THE HAGUE CONVENTION: "BRAZILIAN STYLE"

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Note: When I reviewed the article over 4 years after I had first written it, I chose to leave much of the original text "as-is" and append it with updates. Although the status of the individual cases referenced have changed, I believe that the original story still reflects the truth that most left-behind parents face today.

In August, 2006, when my two children were illegally retained in Brazil. I was comforted by the fact that the Hague Convention on the Civil Aspects of International Child Abduction had entered into force between Brazil and the United States nearly three years earlier in December, 2003. As of October, 2013, the Convention, having the same legal standing as an international treaty, has been adopted by 90 countries since its drafting in 1980. Article 2 of the Convention states that,

Contracting States [countries] shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

It further establishes the goal in Article 11 that a child be returned within six weeks from the date of commencement of the proceedings. With this in mind, I dutifully filed my petition through the Office of Children's Issues at the United States Department of State, fully expecting to have my children back quickly.

A treaty is like a contract and there are several fundamental principles relevant to treaty law.

The first is best expressed by the Latin phrase, *pacta sunt servanda.* In English it means, "pacts must be respected." The second, according to the Vienna Convention on the Law of Treaties, states that "*every treaty in force is binding upon the parties to it and must be performed by them in good faith.*" With this comes the implication that a party to a treaty cannot utilize provisions within its domestic laws as justification for a failure to comply with the terms of the treaty. In the United States, an international treaty is second only to the constitution. In Brazil, the Attorney General (AGU) has long argued (albeit unsuccessfully) for the *supra-legality* of the Convention.

According to Article 3 of the Convention,

The removal or the retention of a child is to be considered wrongful where

A. IT IS IN BREACH OF RIGHTS OF CUSTODY ATTRIBUTED TO A PERSON, AN INSTITUTION OR ANY OTHER BODY, EITHER JOINTLY OR ALONE, UNDER THE LAW OF THE STATE IN WHICH THE CHILD WAS HABITUALLY RESIDENT IMMEDIATELY BEFORE THE REMOVAL OR RETENTION; AND
B. AT THE TIME OF REMOVAL OR RETENTION THOSE RIGHTS WERE ACTUALLY EXERCISED, EITHER JOINTLY OR ALONE, OR WOULD HAVE BEEN SO EXERCISED BUT FOR THE REMOVAL OR RETENTION

The requesting parent, more commonly referred to as *left-behind parent*, will often obtain a local court order to establish that these conditions existed at the time of abduction and then attach this order as evidence for the petition. Like most requesting parents, I obtained a court order and attached it to my petition.

Article 12 very clearly outlines the procedure that a Contracting State (country) must follow when faced with a petition under the Convention:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

It would seem that getting one's child back from a country that is a signatory to the Convention is a black and white issue. In most countries, it is; however, not so in Brazil.

One provision of Article 12 is often cited by Brazilian courts as reason to refuse issuing a return order. This provision states that:

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Article 12 was cited in the case of David Goldman, when in October, 2005, the Federal Court recognized that although his son had clearly been abducted, because more than one year had passed since the date of abduction and the date of ruling, the child was to remain in Brazil. This same Article was used by the judge who ruled against the return of my children.

A correct interpretation is that a court may only invoke Article 12 if the requesting parent waited more than one year to commence proceedings, clearly not the case for Mr. Goldman or myself. Under the terms of the Convention, filing a petition for return or access through the Central Authority should satisfy this definition.

However, Brazilian law allows the judge to consider the actual date that the suit was filed in court instead. Thus, in Brazil, where the justice system often moves like cold molasses, it sometimes takes more than one year for proceedings to commence. According to the 2012 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, the US Department of State noted:

> The judicial process is drawn out in Brazil; appeals add months, and sometimes years, to Convention cases. One return case has been pending in Brazilian courts since 2005.

There are many other loopholes that Brazilian judges also use to justify their refusal to return abducted children. Paraphrasing from Article 13, a return order may be refused, if the court believes that:

A. THE CHILD WOULD BE EXPOSED TO A "GRAVE RISK OF PHYSICAL OR PSYCHOLOGICAL HARM" OR PUT "IN AN INTOLERABLE SITUATION" IF SENT HOME;

B. THE CHILD "OBJECTS TO BEING RETURNED" AND IS OLD AND MATURE ENOUGH TO HAVE HIS OR HER VIEWS TAKEN INTO ACCOUNT;

C. THE REQUESTING PARTY HAD CONSENTED TO OR SUBSEQUENTLY ACQUIESCED IN THE REMOVAL OR RETENTION OF THE CHILD.

Judges in Brazil often order psychological evaluations of the children. In the United States, recognizing that young children are easily influenced, a child's opinion is often ignored by the courts until they are a teenager. In Brazil, the child may be as young as 8 years old.

My own case presents a case study on the misuse of Article 13.

After reading the psychological evaluations of my children, the psychologist presented two arguments against the court ordering the return of my children. I'm positive the authors of the Convention never intended it this way. The psychologist repeatedly stated throughout her report (in clear violation of Article 12) that my children have become well-adapted to life in Brazil and have developed healthy relationships with friends and family there. This then lead her to conclude that under Article 13, returning them to the United States would likely cause psychological harm. In addition, she noted that my children stated a preference to stay with their mother (an easy to understand consequence after more than two years of parental alienation). Had the petition for my children's return been acted on in a timely manner (as outlined in Article 11), these arguments would have been a mute point.

In another cruel twist of reality, my children's mother testified in court that I had actually planned to relocate to Brazil and that, in fact, I was the person who had committed the wrong. Her evidence was the simple fact that I had visited a school in Brazil. Her attorney argued this demonstrated that I planned on moving to Brazil. In response, I testified to the judge that I was a teacher in the United States who had previously taught in Argentina through a teaching exchange and was simply interested in visiting a Brazilian school as a professional interest. At no point had I registered my children in school in Brazil or withdrawn them from school in the United States. Despite the overwhelming evidence that I had not consented to their relocation to Brazil, the judge cited this evidence when refusing to order my children's return. Sadly, I am far from the only parent who has experienced a Brazilian judge who issued rulings that seemed to fly in the face of the evidence presented.

Further taking advantage of the apparent loophole in part “a” of Article 13, nearly every taking parent has accused the left-behind parent of either negligence, abuse, or both. Local Brazilian judges often accept these accusations at face value and order custody to the taking parent, thus “legitimizing” the abduction/illegal retention. This is a clear violation of Article 16, which states:

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

The US Department of State noted in its 2008 Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction,

The USCA notes several instances during FY 2007 in which Brazilian courts treated Convention cases as custody decisions, rather than applying the principles of wrongful removal and retention laid out in the Convention.

In many instances, the taking parent is able to transfer jurisdiction to local, rather than federal courts. Not only is this in clear violation of the treaty itself, but also with the principles of treaties in general.

As a result of ongoing judicial deficiencies, the U.S. Department of State has consistently given Brazil a failing grade in the category of Judicial Performance.

However, these are not the only examples of how the Brazilian judicial system has failed to properly implement the Hague Convention.

- **Ariel Ayubo’s** son was abducted in August, 2004. Since then, he has had 13 judges assigned to his case. According to Mr. Ayubo, it appears that no judge wants to make a ruling on this issue and simply passes it off to the next judge after 3 months.
- **Alessandra Oliveira** is now on the third judge since her two children were abducted in December, 2007.
- **Manuel Bordaty**, whose three children were abducted in March, 2007, has a different story (see www.hatufim.org). Although his case has not changed judges, he has been waiting nearly two years to even have his day in court.
- **Kelvin Birotte’s** son was abducted in April, 2006 and although the judge heard his case in March, 2008, he is still waiting for a ruling.

Taking a page from my own case, the judge ordered a psychological evaluation of my children in March, 2008. The psychologist performed the evaluation in November, 2008 and presented her report to the judge's secretary in January, 2009. The secretary, sensing the need to act "expeditiously," handed the report to the judge a mere 17 days later. I think that Francois Larivee, whose child has been in Brazil **since 2004** best stated the situation with this quote,

"When will the Supreme Court make a final decision? 2009? 2010? 2020?"

Some left-behind parents even expressed the suspicion that the judges intentionally delay just so they can then apply (albeit improperly) Article 12 as previously discussed in this article.

What would it take for Brazil to get their act together? Maybe they should follow the lead of the Manitoba Court System in Canada. In 2007, they adopted a standard procedure for Hague Convention cases and published it for the world to see. It would be nice if things were this simple in Brazil; unfortunately, they're not. With this, I'll leave all newly left-behind parents with one piece of advice, "Take a number and get in line, because it will be a long and frustrating wait."

For further information about the Hague Convention and its problems, please go to: http://www.pact-online.org/html/about_the_hague_convention.html

December, 2013 updates

David Goldman: In December 2009, Sean Goldman was returned to his father. As of the date of this update, litigation continues in both the United States and Brazil and Mr. Goldman has incurred more than $750,000 in legal and travel expenses.

Francois Larivee: Just prior to the date his case was scheduled to be presented to the Brazilian Supreme Court, Mr. Larivee and his ex-wife were provided an opportunity to attend a "conciliation hearing" to determine if they could reach a mediated agreement. During the conciliation hearing, the child's mother agreed to return to Canada in return for Mr. Larivee's ceding custody of the child to her and provisions for extensive financial support. In March 2011, mother and child returned to Canada and Mr. Larivee, through regular visitation, has been permitted to participate in the rearing of his child.

Alessandra Oliveira: In May 2011, Ms. Oliveira's first daughter was returned to the United States. Her second daughter followed in August 2011. Prior to this, the Brazilian courts had removed the children from their father and placed them in the care of Ms. Oliveira's brother. Despite this, she still needed to fight in court for another two years for their eventual return.

Manuel Bordaty: After many years of fighting from the United States, Mr. Bordaty relocated to Israel in an effort to have his children returned to a more neutral country.

Kelvin Birotte: After a wait of over two years from the hearing date (four years after the abduction), in April, 2010, the federal judge ordered the return of Mr. Birotte's son. The mother promptly filed an appeal and the court suspended the return order. Over two years later, Mr. Birotte is still waiting for a ruling from the first-level court of appeals.

Timothy Weinstein: After my case formally finished in July, 2011 after I ran out of appeals, I had resigned myself to the fact that my children would grow up in Brazil. To my surprise, in August, 2013, their mother declared she would be voluntarily returning them. After two months of legal maneuvering to get the children out of Brazil, they finally arrived in the United States in October, 2013. The children are thriving and their mother admitted it was both the hardest decision she ever made, but also the best, to voluntarily return them.