

THE BRAZILIAN JUDICIAL SYSTEM AND THE HAGUE CONVENTION

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One of the two goals of the Hague Convention on the Civil Aspects of International Child Abduction is “to secure the prompt return of children wrongfully removed to or retained in any Contracting State.” Article 11 of the Convention states more specifically,

“The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. . .”

Given this, it would be reasonable to anticipate prompt returns of children who have been abducted to or illegally retained in Brazil. At least that is what I thought, 5 years ago, when my two children were illegally retained. While my case was characterized by painful delays, it appears that this pattern has thankfully ameliorated somewhat over the years. The stumbling block however for most left-behind parents in getting their children back seems not to be delays, but rather the multiple levels of appeals afforded to the taking(abducting) parent. And as the wheels of the Brazilian justice grind ever so slowly, the child loses half of their identity and in many cases, becoming alienated from the left-behind parent.

The focus of this article is to provide the reader a basic understanding of the Brazilian judicial system, along with the more common legal strategies used when arguing a Hague Convention case. It does not pretend to be an all-inclusive summary of the Brazilian judicial system. After reading this article, it should be easy to understand why so many left-behind parents wait endlessly for their children’s return.

What are the different levels of courts in Brazil?

Brazil is composed of twenty-six states and one federal district. In a Hague Convention petition, a single judge within the federal court system will hear a case. This court is called a Vara Federal (VF) and is often referred to as the court of 1st instance. These courts reside in their respective state. Each state has several Varas Federais, though not all are designated to analyze a Hague Convention case.

A ruling from the 1st instance can be appealed to the designated appellate court, known as a Tribunal Regional Federal (TRF). Each of these courts of 2nd instance covers two or more states. The current judicial divisions for the TRF are (headquarters):

- 1st Region – Acre, Amapa, Amazonas, Bahia, Distrito Federal, Goiás, Maranhão, Mato Grosso, Minas Gerais, Pará, Piauí, Rondônia, Roraima and Tocantins (Brasilia)
- 2nd Region – Espírito Santo and Rio de Janeiro (Rio de Janeiro)
- 3rd Region – Mato Grosso do Sul and São Paulo (Sao Paulo)
- 4th Region – Parana, Rio Grande do Sul and Santa Catarina (Porto Alegre)
- 5th Region – Alagoas, Ceara, Paraiba, Pernambuco, Rio Grande do Norte and Sergipe (Recife)

The court of 3rd instance (second appellate level) is the Superior Tribunal de Justiça (STJ). This court was created in 1988, when Brazil’s new constitution was drafted, and serves as the highest appellate court for non-constitutional issues. Although the TRFs are located in five cities throughout Brazil, there is only one STJ, located in Brasilia. Most likely, a Hague case will end at the STJ.

The highest court in Brazil is called the Supremo Tribunal Federal (STF). Although David Goldman’s case was accepted by the STF, Sean Goldman was returned before the court had ruled on its merits as a Hague Convention case. As such, we do not yet know how the Supreme Court would handle a Hague Convention case and how it would analyze its merits.

The text above is summarized in the following table:

Level	Portuguese Name (Abbreviation)	English Translation	# of courts	# of judges per case
1	Vara Federal (VF)	Federal Court	Hundreds	1
2	Tribunal Regional Federal (TRF)	Regional Federal Court	5	Panel (3)

3	Superior Tribunal de Justiça (STJ)	Superior Court of Justice	1	Panel (5)
4	Supremo Tribunal Federal (STF)	Supreme Federal Court	1	Panel (5)

What are some common legal strategies in a Hague Convention case?

The following table outlines a number of common legal strategies that may be used in the Brazilian court system. In all cases, the AGU has twice as long to file a specific action.

Type	Days to File	Notes
Embargos de Declaração	5	Used to claim a contradiction or inconsistency, omission or obscurity in a ruling. Suspends the time limit to file an appeal. Only after the ruling on the Embargos de Declaração, which may take weeks or months, may the losing side file their appeal to a higher instance. As one can imagine, they are commonly abused and used as a delay tactic. Such behavior by an offending party often results in a fine.

Embargos Infringentes	15	Used if the decision from a panel of judges is not unanimous and changes the lower court's ruling. This action will be heard by a Seção (combined panel of judges) and must be resolved before an appeal can be filed to the next level.
Embargos de Divergência	15	Used to solve differences in interpretations between different panels of the court. It functions to standardize the position of the court when different panels of judges issue conflicting decisions in regard to similar cases. May be used in either the TRF and STJ.
Agravo Interno / Agravo Regimental	5	Used against preliminary decisions of the rapporteur judge. Can be filed when the case is at the TRF, STJ or STF.
Agravo de Instrumento	10	Used against preliminary decisions of the first level judge (Vara Federal). It is sent directly to the TRF and will be judged there by a panel of three judges.
Agravo Retido	10	Used against preliminary decisions of the first level judge (Vara Federal), but will only be judged by the TRF at the same time it analyzes the main appeal (Apelação).
Ação Cautelar	varies	Argues with urgency that enforcement of any situation would cause potential damage to the client and needs an immediate judicial decision to neutralize it.

How does a case travel through the court system?

A Left-Behind Parent (LBP) can choose to file a Hague Convention petition two ways. They may either file through a private attorney or petition the Brazilian Central Authority (BCA) which will then contract the Advocacia Geral da União (AGU) to process the case. If you use a private attorney, you will be the client. If you use the AGU, the Brazilian government is the client. Historically, the AGU would not become involved when the Hague Convention case was filed through a private attorney. With the complexity of David Goldman's case however, the AGU entered as a party. Since then, the AGU may participate in a case even if the left-behind parent contracted a private attorney. In this event, the AGU will be treated by the judge as if it was the author of the case. For a better understanding of the terminology used throughout this article, please read, [Untangling the Bureaucracy of International Child Abduction](#). The article, [Tough Decisions for a Left-Behind Parent](#), further discusses the two ways to file a petition. Regardless of whether the AGU or a private attorney files the petition, a single judge at one of the Vara Federais will hear the case.

A ruling from the first instance can be appealed to the appropriate TRF to be heard by a panel of three judges. An alternate form of appeal, an Embargos de Declaração, may be used in the case of a contradiction, omission or obscurity in the decision from a court. This appeal is analyzed by the same judge (VF) or panel of judges (TRF/STJ) that issued the decision. This form of appeal may be used between any two levels of instance and must be resolved before a case can proceed.

One judge from the three-judge panel at the TRF will serve as the rapporteur judge. This judge is responsible for compiling reports and arguments and presenting them to the others judges. The rapporteur judge also has the ability to issue preliminary rulings. Some decisions from the rapporteur judge can be appealed and will be decided by the full panel of 3 judges. A panel of judges is called a Turma whether it be at the TRF, STJ or STF.

Whether a ruling confirms the previous level and whether it was unanimous will determine the next type of appeal. A final decision of the panel that confirms the ruling in the first instance can be appealed directly to the STJ, as can a unanimous ruling that reformed the ruling of the first instance. However, if the ruling reforms the previous level and was not unanimous, it must be appealed within the same level using an Embargos Infringentes before an appeal can be filed to a higher level. In this event, a Seção which is formed in the TRF by six judges (2 panels of 3 judged combined) will analyze the appeal. Only after the decision of the Seção is issued may the losing side appeal to the STJ.

The following table outlines the previously described text:

Unanimity of Court	Original Ruling	Type of Appeal	Analyzed By
Not Unanimous	Reforms	Embargos Infringentes	Seção (TRF)

Unanimous	Reforms	Recurso Especial	Turma (STJ)
Unanimous/Not Unanimous	Confirms	Recurso Especial	Turma (STJ)

As before, the final decision of the TRF can be challenged with an Embargos de Declaração. In general, the final decision of the TRF must be immediately enforced after its publication; although, the losing side may suspend it with the argument of “urgency and potential damage” by filing a special action with the STJ called an Ação Cautelar. This action will be analyzed by a panel of five judges. The rapporteur judge will first rule whether to suspend the decision from the TRF. This decision will then either be confirmed or reformed by the full panel.

The STJ consists of six panels of judges, each with five judges and one serving as the rapporteur judge. Only two panels however, analyze Hague cases. These two panels, when combined, form a Seção. Again, some decisions of the rapporteur judge can be appealed and will be decided by the same panel. As stated before, a Hague Convention case will most likely end at the STJ though there are still some legal strategies left for a skillful attorney.

First, the final decision can be challenged by an Embargos de Declaração to be analyzed by the original panel of five judges. Second, an Agravo Regimental may be filed, also to be analyzed by the original panel of judges. This type of appeal has the same function as the Agravo de Instrumento, which is to challenge preliminary decisions from the rapporteur judge. Likewise, Embargos de Divergência can be filed to the Seção to argue a divergency between different interpretations to a specific situation in a case from the two panels that form the Seção. Such divergences however, are very unlikely in a Hague Convention case, and as such, are not something that left-behind parents should worry about. There are a few others circumstances, all unlikely, under which an appeal could be filed to the Seção.

A ruling from the STJ can also be appealed to the Corte Especial, formed by the fifteen oldest judges of the court. One important attribution of the Corte Especial is to judge allegations of constitutionality. For example,

if one party questions the constitutionality of a certain article of the Hague Convention, the standard panel of 5 judges must submit the case to the Corte Especial to resolve the argument of constitutionality, unless it had already ruled about the same argument before in another case. After the Corte Especial resolves the argument, the case returns to the Turma to continue its analysis. As the Corte Especial will only analyze a specific argument of constitutionality once and the conditions for other appeals are very specific, it is highly unlikely that such an appeal would ever be used in a Hague case.

Only by using arguments that involve violations of the Constitution, may the losing side appeal to the highest court in Brazil, the STF. Whereas the Supreme Court of the United States has 9 judges, there are 11 in Brazil. However, only 5 will hear a case, with one of them serving as the rapporteur judge. As before, some decisions of the rapporteur judge can be appealed and will be decided by the entire panel. The panel may decide however that the case must be judged by all the eleven ministers. Again, it is possible to file an Embargos de Declaração. Having received new 100,781 cases in 2008, The Economist magazine, in May 2009, called the STF “the most overburdened court in the world. . . overstretched to the point of mutiny.” However, things are improving slowly, but steady. The number of new cases dropped to 84,369 in 2009, 71,670 in 2010 and is on pace for approximately 67,000 in 2011. The STF currently has approximately 88,000 proceedings under analysis, in contrast to over 100,000 in 2009.

How much time does one have to file and appeal?

The AGU is always given twice as much to file an appeal as a private citizen. Although the name for an appeal at each instance is different, the purpose is the same. Aside from the legal maneuvers discussed above, the following table outlines the time frames for filing an appeal at each instance.

Court	Type of Appeal (English Translation)	AGU as Plaintiff	Citizen as Plaintiff
TRF	Apelação (Appeal)	30	15
STJ	Recurso Especial (Special Appeal)	30	15
STF	Recurso Extraordinário (Extraordinary Appeal)	30	15

Are there any differences between an appeal at the various levels?

The analysis of an appeal to the STJ or STF is very different from one to the TRF. The STJ and STF can only discuss the interpretation and application of the law or Constitution – as if it was a theoretical or doctrinal discussion. They cannot change what the TRF has decided is a true fact. Thus, new evidence cannot be entered, nor can, for the most part, the veracity of existing evidence be questioned once a case leaves the TRF. For example, if the TRF states, “the child is well settled in Brazil”, the STJ or STF cannot say it is not. They can however discuss whether it is a valid argument to consider a the child’s adaptation in denying or allowing a return under the terms of the Hague Convention and the Constitution. Although the rule says that the STJ or STF cannot resolve facts, in some situations the boundaries are gray. What one person thinks is a factual discussion, a skillful attorney may successfully argue is a matter of interpreting the law.

What time frames can a LBP expect for their case as it travels through the court system?

Historically, proceedings have been very lengthy. I waited nearly 3 ½ years for a ruling in the first instance. It then took another year for the TRF to rule on the appeal, and another 4 months to publish the ruling. Until a ruling is published, an appeal cannot be filed. According to the court dockets, at one point in my case, it took nearly two months for a document to travel from the judge’s secretary to his desk.

There are many reasons for this, some legitimate and other not so. In a Hague Convention case, the Ministério Público Federal(MPF) must be heard, in addition to considering the arguments of the Left-Behind Parent (LBP) and Taking Parent(TP). In general, the MPF considers the question, “What are the best interests of the child?” Depending on the instance and the type of appeal, these “advisory rulings” add weeks to months to a final ruling. Delays may also be imposed due to the possibility of appealing secondary decisions from the rapporteur judge or alternate forms of appeals such as Embargos Infringentes or Embargos de Declaração.

Although Brazilian law provides for very short time frames for judges to make a decision, it is widely not respected and there is no punishment for failing to comply. The prevailing attitude seems to be that slowness is endemic within the Brazilian judicial system and it would be unfair to punish judges for problems they, in most cases, did not cause. Sadly, this does not prevent the left-behind parent from being punished. In most instances, including my own case, the judge rules against returning a child home because, in the time it took to process a case, the child had adapted to their new environment and, in violation of Article 13b of the Hague Convention, returning them would pose “a grave risk . . . expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”

Brazilian courts however, have begun to take measures to improve their efficiency. They now take advantage of technology to handle many cases. Frequently, proceedings need to be scanned and become “virtual” proceedings. As such, they are sent to other courts through the Internet as well as the intranet of the court system. In some cases, documents are now analyzed and decided by the judges with computers and not with papers.

Additionally, the Conselho Nacional de Justiça (National Justice Council in English), a body within the Brazilian judiciary with the goal of proactively improving the delivery of justice, has set a target of 2014 for courts to publish all decisions within 10 days. Of course, most of the courts are still far away from achieving this goal. Nonetheless, awareness of a problem is the first step towards solving it.

Finally, with the goal of expediting Hague petitions, the AGU has attempted to argue the supralequality, of the Hague Convention. In essence, they have argued that since the Hague Convention is an international treaty and that such treaties are above the level of ordinary laws. As such, Hague cases should be exempt from using the overburdened and overcomplicated court structure as it exists in Brazil today. Although some rulings have confirmed this, it has yet to lead to changes in how Hague Convention cases are heard.

Although cases still travel at glacial speed, things are improving. Recent rulings from the Vara Federais have taken, on average, between 1-2 years while rulings from the TRF or STJ are somewhat quicker. So far, David Goldman is the only person in the United States to have received his child back through a court order from Brazil. Sadly, the Brazilian courts will never allow me to raise my children in the United States. However, in the 5 years since my children were abducted, I have seen improvements overall in the handling of newer cases. Who knows? Maybe one day, left-behind parents whose children are taken to Brazil will have hope for prompt returns.