Examining The Legal Landscape for Street Involved Children and Youth:

Argentina 2015

By Pro Bono Volunteers From

Baker & McKenzie and MSD

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Introduction

This memorandum provides a general description of the laws, rules and regulations concerning various issues with regard to street youth in Argentina. Set forth below is a compilation of the legislation and relevant topics for your reference.

1. Legislation and Government Structure in Argentina

The Republic of Argentina (República Argentina) is a federation with three (3) levels of government: (i) Federal; (ii) Provincial; and (iii) Local, and it is ruled by a National Constitution (Constitución de la Nación Argentina).

The Federal State is governed by a President elected by means of a direct election - who acts as both the Head of State and Head of Government, and constitutes the Executive Branch of the Government. The Executive Branch can issue orders or regulations called "decrees" - when issued by the President - and "resolutions" - when issued by a Ministry or Secretary of the Executive Branch.

There is a hierarchy of legislative instruments with the National Constitution at the top, followed by Federal Laws/International Agreements, decrees/resolutions, and provincial constitutions, laws and resolutions, respectively. Under the National Constitution, each Province has its own legislation, including provincial constitutions, laws and resolutions - which shall be in line with the rights protected by the National Constitution.

Each province has a set of judicial forums or courts composed by: Criminal, Civil and Labor Forums, as well as the National Judicial Forum which may adjudicate issues on appeal or issues in the original jurisdiction of the Federal judicial body.

Please note that some provinces provide a specialization of the civil forum in which each judge is responsible for its respective practice area - ranging around family, estate law, commerce, minors, bankruptcy, etc. The rulings of the civil judges can be appealed to the Civil Courts of Appeal (Cámaras Civiles de Apelación), collegiate tribunals generally complying with the written system, like the majority of the civil forum. The decisions issued by these courts can only be appealed to the Provincial Supreme Court or Superior Tribunal, through an extraordinary recourse known as "revocation" (casación).


2.1. International Law

Argentina has ratified the Convention on the Rights of the Child through National Law No. 23,849, in force as of September 2, 1990 (the "Convention"). The Convention establishes, among others, the following main rights for the children: (i) protection against all forms of discrimination; (ii) protection of their welfare; (iii) ensures the development of the child; (iv) ensures that children receive identification and a nationality; and (v) provides material assistance in nutrition, clothing, housing and education.

In addition to the above, Argentina has also become a member of the State of the American Convention on Human Rights, also known as "Pact of San José de Costa Rica", ratified by National Law No. 23,054, which establishes - in its article 19 - the obligation of the States to ensure children protection.

2.2. Federal Law

2.2.1. Children and Youth Law

In October 2005, Argentina enacted National Law No. 26,061 for the Comprehensive Protection of the Rights of Children and Adolescents (the "CPRCAL").
The main purpose of the CPRCAL is not only to ensure a comprehensive protection of the children's rights, but to make sure those rights are taken into consideration when the State takes any action or makes any decision - either administrative or judicial - that could or may affect, in any way, the children's welfare. Thus, the CPRCAL imposes onto the State a non-delegable duty to ensure children's rights.

It is important to outline that when the CPRCAL was approved, Law No. 10,903 was revoked - the revoked law about Minority Custody Board. Such change led to a significant transformation; the CPRCAL would intend to put special interest and would emphasize the rights of minors, considering them as a "subject" of law, instead of as an "object". This means that under the CPRCAL, the State shall take into consideration new and improved conditions for purposes of creating places to protect the children until they are able to handle/solve their social issues and/or problems, instead of only having places for hospitalization - pursuant to the guardianship model of the old law.

Broadly, CPRCAL replicates the rights originally protected under the two (2) International Conventions mentioned in Section 2.1. above. However, CPRCAL focuses on the State's obligation to interruptedly protect the child and emphasizes that any failure of the State in complying with the rights contained therein entitles any citizen to file a proceeding against the State.

In order verify the compliance of such obligations, CRPCAL created the following administrative entities:

- **The National Office for Children, Youth and Family**, with the following main objectives: (i) to promote active policies in order to provide and protect the rights of children, adolescents and their families; (ii) to coordinate actions with all the branches of government agencies and NGOs, encouraging the active participation of children and adolescents;

- **Defender of the Rights of Children and Adolescents**, with the following main objectives: (i) to file actions for the protection of the rights of children and adolescents in any proceedings, body or court; (ii) to ensure full respect for the rights and guarantees of children;

- **Federal Council for Children, Youth and Family**, with the following main objectives: (i) to ensure policies of protection of children; and (ii) to promote the full protection of the rights of children, adolescents and their families; and

- **The National Office for Children, Youth and Family** and the **Federal Council for Children, Youth and Family**, with the following main objectives: to jointly coordinate and ensure fair and equitable distribution of budgetary allocations and all national and international resources for the enforcement of the objectives of the CRPCAL.

### 2.2.2. New Civil and Commercial Code

The Civil Code of Argentina, effective as of 1871 - as amended - includes general principles that regulate the laws with respect to minors and youths in Argentina.

However, as of August 1, 2015, a new Civil and Commercial Code shall enter in force in Argentina (the "New Civil and Commercial Code"), replacing the current Civil Code. Among other issues, the New Civil and Commercial Code shall amend the current regime of capacity and adoption - both of which have a significant impact on youth rights - and provide the minors with broader rights. The following topics shall be subject to amendment:

(i) Capacity

The New Civil and Commercial Code sets forth that those who have not turned eighteen (18) years old - called "minors" - can exercise their rights through their legal representatives. However, if the minor has "sufficient age and maturity," he/she can perform the acts that are permitted by law by himself/herself. This paragraph leaves open a threshold to determine on a case-by-case basis if the minor has **sufficient age and maturity**.
Notwithstanding, in accordance with the New Civil and Commercial Code, an adolescent that has turned sixteen (16) years old shall be considered as being an adult with respect to the decisions about his/her body. In this line, it is presumed that adolescents between thirteen (13) and sixteen (16) years old have full capacity to decide whether or not dispose their bodies to non-invasive treatments or those treatments that do not compromise their health. At last, it shall be noted that for the invasive procedures, a consent of their legal representatives shall be required - always focusing on minor's best interests must be weighed.

(ii) Adoption

The New Civil and Commercial Code establishes that the purpose of adoption is to protect the rights of children and adolescents in order for them to live with and be raised by a family that is able to provide them with the necessary care. Under the New Civil and Commercial Code, this subject matter [adoption] is encompassed on a more precise context, in comparison with the current Civil Code - which does not establish any particularities concerning the objective of adoptions.

The New Civil and Commercial Code enumerates certain general principles that a judge should follow when deciding to authorize a child's adoption: (i) superior interests of the child; (ii) respect for the identity and right to know the child's origin and history; (iii) child's right to be heard and the right to have his/her opinion considered - according to his/her age (after turning 10 years old, the child's consent is mandatory); (iv) depletion of possibilities to stay with his/her biological family; and (v) the preservation of the fraternal bonds, giving priority to adoption of groups of siblings in the same family.

The current Civil Code prohibits those persons who have not reached thirty (30) years old to become an adopter - except for spouses with more than three (3) years of marriage. However, according to the New Civil and Commercial Code, as from August 1, 2015, the following persons may become adopters: (i) spouses (same or different gender); (ii) members of a conventional partnership (same or different gender); or (iii) a single person. In all cases, adopters must be at least sixteen (16) years older than the adoptee, in order to ensure an appropriate tutor for the child.

2.2.3. Domestic Violence

National Law No. 24,417 establishes that when children are victims of domestic violence, a procedure shall be filed and reported by their legal representatives and/or prosecutors.

The judge in charge of the claim is entitled to take any of the following precautions:

- Require the exclusion of the defendant from the house inhabited by the victim;
- Prevent access of the defendant to the victim's house, as well as the work or study places; and
- Order temporarily foods, possession and right to communicate with their children.

The State must provide the defendant and his/her family with free medical and psychological assistance. The Federal Council for Children, Youth and Family must keep a register of complaints, of aggressor and victims.

2.2.4. Education

Education is compulsory and free until the completion of Secondary School (approximately at the age of 18 years old).

2.3. Provincial Laws

Each of the twenty-four (24) provinces of Argentina has a different approach with regard to the development of the legal system that protects children and adolescents - and, therefore for street youth.

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1 http://www.desarrollosocial.gov.ar/ninez/139
According to a study conducted in 2012, from the twenty-four (24) jurisdictions that include the twenty-three (23) provinces and the City of Buenos Aires, seventeen (17) jurisdictions have provincial laws regarding the full protection of children and adolescents; four (4) jurisdictions have laws that incorporate the CPRCAL and one (1) jurisdiction has a law that incorporates the Convention on the Rights of the Child. However, two (2) provinces still do not have any regulation in this regard.

Therefore, each jurisdiction has a different approach and status in relation to the development of the protection of children and adolescents, and also different institutions and/or policies to protect them. Please see a brief summary of that matter relating to the City of Buenos Aires in Section 2.3.1. below.

### 2.3.1. City of Buenos Aires

In the City of Buenos Aires, there are seven (7) establishments named "Houses of the Child and Adolescent" ("Casas de los Niños y de los Adolescentes") (hereinafter the "Houses").

The Houses are entrusted with promoting activities and helping minors in several aspects, including but not limited to providing them with food, health care, ID, school guidance, supporting them to find a job, among others. The main purpose of the Houses is to provide children with a variety of tools that may enable them to grow and handle/solve issues that caused them to be on the streets (i.e., a complicated family scenario, lack of job of their parents, etc.)

Focusing on social vulnerability of children and adolescents, the Houses have a three-level program, as follows:

- **First level**: Direct work with street youth.
  - A group of people across the city visits critical areas on a daily basis, acting upon specific needs of the children and adolescents, informing them about the alternatives that are available to leave their current street situation;
  - A day center for children/adolescents that work, live or ramble on the streets to help them come up with strategies for purposes of gradually leaving the streets; and
  - Transit Places: places created for children/adolescent to solve their basic needs while the Government of the City of Buenos Aires works on a definitive solution for their situation of social vulnerability.

- **Second level**: Work through own houses of full support for children/adolescents and through houses under arrangements with NOGs, aiming to provide them with full support until their situations are solved.

- **Third level**: Work in the "exit" process of children/adolescents through different alternatives, such as adoption, return to the family of origin or other affective referrals, etc.

The Houses have a hotline number that is operative all year. For more information please visit their website: [http://www.buenosaires.gob.ar/desarrollosocial/ninezyadolescencia/consulta-de-establecimientos.](http://www.buenosaires.gob.ar/desarrollosocial/ninezyadolescencia/consulta-de-establecimientos.)

### 3. Employment Law

The main law that sets forth employment-related matters is the Employment Contract Law (Law No. 20,744, hereinafter the "ECL"). The ECL was amended by Law No. 26,390 (the "New Law"), passed on June 4, 2008, that added relevant regulations on child work.

The New Law broadly disposes about child work, taking into consideration not only those economic activities in which there is a formal employer, but also including strategies for dealing with street youth issues. The New Law defines child work as "any kind of activity, pursuing profit or not". Hence, the concept of "child labor" is broader than the contract of employment in terms of the employment law of Argentina, as it encompasses both remunerated or non-remunerated activities.
The New Law collects and is based on the following International Treaties, laws and initiatives:

- Convention related to Minimum Age for Admission to Employment (effective as of June 19, 1976)
  Adoption: Geneva, 58th ILC Session (26 Jun 1973);
- Convention on the Rights of the Child;
- Law of Protection of the Rights of Girls, Children and Adolescents (2005); and

In 2006, Argentina established the National Plan for the Prevention and Eradication of Child Labor, issued by the National Commission for the Eradication of Child Labor (CONAETI, created by Executive Branch's Decree No. 719/00), with the scope of the National Ministry of Labor, Employment and Social Security, together with the provincial commissions for the prevention and eradication of child labor (COPRETI).

The National Plan for the Prevention and Eradication of Child Labor is part of a series of actions that were carried out by different areas - governmental, international organizations, and general population - in order to prevent and eradicate child labor in Argentina.

Among the objectives of the plan, its objective No. 9 states: "9. Promote the harmonization of national and provincial regulations, related to the problem of child labor, aimed at building a legal framework in accordance with the Convention of the Rights of the Child and other international treaties on the subject."

According to the ECL, children under the age of sixteen (16) years old are not authorized to work under any circumstances, even if they are expressly authorized by their parents or guardians.

The labor administrative authorities - at the Federal level: the Ministry of Labor, Employment, and Social Security of Argentina; and at the Provincial level: the entities performing such tasks at the respective jurisdictions - are entitled to perform and carry out any and all activities that are deemed necessary in order to secure the enforcement of the above mentioned prohibition.

However, children ranging from fourteen (14) to eighteen (18) years old may work for legal entities owned by their parents or guardians, during working days, provided that (i) they do not exceed three (3) hours per day or fifteen (15) hours per week, (ii) the nature of work is not dangerous or unhealthy, and (iii) the children attend school appropriately - complying with the minimum required attendance. Note that in order to hire those children, the company must obtain an authorization from the labor administrative authority of each jurisdiction.

Notwithstanding, individuals that are over sixteen (16) years old and still have not turned eighteen (18) years old are entitled to work with the due authorization of their parents or guardians. Please note that such authorization is presumed when the adolescent is not living with them.

According to specific legal regulations, the minors (ranging from 16 to 18 years old) are entitled to receive the same salaries and benefits corresponding to adults, and their salaries shall not be reduced for any reasons whatsoever - other than those arising from reductions for apprentices or workers who meet reduced working hours. Nonetheless, those minors shall not be employed in any type of task during more than six (6) hours per day or thirty-six (36) hours per week.

The working day of minors of over sixteen (16) years old, with prior authorization of the administrative authority, may be extended to eight (8) hours of day or forty-eight (48) hours per week.

Minors may not be employed in night time work, meaning the period of time between 8 p.m. to 6 a.m. of the following day.

When hiring workers younger than eighteen (18) years old, the employer must require from them or their legal representatives a medical certificate in which it should be provided their aptitude for the work, and must have them undertake the periodical medical check-ups foreseen in current regulations.
Minors shall be entitled of a minimum annual leave of fifteen (15) days. In addition, underage employees are entitled to become union members, without prior authorization of parents and/or legal guardians.

Employment regulations have a federal nature in Argentina and shall be applicable nationwide.

4. Criminal Law

Under Law No. 22,278, any minor under sixteen (16) years old shall not be punished for any criminal offense in Argentina. Furthermore, children of ages of sixteen (16) to eighteen (18) years old shall not be punished for criminal offenses sanctioned with less than two (2) years of imprisonment (i.e. misdemeanors).

Therefore, any minor ranging from sixteen (16) and eighteen (18) years old, involved in any wrongdoing, punished with imprisonment as from two (2) years would be subject to an specific type of criminal proceedings, as further described below.

During the proceedings, the minor would be subject to the jurisdiction of a Juvenile Judge, that would first proceed to verify whether or not the wrongdoing is a crime under the Argentine Criminal Code, and then, interview the minor and his/her parents or guardians in order to decide either to return the minor to his/her parents or guardians under supervision of a public office (Patronato de Menores) or to put the minor under custody in the Juvenile Detention Institute (Instituto de Menores) - in order to take care of the minor under the court's supervision. The last scenario will only be chosen if there are sufficient grounds (after interviewing the minor and his/her parents or guardians) to sustain that the minor is dangerous for himself/herself, and/or for any third party. The minor would be admitted at the Juvenile Detention Institute and subject to a examination period, whereby the minor would be interviewed, as well as his/her parents or guardians in order to establish the reasons of the wrongful behavior, with purposes of persuading the minor to avoid any second offense.

The Convention provides special rules for these proceedings. For instance, any minor under detention should be treated with dignity (thus, the police cannot use handcuffs), bearing in mind its age; keeping him/her separated from the adults that are also under detention, and in contact with the family.

During the examination period, the Juvenile Judge would analyze the facts and evidence of the case file and, upon analyzing the different reports provided by the Juvenile Detention Institute, the Juvenile Judge shall decide either to punish the minor with the penalties established by the Argentine Criminal Code or dismiss the charges against the minor. In case the Juvenile Judge decides to punish the minor, he/she would be put into the Minor Institute, where he/she would be subject to additional examination, until he/she turns twenty one (21) years old.

According to the Argentine Criminal and Procedural Code, minors under eighteen (18) years old shall only be detained if there are enough and consistent grounds to sustain that the minor would not present himself/herself at the court when summoned or would destroy or affect any other evidence that would be produced during the trial. In any event, the minor should not be put into a common prison, but into a specific detention place, accordingly set up to receive minors.

On the other hand, the CPRCAL focuses on different guaranties for any minor subject to criminal proceedings as described above. In this sense, from a criminal law perspective, CPRCAL provides the minor with the following guaranties:

(i) To be heard before the judge/prosecutor whenever requested by the minor;

(ii) To be heard prior to a decision that may affect the minor is granted;

(iii) To be assisted by a legal counsel specialized in children and adolescents from the very beginning of judicial proceedings. The State provides the minor with a public Defender/Public Counsel if the minor does not have enough resources to afford a legal counsel; and

(iv) To actively participate in the whole procedure, either by appealing any ruling or decision made by the court, or by offering any evidence to the proceedings (documentary, witnesses, etc.).
Based on the CPRCAL, any minor subject to criminal proceedings would be entitled to proactively participate in the proceedings in order to verify that his/her rights are completely guaranteed by the courts. For such purpose, the Judiciary has appointed different officials - Public Defenders, Public Minor Counsel, etc. - to represent the minors during this kind of proceedings. Therefore, the minor would be actively represented during the proceedings.

Finally, Law No. 26,364 prohibits human trafficking - both domestically and internationally - for purposes of forced labor or sexual exploitation. This law was recently amended to include more severe penalties for trafficking. Moreover, the Argentine Criminal Code classifies as a crime facilitating, promoting, or benefitting economically from child prostitution. The Argentine Criminal Code also prohibits the use of children in pornographic shows and in the production, publication, and distribution of child pornography. However, it does not classify the possession of child pornography for personal use as a crime.

Law No. 23,737, for instance, establishes more severe penalties if children are used in any drug trafficking.