or if the defendant had not been duly served notice.”*

The bill furthermore provides that:

1. *“Acknowledgement and execution procedures will be governed by the law of the required State”.*
2. *“The physical presence of the child or applicant will not be required at any procedure”.*
3. *“A support agreement entered into in a contracting State may be acknowledged and executed as a decision, provided that it is executory in nature as a decision in the State of origin”.*
4. *“Execution will be fast and it will take place without any need for any further action by the applicant”.*
5. *“Contracting States will provide efficient measures in their internal Law so as to execute decisions”,*
6. *“Personal data obtained or transmitted in the furtherance of the agreement may only be used for the purposes for which they were secured or transmitted.*

*Every authority in charge of processing information must guarantee confidentiality thereof pursuant to the Law of its State”.*

7. *“No legalization or any other similar formality will be required in the context of this convention.”*

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<sup>5</sup> The bill states: “A State may declare that it will provide free legal assistance regarding applications different from those provided for in Article 10 (1) a) and b) of the named agreement and the cases covered by Article 20 (4) of the convention, subject to the examination of the child’s economic resources.

<sup>6</sup> ***“Pursuant to provisions in Articles 62.1 and 20.2 and, in the event that parties had accepted jurisdiction in a written agreement, a decision adopted in a contracting State (the State of origin) will not be acknowledged or executed since Argentine legislation does not allow to extend jurisdiction in family matters”.***

<sup>7</sup> “If the required State may not acknowledge or execute the decision in full, it will acknowledge or execute any divisible part of such decision that may be acknowledged or executed.

The recommendation to adhere to The Hague Convention of 2007 has been sustained at all forums where Argentina has been participating for several years now, such as Mercosur and IberRed, and also at Private International Law Sessions and Seminars since it is considered to be an extremely valuable instrument so much so to the extent that other countries in Latin America as well as the rest of the world also adhere.

This instrument will allow Argentina to relate to other countries such as the United States of America, which is not a part of the New York Convention but has ratified The Hague Convention of 2007, and with which Argentina has increasing migration links.

To date only Brazil and Honduras have ratified the Convention within Latin America, therefore more promotion and training is required in order to achieve understanding of the instrument in question so that it is approved by the rest of the countries. We anticipate that it will become a very useful tool.

## 2. INTERNAL LAW

### Standards of Private International Law in the National Civil and Commercial Code

The National Civil and Commercial Code that became effective on August 1<sup>st</sup>, 2015 incorporated Private International Law standards very useful in this matter and which compensate to a certain extent the fact that The Hague Convention of 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance has not been ratified yet.

Article 2603 of such code deals with provisional and precautionary measures; it provides when Argentine judges are competent and the fact that compliance by an Argentine judge of a precautionary measure does not imply the commitment to acknowledge or execute a foreign final sentence issued within the main lawsuit.

In turn, Article 2611 provides for the principle of jurisdictional cooperation and ratifies the obligations assumed by the Republic of Argentina in Inter American Conventions<sup>8</sup>. However it does not specify either the scope of or which the cooperation means will be.

Article 2612 deals with international procedural assistance and establishes that communications addressed to foreign authorities must bear the form of letters rogatory and

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<sup>8</sup> Letters Rogatory (*Exhortos o Cartas Rogatorias (CIDIP I, 1975)*), Reception of Evidence Abroad (*Recepción de Pruebas en el Extranjero (CIDIP II, 1979)*), Compliance with Precautionary Measures (*Cumplimiento de Medidas Cautelares (CIDIP II, 1979)*), Evidence and Information of Foreign Law (*Prueba e Información del Derecho Extranjero (CIDIP II, 1979)*), and International Restitution of Minors (*Restitución Internacional de Menores (CIDIP IV, 1989)*), to the Mercosur Protocols of Las Leñas (1992) and Precautionary Measures (1994), and The Hague Conventions about Notices (1965), Evidence Procurement (1970) and Civil Aspects of Child Abduction (1980).

empowers judges to open direct communications with foreign judges that so accept so long as the guarantees of due process guarantees are sustained.

It provides for the principles of “officiality” (*oficialidad*), which means that the process must move forward at the court’s own motion, and celerity and establishes Argentine international public order as a limitation and that, if applicable, the applicant should cover all expenses derived from compliance with cooperation.

Our code particularly deals the Support issue in articles 2629 and 2630. The first one establishes jurisdiction. *“Legal actions regarding the provision of support must be filed, at the applicant’s choice, before the judges corresponding to his/her domicile, his/her habitual residence or the domicile or habitual residence of the defendant. Furthermore, if it were reasonable depending on the circumstances of the case, they may be filed before the judges of the place where the defendant has assets/property/goods.*

*Litigation between spouses or cohabitants must be brought before the judge of the last marital or co-habitational domicile, before the habitual residence of the defendant or before the judge hearing in the bond dissolution.*

*If an agreement had been entered into, at the plaintiff’s option, the action may be brought before the judge of the jurisdiction where the obligation must be performed or where the agreement had been entered into, if it is the same as the defendant’s residence.”*

The second article refers to applicable legislation. *“The right of support is governed by the law of the support debtor’s or creditor’s domicile, whichever is most favorable to the support creditor’s interest, at the competent authority’s criterion.*

*Support agreements, at the election of the parties, are governed by the law of the domicile or usual residence of any of the parties at the time the agreement is entered into. Otherwise the law governing the right of support is enforced.*

*The right of support between spouses or cohabitants is governed by the law of the last marital domicile, the last effective cohabitation or that of the country whose law is applicable to the dissolution or nullity of the bond.”*

The autonomy of the parties’ will is introduced. The interpretation of the rules for the assignment of competence, as well as the determination of applicable law in the pertinent case must essentially protect the support credit and support creditor. When minors are involved the significance of this factor increases.

## **B. THE HAGUE CONVENTION OF 2007 IN LATIN AMERICAN COUNTRIES**

### **BRAZIL**

These are the only two countries in Latin America that have ratified the 2007 Convention: Brazil and Honduras.

On Monday 17 July 2017, Brazil signed and deposited the instruments of ratification of the *Hague Convention of 23 November 2007* and the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations* (2007 Maintenance Protocol). The Convention and the Protocol entered into force for Brazil on 1 November 2017. Brazil becomes the 36<sup>th</sup> State to have ratified it. The Central authority is the Ministry of Justice and Public Security, SCN Quadra 6, Bloco A, 2° andar, Ed. Venâncio 3000, CEP 70.716-900, Brasília-DF Brazil. Telephone: +55 61 2025 8919.

### **HONDURAS**

On Monday 16 October 2017, Honduras deposited the instruments of accession to the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, and to the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Form of Family Maintenance.

With the accession of Honduras, the 2007 Child Support Convention counts 38 Contracting Parties. The 2007 Child Support Conventions will enter into force on 19 October 2018.

The Central Authority (Art. 4) will be: Dirección de Niñez, Adolescencia y Familia (DINAF), Colonia Humuya, Calle la Salud, N°1101, Tegucigalpa, Honduras C.A. Tel.: +(504)22399605, +(504)22398029 and +(504) 22397879

While not a Member of the HCCH, Honduras is currently Party to two other Hague Conventions, namely: the *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* and the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.*

### **URUGUAY**

Uruguay has not yet ratified The Hague Convention of 2007. The intention exists of ratifying such instrument which has the favorable opinion of certain areas of the Executive Branch which would be involved in its eventual application. To date, however, the bill has not been introduced in Congress for approval. One of the issues where agreement is still pending is which Body would act as the Application Authority of the instrument and which roll would be assumed by other actors of the State in its implementation.

In this sense, the officers of the relevant technical areas of the Executive Branch who have been consulted explained that at the time when The 1956 New York Convention was ratified by Uruguay, the bodies acting as transmitting and receiving agencies had not been previously designated and this entailed serious inconveniences at operational level. Eventually the Ministry of Education and Culture was designated as the Transmitting Agency and the Public Prosecutor's Office (*Ministerio Público Fiscal*) was designated as the Receiving Agency but in the meantime, the convention remained inactive along many years.

Given this background and since the 2007 Convention provides for a significant burden of competences of the Central Authorities in order to facilitate international cooperation in the matter, the authorities of the Ministry of Education and Culture consulted in this regard have agreed that, before ratifying the Convention, it would be necessary to designate the Central Authority of The Hague Convention of 2007, as well as to determine the tasks to be performed by the other actors involved in the application of the instrument on whom some of the objectives of the Convention may fall upon. This would be in line with the analysis process and further ratification undertaken by Brazil.

At academic level, there is great interest in the ratification of this Convention, which is considered to be extremely useful, not only at a theoretical but also at a practical level since it would allow Uruguay to be linked to several countries with which there are strong migration bonds. In this sense, a group of scholars intends to encourage Uruguay's ratification of the instrument, prior determination by the State branches, of the competencies assigned to the bodies that will perform the different rolls anticipated in the Convention so that it is fully operational from the very first moment of its ratification and Uruguay does not incur any liability.

But the fact remains, that since there is not yet any favorable decision of the Foreign Office to submit the Convention before the Parliament, it is difficult to estimate how long this process might take.

## **PARAGUAY**

Paraguay is right now neither part of The 2007 Hague Convention nor the Protocol on the Law Applicable to Maintenance Obligations.

Even if there are favorable technical reports regarding their ratification issued by the local Foreign Office and the National Secretariat of Childhood, Adolescence and Family, the Body that acts as central authority for other international instruments effective in such country in the issue of child protection, such as the Inter American Convention on the International Return of Children and The Hague Convention of 1980 on the Civil Aspects of International Child Abduction, the Convention has not been yet submitted before Parliament for approval.

To a certain extent, Paraguay's great interest in ratifying this instrument lies on the significant number of cases that have appeared in that country regarding support related to creditors and debtors who reside in different countries, for which The Hague Convention of 2007 would provide an extremely beneficial solution.

This being an election year, the political context may become one where it is possible to give new impulse to the introduction of the international instrument to Congress, as the officers of the present government have informed.

### **CHILE**

Chile has not yet subscribed The Hague Convention of 2007. A former officer of the Judicial Assistance Organization of the Metropolitan Region of this country that acts as the central authority for different international conventions in civil matters (The Hague Convention of 1980 among others) was consulted and said that in the last time Chile has been devoted to the study and analysis of this instrument and has organized an inter-institutional board at the Foreign Office with the participation of the Ministry of Justice and the Supreme Court of Chile. Such study was completed with the issuance of a report that has been presented to the Executive Branch so that it may evaluate the viability and convenience of sending the instrument to Congress for its approval.

Although government authorities reveal that there is much interest in Chile becoming a party to this Convention, there is still no certainty as to when this may occur.

### **CONCLUSION**

Notwithstanding the fact that several countries in Latin American are discussing this Convention and, as mentioned above, some have taken concrete steps towards achieving approval from their governments, it is necessary to have the political decision to incorporate the instrument, which at the same time as providing a solution to a universally significant matter, requires from signatory States, the assumption of obligations and allocation of adequate resources in order to be able to comply with the objectives therein provided for.

This is something to look forward to, and hopefully more efforts will be undertaken by the different States to acquire this excellent, tool that will allow more cooperation and efficiency in obtaining this basic human right to maintenance.