Spanish Practice in Respect of Intercountry Adoption

Pilar Rodríguez Mateos
Professor of Private International Law
University of Oviedo

Ángel Espiniella Menéndez
Associate Professor of Private International Law
University of Oviedo

I. INTRODUCTION

1. Content of the Intercountry Adoption Act, Law 54/2007

Title II of the Intercountry Adoption Act (hereafter referred to by its Spanish acronym LAI),[1] entitled "Rules of Private International Law governing intercountry adoption", regulates the jurisdiction of Spain's judicial and consular authorities, the Law which the latter must apply to the constitution of the adoption and recognition of the decisions taken by foreign authorities. Title III of the Act also focuses on these three areas, albeit in lesser detail, with regard to other measures protecting minors.

Specifically regarding intercountry adoption, the LAI also covers other aspects. Special accent is put on the administrative phase prior to the constitution of the adoption through three aspects: first, the intervention of public bodies entrusted with the protection of minors and intermediation in intercountry adoption (Title I, Chapter II); secondly, a review of the steps of the adoption process from the beginning with the declaration of suitability of the adopting parents to the rights and duties which could affect the adopting parents and/or children subsequent to the constitution of the adoption – basically rights to information and data protection (Title I, Chapter III); and thirdly, a description of the circumstances which prevent or jeopardise the processing of the adoption (Article 4). This latter aspect relates to the declaration regarding the scope of application and the principles underlying the Act. Hence, Article 1.II provides a definition of intercountry adoption describing it as the legal filial relationship with a foreign element arising from the nationality of the habitual residence of the adopting parents or the adopted children (Article 1.II). This notion arises from the constitution of the adoption by the Spanish authorities and does not refer to the recognition of adoptions constituted before foreign authorities despite the fact that it regulates this latter aspect. The said definition of adoption does not appear to prevent the application of the LAI in the case of adopted children of legal age (Article 1), although the residual nature of this type of adoption causes that, in determining the aim and purpose of the LAI, Article 2 refers to the adoption of minors.

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[1] The Intercountry Adoption Act, Law 54/2007 of 28 December (*Official State Gazette* No. 312, 20-XII-07).

2. The complexity of the Spanish regulation

The regulation governing adoption is found in the LAI itself, in the regional regulation[2] and in a series of Conventions which define a special procedure having regard to the Contracting States. Also, the LAI assumes the principles underpinning the Convention on the Rights of the Child done at New York on 20 November 1989,[3] and the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (hereafter the 1993 HC).[4]

The special status of the 1993 HC is evident, for example, in Article 9 LAI which provides that the communication between the Spanish and foreign authorities shall be made in accordance with the Convention not only when such communication is between States party to the Convention but also between States party to other international treaties or conventions on intercountry adoption. In other words, the 1993 HC has become the cornerstone of Spain's relations with other States with which it has signed an agreement outside of the scope of the 1993 HC. Similarly, the LAI calls on public bodies involved in the adoption process to include, to the degree possible, the standards and safeguards laid down in the 1993 HC in those agreements which they sign with "non-party States" [Article 3(2), *rectius*, they sign with the administrative authorities of non-contracting States].

This philosophy of extending the principles of the 1993 HC to any agreement or convention endorsed by Spain in the area of adoption goes beyond the provisions of the 1993 HC. Article 39(2) provides that the States Parties may sign bilateral agreements *amongst themselves* to be applied jointly with certain provisions of the 1993 HC and which, in the final analysis, are assumed to favour the application of the latter in their reciprocal relations. The Protocol on intercountry adoption between Spain and the Philippines would coincide with the provision of these articles of the 1993 HC insofar as it was concluded by two State Parties to the 1993 HC (in force in Spain since 1995 and in the Philippines since 1996).[5] This

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[2] Regarding the sometimes thorny issue of delimiting national and regional competence, see S. Álvarez González, "Reflexiones sobre la Ley 54/2007, de adopción internacional", *La Ley*, No. 6910, 25-III-2008, pp. 1–8, esp. pp. 2–3.

[3] Official State Gazette No. 313, 31-XII-90. Regarding the implications of the Convention in relation with the adoption, see P. Rodríguez Mateos, "La protección jurídica del menor en la Convención sobre los derechos del niño de 20 de noviembre de 1989", *REDI*, vol. XLIV, 1992, pp. 465–498, esp. pp. 483–487.

[4] Regarding whether the Intercountry Adoption Act is truly consistent with the 1993 Hague Convention, see R. Arenas García and C. González Beilfuss, "La Ley 54/2007 de 28 de diciembre de adopción internacional: entre la realidad y el deseo", *REEI*, No. 17, 2009, pp. 1–39, esp. pp. 3–5. As an illustration in the comparative field, see C. Lima Marques, "Kulturelle Identität und Quellendialog im brasilianischen internationalen Adoptionsrecht nach Inkrafttreten des neuen brasilianischen Zivilgesetzbuches von 2002", in H.P. Mansel and others (Dirs.), *Festschrift für Erik Jayme*, vol. I, Munich, Sellier, 2004, pp. 505–526, esp. pp. 508 et. seq.

[5] Done at Manila on 12 November 2002 (provisional application, Official State Gazette, 24-I-03; entry into force, *ibid.*, 5-XI-03). See C. González Beilfuss highlighting the favourable circumstance that this Agreement is subsequent to the entry into force of the 1993 HC

is not the case of the bilateral agreement on intercountry adoption signed with Bolivia insofar as it was concluded in November 2001 and the 1993 HC entered into force in that Andean country in July of 2002.[6] Neither is it the case of the Agreement between Spain and Vietnam on cooperation in adoptions matters since Vietnam has not still ratified the 1993 HC.[7] Given that the two latter agreements are with States that were not party to CH 1993 when they were signed, they are not covered by the latter's Article 39(2). In any case regarding Bolivia, and foreseeably regarding Vietnam in the future, when it ratifies the 1993 HC, Article 39(1) of 1993 HC will be applied and this article provides for non-derogation of international instruments to which the Contracting States are already parties and which contain provisions regarding matters regulated by the 1993 HC, unless a contrary declaration is made by the State Parties.

These considerations revolving around Article 39 the 1993 HC are applicable to the bilateral agreements mentioned because they refer to situations regulated by the 1993 HC (basically cooperation of authorities and the effectiveness of intercountry adoptions) and because they are authentic treaties. Indeed, Article 39 of the 1993 HC makes reference to "international instruments" and to States Parties. It is therefore not referring to other bilateral agreements of an administrative nature on intercountry adoption which is the case of the Protocols signed with Romania, Peru, Colombia, Ecuador and, at one stage, with Bolivia,[8] which were not concluded by sovereign states but were rather signed by a Spanish Ministry and an administrative body of the countries in question.[9] As concerns recognition of intercountry adoptions, the Spanish system is governed by the terms of the LAI and those of

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for Spain and the Philippines ("El Protocolo de adopción internacional entre el Reino de España y la República de Filipinas", *REDI*, vol. LV, 2003, pp. 585 et. seq., esp. p. 586).

6 Agreement with Bolivia of 29 October 2001 (provisional application, Official State Gazette, 20-XII-01; entry into force, *ibid.*, 5-XI-03). See comments made by A.L. Calvo Caravaca and J. Carrascosa González in *La Ley 54/2007, de 28 de diciembre sobre adopción internacional. Reflexiones y comentarios*, Granada, Comares, 2008, pp. 164 and 165; P. Rodríguez Mateos, "El Convenio entre España y Vietnam sobre cooperación en materia de adopción", *AEDIPr.*, t. VIII, 2008, pp. 655 et. seq., esp. pp. 658–660.

7 Done at Hanoi on 05 December 2007 (provisional application, Official State Gazette, 18-I-08; entry into force on 07 January 2009, *Ibid*., 20-II-09). See P. Rodríguez Mateos, *loc. cit.*, pp. 656 and 658, notes 6 and 14.

8 Specifically, on 05 April 1995 and 21 May 1997 Spain signed Protocols with Bolivia which were replaced by the 29 October 2001 Agreement.

9 *Cf.* A.L. Calvo Caravaca and J. Carrascosa González, *La Ley 54/2007…op. cit*., p. 165. They therefore were not published in the Official State Gazette nor controlled by the Parlamient as the international treaties (see C.A. Esplugues Mota "Conclusión por parte de España de cuatro Protocolos sobre adopción internacional", *REDI*, vol. XLVIII, 1996–2, pp. 336–340; F. Calvo Bavío, "Naturaleza y alcance de los Protocolos de adopción suscritos entre España y Colombia, Bolivia, Ecuador y Perú", *AEDIPr.*, t. 0, 2000, pp. 455 et. seq.; N. González Martín, "Los acuerdos bilaterales en materia de adopción internacional firmados por España: Rumania, Perú, Colombia, Ecuador, Bolivia y Filipinas" in A.L. Calvo Caravaca and E. Castellanos Ruiz (Dirs.), *El Derecho de familia ante el siglo XXI: aspectos internacionales*, Madrid, Colex, 2004, pp. 247 et. seq.

international agreements affecting Spain. These agreements are the 1993 HC and other bilateral agreements generally covering matters of recognition which could be applicable to adoption. When a State Party to one of these agreements is also party to the 1993 HC, the compatibility between the two must be determined based on the provisions of the said bilateral agreement and Article 39(1) of the 1993 HC. The specific regulation of recognition arising from specific agreements on matters of adoption referred to in the foregoing may be added to that. This set of rules will be analyzed in the heading on "recognition regimes" (IV.1).

II. ADMINISTRATIVE PHASE PRIOR TO THE CONSTITUTION OF THE ADOPTION

1. Commencement and preconditions of the administrative procedure

Certain administrative authorities may have to intervene prior to the constitution of the adoption by the judge. This phase is initiated by an application filed by the adopting parents which includes their offer to adopt.[10] Despite the controversy surrounding which authority has jurisdiction,[11] Article 24 of the LAI provides that the said application must be filed before the public body at the place of residence of the adopting parent.

This intervention on the part of Spanish administrative authorities is regardless of the authority constituting the adoption[12] and of the law applied by that authority, be that Spanish or a foreign. Also, this intervention by the administrative body may vary in scope; in some cases a simple declaration of suitability is sufficient while in others there must be a preliminary proposal. Be aware that typically the preliminary proposal includes the declaration of suitability but the two aspects are not absolutely identifiable.[13] On this basis, three situations can be distinguished:

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[10] According to Article 5.a) of the LAI, the public body shall provide complete, true, updated and freely accessible information enabling the adopting parents to make a self-assessment of their suitability for intercountry adoption. Then, the submission of the application to adopt before the public body entrusted with the protection of minors [Article 5(c)] initiates the adoption procedure. In order to initiate the procedure in some Autonomous Communities, aliens must submit a certificate from the State of their nationality certifying that the intercountry adoption proposed will be fully recognised in that State.

[11] See J.M. Espinar Vicente, "Reflexiones sobre algunas de las perplejidades que suscita la nueva regulación de la adopción internacional", *A.C.*, t. 2, 2008, pp. 1949–1963, esp. pp. 1951–1952.

[12] Indeed, Article 26(3) LAI requires the declaration of suitability of adopting parents who are Spanish or are residents in Spain *prior to* recognition of the adoption by a foreign judge.

[13] Indeed, the declaration of suitability can take place before the preliminary proposal and there are cases where the declaration of suitability is required by the Spanish authorities without the existence of a preliminary proposal. Moreover, the content of the preliminary proposal (Article 1.829 LEC of 1881) extends over and above the declaration of suitability of the adopting parents because it proposes a specific adoption to the judge. According

One: intervention of the public body to declare the applicants suitable and formulate a preliminary adoption proposal. This is the case when the adopting parent has been residing in Spain for the last two years[14] and the adoption is going to be constituted by the Spanish authorities (Article 24 LAI).[15] In this preliminary proposal the Spanish authority, inter alia, expresses its accordance with the decision of the authorities of the State of origin regarding the placement of a minor [Article 5(f) LAI].

Two: intervention of the public body to declare the suitability of adopting parents without having to formulate a preliminary proposal. This is the case when the future adoption is going to be constituted before a foreign judge and the adopting parent, Spanish and resident in Spain,[16] seeks the recognition of the future intercountry adoption (Article 26.3 LAI). As we will see further on, this raises some doubts concerning the eventual application of Article 5 f) LAI in terms of the recognition of intercountry adoptions. It is difficult to understand why, in the best interest of the minor, accordance with the placement of the adopted child made by the foreign authority is not required in addition to the declaration of suitability.[17]

Three: absence of intervention by a Spanish public body (no administrative declaration of suitability and no preliminary proposal). In this regard, a distinction must be drawn between three cases.

First of all, administrative intervention is not needed when the situations described in Article 176 C.c. prevail. In these cases it is the adopting parents themselves and not the administrative body who submit an adoption application to the judge and prove that they are exempt from the preliminary proposal.[18] Furthermore, the

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to this precept, declared temporarily in force by the Spanish Civil Procedure Act of the year 2000, the said proposal shall express the conditions and means of support of the adopting parents, their relationship with the adopted child and the reasons justifying the exclusion of other interested parties. It shall also include the consent of the spouse of the adopting parent and of the parents of the child facing adoption, all duly documented.

[14] This circumstance is deduced from Article 24 of the LAI which, although formulated as a rule regarding competence and somewhat out of place in a chapter on law applicable to the constitution of the adoption by the Spanish authority, implicitly established the supposition of administrative intervention.

[15] Article 24 LAI which refers to the preliminary report, seems to be linked to the constitution of the adoption before a Spanish authority. It is in fact located outside of Chapter III referring to the effects of adoptions constituted by a foreign authority.

[16] General residence and not the sort referring to the last two years as in the case of the preliminary proposal.

[17] Especially since it has been noted that in the typical case of adoption, i.e. adopting parents residing in Spain and adopted child resident abroad, the adoption is normally constituted abroad. See A. Borrás Rodríguez, "Espagne. Nouvelle Loi sur l'adoption international", *Société de Législation Comparé. Section droit international privé (http://www.slc-dip.com)*, 16-I-2008.

[18] *See* L. Díez-Picazo and A. Gullón, *Sistema de Derecho civil*, vol. IV: *Derecho de familia y sucesiones*, 10º ed., Madrid, Tecnos, 2007, p. 280.

suitability of the adopting parents is not declared by the administration but is rather presumed by the judge who may request a report in this regard.

Secondly, the intervention of a public Spanish body is not necessary when the adoption is constituted by a foreign authority and is going to be recognised in Spain if the adopting parents are aliens or reside abroad (*a sensu contrario* vis-à-vis Article 26.3 LAI). The fact that a certificate of suitability is not required of Spaniards currently residing outside of Spain even though they have resided in Spain at some point during the last two years is debatable.[19] Perhaps this is because residence outside of Spain is expected to continue following the constitution of the adoption and the adopting parent is Spanish. But even stranger still is that suitability to establish a filial relationship with the adopted child is not required of alien residents in Spain. In other words, the effectiveness in Spain of unsuitable adopting parents is tolerated solely on the basis that they are aliens.[20]

Thirdly and lastly, the intervention of a public body is not necessary if the adoption is to be constituted by a Spanish authority and the adopting parents have not had residence in Spain for the last two years. At this stage Article 24 LAI states that the Consul will gather sufficient reports to assess the suitability of the adopting parents from their place of residence. Even the suitability declared by a public body of the foreign State where the adopting parents have residence may be taken into account. Nonetheless, the wording of LAI Article 24 raises the doubt as to whether consular activity refers to adoption constituted by consul or also to cases of adoption by a Spanish judge. Thus, option a): although not expressly stated, LAI Article 24 refers to an adoption constituted by Spanish Consul abroad. Given that the adopting parents have not resided in Spain for the last two years, there is no preliminary proposal nor declarations of suitability by Spanish administrative authorities. The Consul himself decides on the suitability of the adopting parents on the basis of reports received from the authorities of the place of residence.[21] Option b): LAI Article 24, over and above consular adoption, regulates exemptions from the preliminary adoption proposal even when constituted before a Spanish

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[19] Paradoxically, in this case LAI Article 24 requires a preliminary adoption proposal because the adoption is constituted by a Spanish authority.

[20] The fact that being Spanish is added to the condition of residency may be due to the assumption of the typical situation, i.e. adoption by a resident of Spain of an alien child before a foreign authority. In these circumstances, and in the light of Article 15 LRC, the adopting parents must have Spanish nationality in order to register the adoption in the Civil Registry thus generating the real need for recognition in Spain. A. L. Calvo Caravaca and J. Carrascosa González (*La Ley 54/2007…op. cit.* p. 212) justify not requiring the Spanish suitability certificate for all adopting parents in the world who seek to validly adopt a child in Spain; they further point out that this would be tantamount to an "imperialist action on the part of the Spanish authorities". We particularly feel that this does not happen in the case of residents in Spain.

[21] Bear in mind that the Consul constituting the adoption is that of the habitual residence of the child to be adopted (LAI Article 17). Therefore, the adopting parents may have residency in a State different from that of the constituting Consul.

judge.[22] The Spanish judge could have international jurisdiction given that the adopting parents are Spanish. In this case, the Consul would act as a "gatherer" of suitability reports for the Spanish judge who ultimately would constitute the adoption without a preliminary proposal.

2. Selection of the child's State of origin

Those interested in adopting must select the State from which they want to adopt. There are no rules concerning when or how this choice is made and this is therefore left up to the criteria of the Autonomous Communities. However, the State of origin is selected prior to the declaration of suitability either on the application form or at some intermediate point.

Article 4 LAI provides a series of cases where adoption applications for minors who are nationals or residents of States affected by certain circumstances are not processed.[23] This is the case when the minor's country of residence (not nationality) is involved in an armed conflict or is suffering from a natural disaster. The constitution of an adoption of a national from a State which has undergone a natural disaster is not prohibited if that national was not living in the State where the disaster took place. But the adoption could be prohibited when the change of residence arises from the proper conflict. It would suffice to recall the exodus of children from Chad or from Haiti.[24] The rationale behind this is to safeguard minors and biological families when there is no guarantee of free consent or certainty that the minor is indeed an orphan.[25] However, although the LAI is silent, the prohibition could be eliminated, when international organisations have determined that a child is an orphan or is abandoned.[26]

Other circumstances preventing adoption include the absence of a specific authority to control and guarantee the adoption,[27] a lack of sufficient guarantees

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[22] In the old Article 9.5 C.c., the exemption from the preliminary proposal due to non-residency during the last two years was linked to consular adoption.

[23] The age at which a child is considered a minor is determined by the national law of the minor (Article 9.2 Spanish Civil Code) although it would not be unusual to apply the law of the affected country, that of the child's residence, for example, or even Spanish law.

[24] See J. González Vega and P. Jiménez Blanco, "El incidente del Arca de Zoé, el tráfico de niños y la crisis del Chad: apuntes desde la perspectiva del Derecho internacional público y privado", *REDI*, vol. LIX, 2007–2, pp. 844–849, esp. p. 849. Highlighting the advantages of LAI Article 4.1 over the 1993 HC, see J. Carrascosa González, "Adopciones internacionales y menores procedentes de Haití", *http://conflictuslegum.blogs.com,* 15-2-2010; and for a positive slant on this regulation see S. Álvarez González, "Reflexiones sobre la Ley 54/2007…", *loc. cit.*, p. 8.

[25] For purposes of illustration, see the informative Note from the Permanent Office of the Hague Conference for States and central authorities "The Haiti earthquake and the intercountry adoption of children", 20-I-2010, available at *http://www.hcch.net.*

[26] See J. González Vega and P. Jiménez Blanco, *loc. cit.*, p. 849.

[27] The term "specific" authority is not defined. This sentence does not seem to refer to a "particular" authority but rather simply to the existence of a public authority controlling the adoption.

for the adoption and the existence of practices and formalities which are not in the minor's best interests and fail to respect ethical principles and international law. These principles are those listed in Article 3 LAI which are taken from the United Nations Convention 20 November 1989 and the 1993 HC. These precepts state that adoption applications shall not be processed if these circumstances prevail in the minor's country of nationality or residency. However, a lack of authority or due process in the minor's State of residence is more relevant because it is that State's authorities who decide on the child's adoptability. It would make no sense to prohibit an adoption when the State failing to provide guarantees is that of the minor's nationality and the minor is residing in a State which does provide these guarantees.

Along with the circumstances barring an adoption application, there are others which simply restrict it (Article 4.3). Special care has been taken to regulate the adoption of minors who are temporarily in Spain for a specific purpose: holiday, studies or medical treatment. These temporary stays cannot be used as a way to cut links with the State of origin leading to the constitution of permanent adoptions without the necessary guarantees from the biological family. Therefore, not only must the country of origin participate in duly regulated adoption programmes, these temporary stays must also have concluded in accordance with the programmes implementing them.

In this context, one of the concerns addressed by the LAI is the coordination between public bodies as from the act of accreditation through the monitoring and control and including the criteria which limit or prohibit adoption, and the standardisation of suitability assessment criteria (Article 10.2.II). In the light of the seriousness of the circumstances preventing adoption and those determining its possibility, regional bodies taking decisions in this respect must do so in a coordinated fashion. It would make no sense, for example, for some Autonomous Communities to prohibit adoptions with certain States while others approve them without any problem. Therefore, decisions in this regard may be subject to the Intercountry Adoption Advisory Board and the attendant institutional coordination body of the public administrations.

3. Suitability of the adopting parents

Once the adoption application has been filed and the State best adapted to the profile of the adopting parents has been chosen, the latter must undergo a psycho-social study giving rise to, as the case may be, the declaration of suitability. This study can be conducted directly by the public entity involved or through duly authorised entities [Article 5.d) LAI]. On the basis of this study and requisite reports, the public entity will issue a certificate of suitability. Article 10.5 LAI prohibits discrimination on the basis of disability or any other circumstance. This certificate has a maximum duration of three years as from the date of emission by the competent body, providing that there has been no substantial change in the personal, family or social situation of the adopting parents (Article 10.3 LAI).

Article 10 LAI introduces the concept of specific suitability for intercountry adoption into the Spanish legal system. This refers not only to the necessary capacity,

aptitude and motivation to exercise parental authority in the best interest of the minor (similar to Article 176.1 Spanish Civil Code), but also to the ability to adapt to the peculiarities of intercountry adoption. Hence, this article introduces a psycho-social assessment into a series of particulars which converge in an aptitude to adjust to the idiosyncrasies of intercountry adoption.[28] The administrative declaration of suitability does not verify the legal capacity to adopt, whose assesment is reserved to the judicial authority constituting the adoption.[29] However, it cannot be denied that at the preliminary proposal stage the administrative authorities take account of the legal system involved (that of the adopting parents and the child) which will subsequently be applied by the authority constituting the adoption. Hence, issues relating to the capacity to adopt such as the age of the adopting parents, are applied within the framework of the preliminary adoption proposal to decide whether the adopting parents are suitable or not. On this point, a unilateral or mixed perspective can be raised. In the former case, the public entity entrusted with the protection of minors will directly lay down suitability criteria as dictated by the terms of the Spanish legal system (e.g. to be over the age of twenty-five). In the latter case, the public entity assesses suitability subject to the legal system in force at the minor's place of origin which was selected by the adopting parents. This latter option is typical of adoptions under the aegis of bilateral agreements with certain countries. In practice, this mixed perspective gives rise to cumulative application of the provisions envisaged in the State of origin and the State of reception.[30]

Be this as it may, the control exercised by the State of the adopting parents is complemented by the authorities of the child's State of origin who are responsible for safeguarding the best interests of the child and making sure that the adopting parents are suitable (Articles 5 and 16). Normally, this consent of sorts on the part of the State of origin refers not only to the capacity of the child up for adoption but also of the capacity and suitability of the adopting parents in accordance with the Law of the State of origin of the adoption. In giving this consent, one assumes that the authorities of the State of origin take account of the declaration of suitability of the adopting parents submitted by the Spanish public entity.

4. The role of intermediation

The adoption may be processed through the public entity or an entity collaborating in intercountry adoption which is duly accredited to work with the State of origin of the minor (Article 4.5 LAI). Economic profits added to what is strictly necessary to cover necessary costs are prohibited. The adopting parents are free to opt for a

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[28] *Cf.* P. Rodríguez Mateos, "Adopción internacional", *AEDIPr.*, t. VII, 2007, p. 1033.

[29] *Cf.* A.L. Calvo Caravaca and J. Carrascosa González, *La Ley 54/2007…, op. cit.*, p. 68.

[30] For instance, the Agreements with Vietnam or with the Philippines (*cits.*) with an evident mixture of administrative and judicial arrangements.

collaborating entity or not and, as the case may be, to choose such collaborator.[31] In any event, these entities must be accredited by the Autonomous Communities in whose territory they operate and must answer to the public entities in terms of standardising processes as much as possible.[32] Moreover, if the public institutions entrusted with the protection of minors observe that certain channels pose clear risks due to a lack of suitable guarantees, they may limit the processing of adoptions exclusively to collaborating entities that are accredited or authorised by both the State of origin and the State of destination (Article 4.2 LAI).

Intercountry Adoption applicants and the collaborating organisation shall sign an intermediation contract (Art. 8 LAI). This contract is conditioned by the obligations imposed by the LAI and which are mandatory rules for the parties; in fact, we can only speak of the intermediation function and no other service may be included. The Law does not pay particular attention to the obligations which must be met by the adopting parents which include paying compensation fees and expenses related to the proceeding and turning in all of the documentation needed for the adoption.

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[31] Naturally, if the adopting parents decide not to engage the services of collaborating entities, they will have to make many of the arrangements on their own. This is typically done with the collaboration, assistance and supervision of the Spanish public entity which can attempt to communicate with the authorities of the State of origin as needed (Article 9).

[32] The number of collaborating entities which can be accredited for a specific country is not regulated under the Law but depends on two criteria. First, the foreign country envisages a maximum number of collaborating entities; or, second, the Spanish public entities deem it necessary to limit that number on the basis of the adoptions constituted or envisaged or other issues and needs (Article 7.4 LAI). The coordination of all of the public administrations is required to establish this *numerus clausus*. The said accreditation is accompanied by follow-up and control on the part of the Autonomous Communities which can give rise to the suspension or cancellation of the accreditation following a period for filing a statement of defence when the conditions leading up to the accreditation are no longer complied with or in the event of infringement of the law. Coordinated inter-regional control and follow-up is required when the entity operates in more than one Autonomous Community (Article 7.8); in the event of suspension or cancellation of the accreditation by the public entity of an Autonomous Community, all information will be furnished to the other public entities of the Communities where the collaborating entity is accredited for the purpose of initiating appropriate investigations (Article 7.5). The scope of the suspension or cancellation can be partial (limited to a particular country) or total (disqualifying its involvement in any case). Accreditation requirements include: 1) non-profitability; 2) registration in the official register set up for that purpose; 3) protection of minors as one of the basic aims listed in the entity's bylaws; 4) availability of material and human resources necessary; 5) working teams which cover all necessary disciplines; and management and administration by qualified persons in terms of their moral, educational and professional integrity. The performance of collaborating entities is an important aspect regulated in the Law: a person must be appointed to represent the entity and the families before the authorities of the State of origin (Article 7.6 *ab initio*). Also, the professionals employed in the countries of origin are presumed attached to the collaborating entity such that the latter is directly responsible for the acts of the said professionals in the discharge of their intermediation duties (Article 7.6 *in fine*). These same professionals may also be evaluated by the public entity in charge of accreditation.

The ECAIs should do what is needed to help put adopting parents in contact with the authorities, organisations and institutions of the country of origin or of habitual residence. They are particularly responsible for: furnishing information and consulting services to those interested in adopting, intervening in the processing of files before Spanish or foreign authorities, advising and supporting adoption applicants in the formalities they must go through in Spain and in the countries of origin,[33] and for making the arrangements to comply with the post-adoptive obligations envisaged in the legislation of the State of origin, always in the terms laid down by the public entity in charge of child protection.

The contract must be notified by the competent public organisation and a register is created to gather claims formulated by the adoption applicants against the intermediary organisation. The sole purpose of that register is to control and keep watch on those organisations and to encourage them to improve action guidelines. This control exercised by the public authorities casts a doubt over the procedure surrounding the intermediation contract. It is an international contract because, although both contracting parties habitually reside in Spain, a significant portion of the intermediation takes place abroad. As a result, it is governed by the "Rome I" Regulation,[34] but its rules do not fit easily to the numerous peculiarities of this contract. It is not excluded from the material sphere of the Regulation because it does not specifically affect "family relations" [excluded pursuant to Article 1.2.c)], but rather the assistance provided by entities specialising in intercountry adoption, nor does it refer strictly to the process [excluded under Article 1.3] since there is no litigation in this area but rather only an administrative procedure prior to the constitution of the adoption. Applicable rules are the general ones because this is not a consumer contract (Article 6) given that the ECAI is a non-profit organisation and not a professional entity with business activity. Hence, Spanish law is applied as the law of the habitual residence of the ECAI which provides the characteristic intermediation services. It would be difficult to find a different law more closely linked (Article 4.3) because, although it is based on the fact that intermediation is carried out in the State of origin, the geographical links with Spain are evident (adopting parents residing in Spain and ECAI with habitual residence in Spain) as are legal ties with the Spanish legal system (authorisation and intervention of a Spanish public entity). It is unusual for the parties to choose a law different from Spanish law due to the latter's ties with the parties and the fact the Autonomous Community must approve the contract and could therefore require the application of Spanish law. Furthermore, the choice of a foreign law would always be conditioned by Spanish overriding mandatory provisions.

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[33] In practice, the ECAIs gather the documentation required in the State of origin of the minor and get it translated and legalised or stamped with the apostille so that it is duly recognised. At that stage, the documents are sent to the representative of the collaborating organisation in the State of origin for presentation to the competent local authorities.

[34] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJEU* No. L 177, 4-VII-2008.

Settlement of judicial disputes is subject to "Brussels I" Regulation,[35] insofar as the defendant most likely lives in Spain, a Member State of the European Area of Justice (Article 3). Since this is an intermediation and assistance contract, it is not excluded from this Regulation even though the ultimate objective is counselling and intermediation regarding intercountry adoption. It could be possible to choose the court although the public entity, when approving the contract, could require that it be subject to the courts within the territorial limits of the Autonomous Community If the court cannot be selected, the forum of the legal domicile of the defendant (Article 2 "Brussels I") could be completed with the location where the obligation serving as the basis of the claim (Article 5.1) must be fulfilled. Unless the parties agree otherwise, this location is presumed to be the place where the intermediation and assistance services are rendered. Nevertheless, it must be remembered that services are rendered State of the adopting parents (Spain) as well as in the State of the child and the latter state may not be a member of the European Area of Justice.

5. Conclusion of the administrative phase

Following intermediation and once the file is in the hands of the authorities of the State of origin, the latter typically draw up a list of potential adoptive parents. From that list they choose the one deemed most appropriate for each child up for adoption. That selection is communicated to the collaborating entity or, as the case may be, directly to the public entity responsible for the protection of minors. The authorities at origin usually then send information about the child. The law of the State of origin may also require a letter of acceptance from the adopting parents, usually referred to as a *Letter Seeking Confirmation for Adopter*), which may even require certification by the public entity (*Letter Seeking Confirmation*).

In this connection, the LAI does not provide rules regarding trips made by the adopting parents to the State of origin or the child to the State of destination. However, the parameters laid down in the 1993 HC could be applied. It is also the law of the State of origin which determines the need for the adopting parents to travel and meet the child, as well as the scope and procedure of this contact. Normally a letter of invitation is sent (*Notice of Coming to the Country for Adoption*). It would be uncommon for the child to depart from the State of origin without the prior constitution of the adoption but it is possible. In addition to the requirements laid down by the State of origin for the departure of the child, we also have the requirements under Spanish law for entry into Spain which, in the case of the 1993 HC, implies that the authorities of both states must take the necessary measures to have the relevant authorisations (Article 18), in addition to guaranteeing that the trip is safe and, as far as possible, in the company of the adopting parents (Article 19.2). Also, if the adoption is rejected in the State of

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[35] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters [*OJEC* No. L 16, 16-I-01; error correction, *ibid.* núm. L 307, 24-XI-01, and No. L 176, 5-VII-02].

reception, the child will be removed and the competent authorities will assume guardianship. The child will be placed again for adoption or foster care in consultation with the authorities of the State of origin after informing of the suitability of the parents. Return of the child to the State of origin shall be only considered as a last resort (Article 21, 1993 HC).

The administrative stage will conclude with the preliminary adoption proposal. As we have already pointed out, that preliminary proposal is drawn up by the Spanish authority if the adopting parents have resided in Spain for the last two years and the adoption is to be formalised before the Spanish authorities. This preliminary proposal is made based on the agreement of the authorities of the State of the minor in the form of a joint proposal modelled on the 1993 HC [Art. 5.f) LAI].[36]

III. CONSTITUTION OF THE ADOPTION BY SPANISH AUTHORITIES

1. Jurisdiction rules

Once the administrative phase has concluded, the public entity may, as the case may be, propose the adoption to the Spanish judge responsible for assessing its constitution.[37]

According to Article 14 LAI (and Article 22.3 LOPJ), the Spanish judge has the authority to constitute the adoption if the adopting parents or the child are Spanish or reside habitually in Spain Nationality and residence in Spain are determined at the time that the adoption request is submitted to the competent public entity.[38] This is an objective determination which does not depend on the intention to move the child to Spain or abroad to change habitual place of residence. This temporary determination of the nationality or residence of the adopting parents or adopted children is not to be taken lightly because a considerable amount of time may elapse between the adoption application before the administrative authorities and its constitution by the judge.

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[36] See, in the framework of the 1993 HC, S. Álvarez González, "Adopción internacional y sociedad multicultural", *Cursos de Derecho Internacional de Vitoria*, 1998, pp. 175–211, especially pp. 196–197; and, regarding the LAI, S. Adroher Biosca, "La nueva regulación de la adopción internacional en España. General comments on Law 54/2007 of 28 December regarding the «santos inocentes»", *Rev. Crít. Der. Inmob.*, No. 711, 2009, pp. 13–55, especially pp. 36–37.

[37] Naturally, Spanish Law does not regulate the constitution of the adoption for the foreign authority nor recognition of the Spanish adoption before the minor's State authority, even though the latter situation is the standard case of international adoption (adopting parents residing in Spain adopting a resident of a foreign country). In fact, the authorities of the child's State are in a better position to safeguard the child's rights and it is easier for it to grant the authorisation needed to depart from the country of origin.

[38] See C.A. Esplugues Mota, "La nueva ley española de adopción internacional de diciembre de 2007", *Riv. dir. int. pr. proc.*, vol. XLIV, 2008, pp. 363–380, esp. p. 371.

The breadth of these fora does not necessarily mean that they are excessive. In fact, their breadth may be justified by the guarantee provided by the intervention of a Spanish judge, independent of the greater or lesser ties that the case has with Spain. Nevertheless, the Explanatory Statement of the LAI points out that the Spanish judge is not in a position to make a ruling "if the case is not minimally connected to Spain".[39] This sort of *forum non conveniens* poses obstacles both in terms of form and content; to begin with, the explanatory should not alter the rules.[40] Two regulatory "parameters" are included which practically cancel one another out: an excessive forum, even when justifiable, based on the nationality of the adopting parents; and *forum non conveniens*, which practically renders the former void of content.[41] Neither would it be appropriate to introduce the *forum non conveniens* outside of a system of legal guarantees and based on the cooperation of authorities.[42] Furthermore, it would have been worthwhile to link the operation of the *forum non conveniens* to the aim of protecting the higher interest of the child as a way to strengthen the initial declaration of the LAI (Article 2).[43] In general, a *forum non conveniens* system offering greater guarantees would have been advisable whereby the legislator defined its circumstances and conditions as is the case, for example, in Regulation (EC) 2201/2003 regarding matters of parental responsibility.[44] In this latter Regulation, the exceptional nature of the case is taken into consideration[45] and the special situation which must exist,[46] subject to dual control by the *conveniens*

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[39] Statement interpreted by A.L. Calvo Caravaca and J. Carrascosa González as authentic *forum non conveniens*, *cf. La Ley 54/2007*…, *op. cit.*, pp. 84–85.

[40] For greater detail see S. Álvarez González, "La Ley de adopción internacional. Reflexiones a la luz de su texto, de sus objetivos y de la comunión entre ambos", *AEDIPr.*, t. VII, 2007, pp. 39–69, esp. pp. 50 and subsequent.

[41] See R. Arenas García and C. González Beilfuss*, loc. cit.*, pp. 10–11, esp. nota 24.

[42] Easy to achieve within the framework of an integrated regional network of authorities and more difficult within the ambit of international cooperation.

[43] See, in general, for warning of the risks of *forum non conveniens*, R.A. Schütze, "*Forum non conveniens* und Rechtschauvinismus", in H.P. Mansel et al. (Dirs.), *op. cit.*, vol. I, pp. 849–858.

[44] This is a system aiding in adapting to the circumstances of the case and which, owing to the seriousness of the declination of competence, the legislator has been meticulous in guaranteeing protection; see M.A. Asín Cabrera, "El dilema «previsibilidad-flexibilidad» en el sistema español de competencia judicial civil internacional: el juego de las cláusulas correctivas de carácter negativo en el sector de protección de menores", in *Pacis Artes. Obra homenaje al Profesor Julio D. González Campos*, t. II, Madrid, UAM/Eurolex, 2005, pp. 1241–1258. See P. Gottwald, "Das Wetterleuchten des forum non conveniens", in H.P. Mansel et al. (Dirs.)*, op. cit.*, vol. I, pp. 277–284, esp. pp. 279–280 and 283–284.

[45] Which even envisages a partial as opposed to total declination for a specific part of the case (Article 15(1) of Regulation 2201/2203).

[46] In an abstract sense, the best interest of the child; more concretely, the consideration that a better situated court exists to hear the case with which the child has some special connection. This special connection is specifically determined by the Regulation and, in our view, different connections should not be sought.

judge and the *non conveniens* judge.[47] The action which must be taken is strictly regulated,[48] both for the judge who must refrain from taking part,[49] as well as for the judge who will hear the case,[50] and goes hand-in-hand with an obligation of cooperation between the authorities affected.

Regarding territorial and functional jurisdiction, the LAI refers to the rules of voluntary jurisdiction [Article 16(1)]. Until amendments are enacted, these rules are still found in the Civil Procedure Act of 1881 which establishes the jurisdiction of the judge of the domicile of the public entity (Art. 63(16)).[51] If the latter has not intervened,[52] the judge of the domicile of the adopting parents shall be competent. Since this could give rise to cases of international jurisdiction in the absence of territorial jurisdiction,[53] the LAI provides that, if territorial jurisdiction cannot be determined, it will be up to the court chosen by the adopting parents (Art. 16(2)).

Constitution of the adoption before Spanish authorities does not necessarily require the intervention of a judge because Article 17 LAI gives these same powers to Spanish consuls.[54] This requires: a) adherence to treaties and international law and that the regulations of the receiving State do not oppose or prohibit this function; b) that the adopting parents are Spanish when the case is initiated (their place of residence being irrelevant: in Spain, in the receiving State or in a third State); c) that the child resides abroad, specifically within the district covered by the consul (nationality being irrelevant). If the adopting parents have not resided in Spain in

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[47] This is what is gleaned from several passages of Article 15 of Reg. 2201/2003. According to paragraph 1, *non conveniens* judge shall assess the child's best interest and his connection with the State of the *conveniens* judge. Paragraph 2(c) tacitly assumes that the ruling judge will assess the special connection the child has with his State and paragraph 5 is very clear in affirming that the ruling judge will re-assess the child's best interest.

[48] And support by at least one of the parties given that, although transfer can be upon the initiative of the *conveniens or non conveniens* judges but in any case requires the consent of one of the parties (Article 15.2 of Regulation 2201/2003).

[49] Who may only interrupt the process and invite the parties to submit it to the ruling judge, establishing a time limit to which the parties are bound [if the complaint is not submitted to the ruling judge on time, the non-ruling judge will continue to hear the case (art. 15.4)].

[50] Who has six weeks, as from the presentation of the complaint or request that he hear the case, to exercise jurisdiction or decline it (Article 15(5) of Reg. 2201/2003).

[51] Precept, among others, declared in force by Spanish Civil Procedure Act of the year 2000.

[52] Recall the cases in which a prior proposal is not necessary (Art. 176 C.c. having regard to Article 24 LAI).

[53] The case where the public entity does not intervene and the adopting parents are not domiciled in Spain.

[54] See criticizing this Consul's powers, A. Borrás Rodríguez, *loc. cit.*, p. 2; C. A. Esplugues Mota, "La nueva ley…", *loc. cit.*, pp. 377–378. Regarding the difficult fit with the 1993 HC, see C. González Beilfuss, "La aplicación en España del Convenio de La Haya de 29 de mayo de 1993 relativo a la protección del niño y a la cooperación en materia de adopción internacional", *R.J.C.*, vol. XCV, 1996, pp. 313–345, esp. pp. 343–345.

the two years immediately preceding the adoption, a preliminary proposal from the Spanish administrative authorities is unnecessary. The territorial jurisdiction of consuls is determined by the habitual residence of the child within the district covered by the consul at the time the application is filed.

2. Applicable law

A) Application of Spanish law

Spanish law is applied in two cases under Article 18 LAI. The first is when the child habitually resides in Spain when the adoption is constituted implying a prior move to Spain with *animus manendi.* The other is when the child is abroad but it is presumed that the constitution of the adoption will imply establishment of his/her residence in Spain.[55] In any event, this application of Spanish law, based on the child's present or future habitual residence, gives precedence to national law[56] regarding certain issues and specific circumstances. The issues governed by the national law of the State of the child are capacity[57] and consent needed to be adopted. This law is applied in either of the two following cases. First, if the child does not reside in Spain at the time the adoption is constituted regardless of whether s/he will move to Spain as a consequence of the adoption. Second, if the child does not acquire Spanish nationality by virtue of the adoption even though s/he resides in Spain. In any event, this national law of the child's country shall not be applied in detriment to Spanish law having regard to stateless persons or minors with undetermined nationality (Article 19. 2 LAI).

This application of the national law of the child, partially limiting the application of Spanish law, is apparently intended to facilitate the effectiveness of Spanish adoption in that State. It is, therefore, a concession made by Spanish law to

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[55] See A.L. Calvo Caravaca and J. Carrascosa González, "Constitución de la adopción internacional en la Ley 54/2007 de 28 de diciembre: aplicación de la ley española", *La Ley*, No. 6953, 26-V-2008, pp. 1–9.

[56] Hence, the section heading is somewhat misleading: "adoption governed by Spanish law".

[57] Some issues related to the capacity of the parties are typically regulated by the law governing the constitution of the adoption instead of the general regulation, Article 9(1) of the Spanish Civil Code. In its time, the Resolution-Circular of the Directorate-General of Registries and of Notaries Public of 15 July 2006 on recognition and entry of intercountry adoptions in the Spanish Civil Registry (Official State Gazette No. 207, 30-VIII-06, esp. No. II), defended this classification of the aspects of capacity as "substance" issues, expressing an opinionated stance where the fundamental axis of the regulation is the perspective of the child and not of the adopting parents. As a result, the adoption constitution law governs the difference in age which should exist between adopting parent and child and certain prohibitions such as those relating to prior kinship (prohibition of the adoption of descendants, collateral second degree relatives) or tutelage (prohibition until approval of tutelage accounts).

the spatial continuity of the adoption.[58] Bearing this purpose in mind, one could speculate about not applying the national law of the child and maintaining the application of the law of present or future habitual residence in any of the following circumstances. First, if it is shown that the recognition rules of the State of the child do not envisage control of applied law; second, if the conflict-of-laws rules of that State are based on habitual residence; and third, if that State admits application of the national law resulting from the adoption, for example, because the child loses his first nationality and therefore the law is destined to be disconnected. The problem with (and perhaps the reason for) imposing the national law of the child is that the effectiveness of the adoption in that child's State of origin will not depend so much on the applicable law in conflictual terms, i.e. control of applicable law, but more on compliance with material requirements relating to the child's adoptability. Naturally, the child's state of origin is not going to recognise, for instance, an adoption where necessary consent has been ignored.

For that same reason the application of Spanish law -and, as the case may be, the application of the national law of the child- can be supplemented with the application of the law of the nationality or habitual residence of the adopting parents or child where there is consent, hearings and authorisations. To that end, the adopting parents or the Public Prosecution Service must file a request and the authority in question must acknowledge that it is in the best interest of the child. This would help facilitate the effectiveness and validity of the adoption in other countries involved in the case.

B) Application of foreign laws

Spanish law does not govern the constitution of the adoption when the child has and will continue to have residence in the foreign country. In other words, if the child does not reside in Spain and is not going to reside in Spain after the adoption. A typical example, but not the only one, is a consular adoption where the child (necessarily) and the adopting Spanish parent both live abroad. In this case, the law of the habitual residence after the adoption, i.e. the law of the country to which the child has moved or will move, shall apply. "Failing that", the law of current habitual residence shall apply. The expression "failing that" refers to cases where the child will not be uprooted or where the move is not made with *animus manendi* (or at least the latter could not be proven).

There are three problems with the application of a foreign law by the Spanish authorities. First of all, the Spanish authority could find that the foreign law does not permit the constitution of adoptions. If adoption is viewed as an institution protecting children, it may be possible to not recognise the prohibition and if the latter is clearly in opposition to Spanish law and order (Article 23). However, it is also true that law and order should be assessed on the basis of the substantive

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[58] See P. Paradela Areán, "Breve comentario a la Ley 50/2007 de adopción internacional", *REEI*, No 16, 2008, pp. 1–12, esp. p. 6.

ties that the case has with Spain.[59] The case of an alien child who does not reside and will not reside in Spain is not the same as that of a Spaniard who adopts a Spanish child although they are living abroad.

Secondly, what would happen in cases where the foreign law recognises adoption but prohibits it in the case of same sex couples. Such a provision could be a violation of Spanish law. While the fundamental right here is not one's right to adopt but rather the child's best interest, today, in the Spanish system, the best interest of the child is not affected if the adopting parents are of the same sex.[60] However, it is important to realise that, in the typical case of intercountry adoption where the adopting parents reside in Spain and the child resides abroad, the authority of the State where the child is living can control the suitability of the adoption and therefore veto adoptions by homosexual couples,[61] refusing to let the child leave the country or to recognise the Spanish adoption which could render it ineffective.

Thirdly, it is doubtful that, in application of foreign law (of the child's state of residence), the Spanish authorities could constitute a simple (not full) adoption. There are indications against this.[62] The clearest is Article 15(4) LAI which states that "for the purposes of this Law, simple adoption shall mean that constituted *by the foreign authority*".[63] Moreover, Article 30(4) LAI refers to the *conversion* of the simple adoption constituted by a foreign authority. However, in a different sense it could be argued that if the LAI has no qualms about admitting the recognition of a simple adoption in accordance with a foreign law (Article 30), it would stand to reason that the Spanish authority could constitute the simple adoption in accordance with the foreign law allowing it. Give greater credence to this, we would note that Article 15(2) provides a forum for the conversion of the simple adoption into a full one where the former is constituted by Spanish authorities.[64] In any event, there are differences between constituting the adoption and recognising it. In the first case, the law of the habitual residence of the child determines the

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[59] See, for comparative purposes, P. Lagarde, "La loi du 6 février 2001 relative à l'adoption internationale: une opportune clarification", *Rev. crit. dr. int. pr.*, vol. 90, 2001, pp. 275–300, esp. pp. 284–290.

[60] In the opposite sense, see Mª. D. Bardají Gálvez, "La orientación sexual como factor determinante de la idoneidad para adoptar", *R.D.P.*, May-June, 2008, pp. 55–84, esp. pp. 75 and subsequent.

[61] This is the case, for example of Vietnamese Decree 68/2002 of 10 July 2002 on international marriage and family which expressly prohibits adoption by two people joined in marriage if they are not a man and a woman. This is an important issue since Spain and Vietnam have a bilateral agreement on adoption (*supra*) which considers the law of each of the States in declaring suitability.

[62] See J.M. Espinar Vicente, *loc. cit.*, p. 1955.

[63] Although the LAI establishes a conflict-of-laws rule for cases of conversion (Article 22) where the conversion is not limited to acts of foreign authorities.

[64] On admission of the constitution of simple adoption by Spanish authorities, see A.L. Calvo Caravaca and J. Carrascosa González, *La ley 54//2007…., op. cit.*, p. 95; *id.*, "Constitución de la adopción internacional en la Ley 54/2007 de 28 de diciembre", *La Ley*, núm. 6997, 25-VII-2008, D–235, pp. 1–6, esp. p. 5.

requirements for constituting the adoption. In the second, the national law of the adopting parents, in the framework of Article 9(4) of the Civil Code, determines the effects of an adoption already constituted by a foreign authority.[65]

C) Valuation

The regulation of the applicable law envisaged in the LAI warns of a lack of symmetry in some conflict-of-laws rules: in some cases the Spanish law "expands" while in other it "diminishes".

The Spanish law applies when the child is residing in Spain when the adoption is constituted. Here, the law of the country of residence resulting from the adoption is not considered, i.e. that established as a consequence of the filial link. In contrast, among foreign laws, the law of the residence resulting from the adoption takes precedence. For instance, if two Spaniards residing in Lima adopt a child also residing in that city, Spanish law will prevail if their intention is to return to Madrid. However, if two Peruvians residing in Madrid adopt a child who is also a resident of Madrid, the Peruvian law would not apply but rather Spanish law, even if they intend to return to Lima. Decoupling from the criterion of current habitual residence is the same in both cases. However, preference for the law of the new habitual residence only applies if Spanish law is not diminished.

In other cases, Spanish law is applied more restrictively than foreign law. For instance, if the child resides in Spain or has been or is going to be moved to Spain after the adoption, the national law of the child must be applied and not "substantive Spanish law" (*sic*, Article 19 LAI). However, if the child resides in, or has been or is going to be moved to a foreign country, national law "may be taken into consideration" (*sic*, Article 21).[66] This difference in wording gives the impression that Spanish law, when it is the law of the habitual residence of the child, diminishes in benefit of the law of the child's nationality; however, the foreign law of the habitual residence expands in detriment of this law on nationality.

IV. CONSTITUTION OF THE ADOPTION BY A FOREIGN AUTHORITY: EFFECTIVENESS IN SPAIN

1. Recognition regimes

The Spanish legal system provides for two recognition schemes: one conventional and the other regulated in the LAI in the absence of an Agreement. The conventional system follows in the wake of the 1993 HC and several bilateral agreements.

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[65] By remittal from Article 30 LAI. Article 9(4) of the Civil Code applies the personal law (national) of the child for the purposes of filiation in general, including adoption. However, when it cannot be determined by this law, the precepts remits to the law of the habitual residence of the child.

[66] See S. Álvarez González, "La Ley de adopción internacional…", *loc. cit.*, p. 52.

Specifically, the 1993 HC provides for the immediate recognition[67] of adoptions certified as compliant with the said Agreement. This ease of recognition is the logical result of a very strict adoption process that implies the involvement of the authorities of the States of residence of the adopting parents and the child.

As for the conventional bilateral system, some agreements can be applied to the recognition of adoptions constituted before the authorities of the other contracting party. The Resolution-Circular of the Directorate-General of Registries and Notaries Public of 15 July 2006[68] notes that many of these agreements "are still applicable" (No. IV. I), given that the 1993 HC does not revoke international instruments in party States.[69] Cooperation agreements on matters of adoption which include recognition rules such as the ones signed with the Philippines, Bolivia and Vietnam[70] must be added to these agreements on recognition matters.

Two requirements must be met regarding the application of bilateral recognition agreements: one, that the agreement does not exclude marital status or family relations matters; and two, that the decision or resolution recognising the adoption take the judgements and voluntary acts of jurisdiction into account. It is therefore surprising that the Resolution-Circular of 15 July 2006 considers the Brazil Agreement applicable to adoption,[71] considering that Article 16 of that Agreement excludes decisions regarding family status and law as regards constitutive and declarative judgements of the said status and law. The application of Agreements which include marital status or family rights matters but apparently refer only to contentious decisions and hence exclude voluntary jurisdiction and therefore adoption, may also be considered questionable. This is the case of the Agreement with the Czech Republic[72] and that is why the Resolution-Circular of 15 July 2006 does not cite it in the list of applicable bilateral agreements.

Some of these bilateral agreements affect countries party to the 1993 HC. Those signed with Germany[73] (Article 23.1), Austria[74] (Article 19.1) and France[75] (Article

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[67] The only exception being public policy.

[68] *Cit. supra.*

[69] In accordance with Article 39(1) of the 1993 HC providing that there is no declaration against the parties. See Introduction.

[70] See reference in Introduction.

[71] Legal cooperation Agreement in civil matters between the Kingdom of Spain and the Government of the Federal Republic of Brazil done at Madrid on 13 April 1989 (Official State Gazette No 164, 10-VII-1991, error correction *ibid.* No. 193, 13-VIII-91).

[72] Agreement on the recognition and enforcement of civil judgements and legal cooperation between Spain and the Socialist Republic of Czechoslovakia, done at Madrid on 04 May 1987 (Official State Gazette No 290, 3-XII-1988, error correction *ibid.* No 22, 26-I-89).

[73] Agreement on the recognition and enforcement of resolutions between Spain and the Federal Republic of Germany done at Bonn on 14 November 1983 (Official State Gazette No 230, 24-XI-1992).

[74] Agreement on the recognition and enforcement of resolutions between Spain and Austria done at Vienna on 17 February 1984 (Official State Gazette No 270, 29-VIII-1985).

[75] Agreement between Spain and France on the recognition of judicial and arbitration decisions of 28 May 1969 (Official State Gazette No 63, 14-III-1970).

19) contain a preference clause in favour of private agreements which translates into application compatible with the 1993 HC. Therefore, if the adoption has been subject to the 1993 HC cooperation rules, it is certified as complying with this Agreement and recognition in all other States Party is likewise governed by the 1993 HC. If such certification does not exist, recognition may find support in bilateral agreements.[76] Other bilateral agreements do not have a compatibility clause recognising the prevalence of the 1993 HC. This is the case, for instance, of the agreements signed with Bulgaria,[77] Colombia[78] and China.[79] Nevertheless, the 1993 HC may be seamlessly applied to adoptions in these countries if the adoption in question is certified in accordance with it.

2. Recognition proceedings

Regarding the recognition procedure, the 1993 HC does not provide for an ad hoc proceeding nor remittal to exequatur, recognition depending on whether the adoption was processed in accordance with the Agreement itself. It would be fair to say that compliance with the guarantees preceding the constitution of the adoption through cooperation between the authorities of the host State and the child's State of origin is what determines the effectiveness of the adoption in the State Parties.[80] This special focus on the administrative stage preceding the constitution of the adoption is also noted in some of the cooperation agreements on matters of adoption.[81]

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[76] The Agreements with Germany and Austria introduce a *favor recognitionis* clause if domestic law is more favourable (Articles 23.2 and 19.2 respectively).

[77] Legal assistance Agreement in civil matters between the Kingdom of Spain and the Republic of Bulgaria done at Sophia on 23 May 1993 (Official State Gazette No. 155, 30-VI-1994). Although this Agreement is not mentioned in the Resolution-Circular of 15 July 2006, the latter does not include a comprehensive list and, in fact, the Agreement expressly includes family law (Articles 1 and 18).

[78] Agreement between Spain and Colombia on the enforcement of civil judgements of 30 May 1908, *Gaceta de Madrid*, No. 108, 18-IV-09.

[79] Treaty between the Kingdom of Spain and the People's Republic of China on legal assistance in civil and trade matters done at Beijing on 02 May 1992 (Official State Gazette No. 26, 31-I-94; error correction *ibid.*, No. 60, 11-III-94). Although the Agreement with China focuses mainly on contentious proceedings, it does not exclude adoption from its scope and the Resolution-Circular of 15 July 2006 considers it applicable *(cf.* No. I.4).

[80] As can be deduced from Articles 23 and 24 of the 1993 HC, once the adoption has been certified as compliant with the Agreement by the competent authority of the State where it has taken place, it shall be fully recognised in the rest of the Contracting States. This certification must show that the national authorities of both States (host State and the child's State of origin) accept the adoption procedure. It must indicate who granted this acceptance and when it was granted. That being the case, recognition may only be denied if the adoption grossly infringes public policy taking account of the best interests of the child.

[81] See, for example, Article 12 of the Agreement with Vietnam of 05 December 2007 which is an adaptation of Article 23 of the 1993 HC although surprisingly no mention is made of the public policy of the requested State.

Many of the recognition agreements remit to the internal recognition procedure. The Resolution-Circular of 15 July 2006 has interpreted this remittal as an exequatur requirement,[82] even though the adaptation of this procedure to acts of voluntary jurisdiction is a controversial issue. Regarding family relation, other Agreements such as the one between Spain and Germany, envisage the possibility for each State to set up a special simplified recognition proceeding (Article 10). In any case, this simplified proceeding does not eliminate the channels of recognition provided for in the Agreement: automatic recognition (Article 10.1), incidental recognition (Article 10.2) or principle recognition (Articles 11 and subsequent). The Agreement between Spain and Austria opts for the automatic recognition envisaged in domestic law, authorising States party (Spain has not done so) to require a specific procedure regarding family relations (Article 12.2). It does not clarify whether the exequatur to which it refers (Article 13) can be extended to principal recognition in the case of automatic opposition.

Within the scope of the LAI, the adoption is recognised automatically without the need for prior exequatur. In fact, Article 27 recalls that recognition is made effective by the Spanish public authority before which the issue of validity is posed, exemplifying what has been said regarding the head of the Civil Register. This lack of exequatur can also be re-channelled to incidental recognition. For instance, imagine that a Spanish judge opens an incidence of recognition of an adoption in light of its relation with the main litigation he is hearing (for example, an inheritance case). If the Spanish authority opposes automatic or incidental recognition, or if the interested parties want recognition with *res judicata* effect and to be binding for all Spanish authorities, certain question arise as to the appropriateness of resorting to the exequatur for a definitive decision.[83] While this has not been common practice in Spain,[84] one doctrinal sector has maintained the application of the exequatur to cases where there is an interest in achieving an unassailable declaration regarding the foreign decision and the latter cannot be entered into the Spanish Registry since it fails to meet the requirements of Article 15.[85]

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[82] In this same sense see the Supreme Court Order of 02 July 1981 granting exequatur for a French decision on adoption in application of the Agreement between Spain and France of 28 May 1969 (*R.A.J.*, No. 3040, 1981, and "Nota" by J.C. Fernández Rozas, *REDI*, vol. XXXIV, 1982, pp. 499 and subsequent).

[83] *See* S. García Cano, "Nueva regulación tras la Ley 54/2007 de adopción internacional de los efectos jurídicos en España de las adopciones constituidas por autoridades extranjeras", *Revista de Derecho de familia*, No. 45, 2009, pp. 25–50, esp. pp. 34–35.

[84] *See Resolution-Circular of 15 July 2006.*

[85] *Cf. P. De Miguel Asensio, Eficacia de las resoluciones extranjeras de jurisdicción voluntaria, Madrid, Eurolex,, 1997, pp. 112 and 113.* For a different view, assuming that the exequatur is not suited to the recognition of acts of voluntary jurisdiction given that these lack *res judicata* and effective enforcement, see "Nota" by R. Arenas García in *REDI*, vol., XLVII, 1995–2, pp. 400 and subsequent, esp. p. 403.

3. Conditions for recognition

The LAI regulates the conditions necessary for adoptions to be effective.

First: the adoption must appear on an authentic public document, either legalised or with the apostille, and translated into an official Spanish language (Article 26.5). However, the LAI reserves any provision which exempts compliance with these requirements which is consistent with the flexibility of the regulation governing the register regarding these requirements (Articles 86 to 89 RRC).

Second: the adoption must have been constituted before a competent public authority, judicial or otherwise. Its international competence (and not its territorial, material or objective competence) is controlled and to that end a cumulative dual control system operating in two steps has been devised. First of all, the constituent authority must be competent in accordance with its own law, meaning that the Spanish authority must substantiate that it has respected its own rules. Secondly, although formulated negatively and as an exception, the Spanish judge must check whether that competence criterion of the judge at origin is based on reasonable connections. Control of competence, according to the law of the judge at origin, seems to unjustifiably assume that the judge of the requested State is in a better position than the judge at origin to assess the regulation. However, it especially denies that the priority interest of the requested State is to assess the adaptation of a foreign decision to its own legal parameters.[86] As for the parameters of the State of origin, the only concern is that the decision be valid and effective in that State, verifying after the fact that the judge at origin was "truly" competent.[87] Also, what criteria are used in determining that the competence of the foreign authority is reasonable? The Law refers to "reasonable connection at origin"; perhaps, for example, the authority of the State of nationality or residence of the child. It also alludes to "family background"; this could be, for instance, the nationality or residency of the biological parents even if they are different from those of the child. It also include other ties "of a similar nature". Given this breadth and lack of definition, the reference to "reasonable criteria" could include, although the LAI does not mention it specifically, "bilateralised" fora, i.e. considering the foreign judge competent in the same cases where the Spanish judge would be declared competent. However, this bilateralisation of fora requires further explanation. For instance, there is a doubt as to whether the *forum non conveniens* file would serve to exclude the competence of the foreign state despite the fora being identical to the Spanish ones. Together with the bilateralisation of fora, the question could be raised as to whether the mention of "reasonable criteria" would permit the introduction of the theory of competent legal system. According to this theory, the adoption would be recognised in Spain even if constituted in a State whose authorities are

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[86] See A.T. von Mehren, "Recognition and Enforcement of Foreign Judgments – General Theory and the Role of Jurisdictional Requirements", *R. des C.*, t. 167, 1980 (II), pp. 9–112, pp. 58–62; G.A.L. Droz, "Regards sur le droit international privé comparé. Cours géneral de droit international privé", *ibid.*, t. 229, 1991 (IV), pp. 9–424, esp. pp. 90–91.

[87] See R. Arenas García and C. González Beilfuss, *loc. cit.*, p. 23–25.

not competent under Spanish law. For that it would be sufficient if the adoption were recognised or liable to recognition in other States whose authorities do indeed pass the bilateralisation test with respect to Spanish regulations.

Third: recognition of the adoption also requires that it has been "constituted in accordance with the law or laws designated" by the conflict-of-laws rule of the State of the constituent authority. Therefore, for the purposes recognition in Spain, it does not matter whether the authority at origin applies conflict-of-laws rules different from those envisaged in the Spanish system. It is not clear whether the expression "in accordance with the law" implies only verification of *what* law was applied and which should be applied or if it also includes control of *how* the said law was applied. In other words, if it respected its material content or not. This control is based on a somewhat illogical assertion: that the Spanish authority is in a better position to review the application of the rules of the State of origin than the authority of that State itself. Furthermore, this leads to a quasi review of the substance, i.e. of how the said authority made its decision, and contributes little to the interests of the requested State which is more concerned about whether an act meets certain parameters of the requested State and whether it is valid and effective in the State of origin.[88] Lastly, it could lead to a paradox if the foreign adoption is not recognised because it is proven that the conflict-of-law rules used were not the ones envisaged in the State of origin, even though they are the same ones that a Spanish judge would have applied.

Fortunately, the LAI allows for corrections, e.g. filling out a consent form or declaration required under the foreign law. The LAI provides for these corrections in Spain before the competent Spanish authority by virtue of the fora envisaged for the constitution of the adoption or also before "any other competent foreign authority". Allowing for such correction "in Spain" and before any "competent" foreign authority could lead one to believe that corrections are only permitted before foreign consuls in Spain. However, there is no basis for this restriction: correction may also be made before a foreign authority abroad by interpreting the expression "in Spain" as an allusion to making the correction "at the time of recognition in Spain". However, it is not clear what impact this correction would have on processing of the recognition. If recognition is automatic, with no declaratory judgement, it would apparently suffice to provisionally reject recognition while waiting for the error to be corrected. In the case of exequatur, a temporary suspension of the proceeding until all consents and declaration are completed, would appear reasonable. In the case of incidental recognition in the context of a pending hearing, it would seem that the incident could also be suspended until the error has been corrected.

Fourth: adaptation of the foreign adoption to the Spanish legal system must be monitored. It is surprising that this requirement has not been included having regard to the full adoption. This oversight should not stand in the way to the application of this requirement because such a legal clause is included implicitly

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[88] See R. Arenas García and C. González Beilfuss, *loc. cit.*, pp. 25 and subsequent.

under applicable law (Article 23), under recognition of a simple (not full) adoption (Article 31) and as a child protection measure (Article 34).[89]

Fifth: where the adopting parents are Spanish and residents of Spain, recognition of the adoption requires that said adopting parents first be declared competent by the Spanish entity before the constitution of the adoption by the foreign authority. This requirement is waived where such a declaration is unnecessary when the adoption is constituted before Spanish authorities.[90] The lack of a competency declaration cannot be corrected after the constitution of the adoption, in contrast to the LAI which allows submission of the competency certificate at the time of recognition.[91] Nevertheless, it is surprising that consent with the assignment proposal made by the child's authorities is not requested from the Spanish public authority. A case could arise where a foreign adoption needs to be recognised because, despite the recognised competence of the adopting parents, the public Spanish authority is not in agreement with the child's assignment.

Six: where the adopting parents or the child are Spaniards, the foreign adoption subject to recognition must produce legal effects which are substantially similar to those envisaged under the Spanish legal system, their denomination in the foreign country being irrelevant (Article 26.2 LAI). Similarity of effects is based on breaking with biological family ties and the establishment of filiation ties with the adopting parents which are identical to natural filiation (Article 26.2.II). Furthermore, these ties must be irrevocable. Therefore, if the adoption constituted were revocable, the adopting parents must waive this possibility before bringing the child to Spain. Such waiver can be through the signing of a public document or by appearing before the authority responsible for the Civil Register. In the absence of this equivalence of effects, the adoption will not be recognised as such, at least not as an adoption regulated by Spanish law. In fact, this equivalency mandate is found under a precept entitled "requirements for validity in Spain of adoptions constituted by foreign authorities".[92] However, this does not prevent the said adoption from being recognised as a simple (not full) adoption provided for under national law in accordance with Article 9.4 of the Civil Code (see Article 30.1 LAI).

Seventh and last: if the child is Spanish, consent from the public official corresponding to the child's last place of residence in Spain is required (Article 26.4 LAI). The regulation is both lacking and excessive. Lacking because consent should extend to any minor residing in Spain whose duty it is for Spanish public authorities to protect. Excessive because it is debatable whether Article 26.4 LAI requires the consent of the Spanish authorities for recognition of the adoption of a Spanish minor residing in a foreign country. Spain is unable to guarantee the

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[89] See S. García Cano, *loc. cit.*, p. 44.

[90] According to Article 176 of the Civil Code and Article 24 LAI. *Vid. supra* II.3.

[91] Resolution-Circular of 15 July 2006, *cit.*, No. II. See P. Orejudo Prieto de los Mozos, "El certificado de idoneidad de los adoptantes en el marco de la prevención del tráfico internacional de menores", *Aranzadi Civil*, No. 12, 1998, pp. 13–26.

[92] This is the line from the Resolution-Circular of 15 July 2006, prior to the LAI.

well-being of all Spaniards living abroad. Here, the issue of personal statute is not at stake but rather the protection of a minor. Moreover, no specification is made as to whether consent is waived where a Spanish child has never resided in Spain; and if it is not waived, no mention is made as to what Spanish authority would issue such consent.

4. The effectiveness of simple foreign adoption

Recognition of simple adoption features two dimensions. The first is addressed in Article 30.1 LAI advocating the extension of its effects[93] and permitting it in Spain as such (simple adoption) with the content provided for under the national adoption law. The second is found in Article 30.4 LAI where simple foreign adoption is used as a springboard for conversion to full Spanish adoption. For the purposes of this conversion (Article 30.4 LAI) which we will analyse further on, simple adoption is considered as placement in foster care. The foreign institution of child protection which does not imply any filiation tie under the law of its constitution, is also considered foster care and not adoption (either simple or full).

In this context, there is an apparent contradiction between the rule allowing recognition of a simple adoption[94] and that which makes recognition of the adoption contingent upon its equivalency with Spanish Law.[95] That contradiction needs to be solved by recognising that the said equivalency can only be applied with respect to full adoption, i.e. adoption regulated under Spanish law.[96] However, the LAI admits the effectiveness of simple adoptions envisaged in other (non-Spanish) legal systems. Hence, according to Article 30(2) LAI, the national law of the child determines the existence, validity and effect, as well as attribution of the authority of the parents, with regard to simple adoptions constituted by foreign authorities. However, these adoptions are not entered into the Civil Register as such as long as they could still be considered foster care (Article 154 RRC).[97] Perhaps the law governing the Register should be adapted so as to provide access to the Register by a foreign filiation institution without having to re-channel it as foster care.[98]

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[93] As a basic value of intercultural dialogue, see A. Malatesta, "Cultural Diversity and Private International Law", in G. Venturini (Ed.) and S. Bariatti (Dir.), *Nuovi Strumenti del Diritto internazionale privato. Liber Fausto Pocar*, Milán, Giuffrè Editore, 2009, pp. 643–657, esp. pp. 653 and subsequent. For recognition of multicultural policy of the LAI, see A.L. Calvo Caravaca and J. Carrascosa González, *La Ley 54/2007…, op. cit.*, p. 298.

[94] Article 30 LAI remitting to the provisions of the national law of the child.

[95] Article 26.2 LAI when the adopting parents or the child are Spanish.

[96] See A.L. Calvo Caravaca and J. Carrascosa González, *La Ley 54/2007….. op. cit.* p. 299.

[97] From a critical perspective, see M.L. Martín García, "Aproximación a la figura de la adopción internacional", *R.D.P.*, May-June 2008, pp. 85–100, esp. p. 100.

[98] There is a certain parallel with the informative annotation of foreign decision which, with regard to civil status, has not been applied to *exequatur* in Spain (Article 38.4 L.R.C.). However, the parallel is not complete insofar as simple adoption has been recognised in Spain with the peculiarity that such recognition is not by means of exequatur but rather

Moreover, according to Article 19.1 of the Civil Code, this type of adoption does not allow for Spanish nationality. It should be recalled that this precept attributes Spanish nationality of origin to children adopted by Spanish nationals[99] precisely due to a claim of *absolute* equivalence between natural and adoptive filiation. In other words, adoption is fully effective in this sense.[100]

The continuance of simple adoption in Spain is subject to the provisions of national adoption law. It is not very clear why the *validity* of simple adoption is governed by this national law rather than by the law governing habitual residence as is the case with full adoption. The application of the national law for the purposes of filiation (Article 9.4 of the Civil Code to which Article 30.1 LAI refers) is more justifiable. Remittal to this law apparently presupposes that, irrespective of the intensity of its effects, simple adoption has a nucleus of filiation. Otherwise, it would not be recognised as simple adoption but would rather put in the same category, pursuant to Article 34 LAI, as foster care or legal guardianship. Based on this nucleus of filiation, national adoption law defines the inherent effects of said adoption, for instance the fact that it can be revoked or the degree of distance with family blood lines.[101] This means that the said law does not refer to a different type of effect such as the attribution of nationality (governed by the law of the State whose nationality is being questioned) or even inheritance rights subject to the law governing succession.[102]

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through automatic recognition. Likewise, although the informative annotation of "event concerning Spaniards or occurring in Spain affecting civil status under the foreign Law" is a possibility (Article 38.3º LRC), its origin and systematic application are intended for acts constituted by foreign authorities with no effect in Spain. But here it is a matter of an annotation in the Registry of acts constituted by a foreign authority which can be recognised.

[99] Providing that the child is a minor under 18. If the child is older, the adoption would give him or her the right to Spanish nationality of origin for a period of two years following the adoption (Article 19.2 of the Civil Code).

[100] Other forms such as Spanish legal guardians or foster parents do not attribute Spanish nationality of origin but rather only provide the possibility of acquisition of the Spanish nationality, not of origin, after residing in Spain for one year.

[101] The establishment of a filiation fully coincident with natural filiation, the break with substantial ties with the original family and the renouncement of the revocability of the adoption are important circumstances in considering that the foreign adoption substantially corresponds with the effects of adoption regulated under Spanish Law (Article 26.2 LAI). All of this is part of the equivalency needed for the recognition of the foreign adoption where the adopting parents and child are Spanish.

[102] After a transposition of institutions between the adoption envisaged under the law governing succession and the simple adoption under scrutiny.

V. CIRCUMSTANCES SUBSEQUENT TO THE CONSTITUTION OF THE ADOPTION

1. Registration in the Civil Registry

Once the adoption has been constituted, by the Spanish or foreign authority, the latter must contact the Spanish Civil Register. From the general regulation of the LRC (Article 15) it can be deduced that adoptions constituted in Spain or constituted abroad must be entered in the Register when they affect the civil status of a Spaniard. It is assumed that an adoption, since it generates a paternal-filial relationship between the adopting parents and the child, affects the civil status of both and therefore an adoption constituted abroad must be entered when the adopting parents or child are Spaniards.

This requirement for adopting parents or child of Spanish nationality to register an adoption constituted abroad is doubtful in the light of the references of the LAI. Article 29 provides that when the adoption is constituted abroad and the adopting parents have legal domicile in Spain, they may request registration of the birth of the child and the adoption pursuant to Articles 12 and 16.3 of the LRC. *Prima facie* it could appear that this precept envisages a new circumstance for registration of an adoption constituted abroad insofar as the Register is accessible not only when the adopting parents or child are Spanish but also when the adopting parents have legal domicile in Spain. In fact, it generates the fictitious idea that the registrable event has actually occurred in Spain because it allows the domicile of the adopting parents to figure as the place of birth of the child. However, a closer look at the regulatory precedents, especially the Resolution-Circular of 15 July 2006,[103] leads one to conclude that article 29 LAI (and Article 16.3 LRC by remittal) do not formally alter the circumstances of registration of the adoption constituted abroad. These are, as from Article 15 LRC, that the adopting parents or the child must be Spanish. Adoption by aliens done outside of Spain may be entered in the Register due to the mere fact that the adopting parents have legal domicile in Spain.[104]

The purpose of Article 29 LAI is to allow the adopting parents to preserve secrecy regarding the origins of the adopted child. To that end, the Directorate-General of Registries and Notaries Public authorised, by virtue of the Instruction of 15 February 1999,[105] the registration of adoptions exclusively with the data regarding the adoptive filiation. Even so, the place of birth of the child could reveal that an adoption had taken place. Therefore the Directorate-General of Registries and Notaries

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[103] Together with the Instruction of 28 February 2006, especially Guideline III on special rules regarding the registration of intercountry adoption (Official State Gazette, 24-III-06).

[104] In this same vein see J.M. Espinar Vicente, *loc. cit.*, pp. 1957–1958; S. García Cano, *loc. cit.*, p. 39.

[105] Official State Gazette No. 2, 30.05.09.

Public, by virtue of the Instruction of 01 July 2004[106] established the right of the adopting parents, in the main entry of the adoption, to use their legal domicile as the child's place of birth providing such domicile is in Spain.[107] This policy of the Directorate-General of Registries and Notaries Public was introduced into registry legislation through the addition of paragraph three to Article 16 LRC,[108] to which Article 29 LAI remits. Said Article 16 LRC does not alter the circumstances under which an event occurring outside of Spain may be registered which are laid down in Article 15 LRC; *in casu*, the Spanish nationality of the adopting parents or the child. Article 16.3 LRC (and by remittal Article 29 LAI) is, therefore, a regulation which acts on the basis of the registration mandates contained in Article 15 LRC. It defines itself as a regulation of "(c) territorial jurisdiction of the Civil Register" and, as such, is covered by the Resolution-Circular of 31 October 2005. Indeed, with the understanding that, *fictio iuris*, the child was born at the Civil Registry of the municipality corresponding to the domicile of the adopting parents, excludes the jurisdiction of the Central Civil Registry because children born in Spain are not registered in that latter Register.[109]

2. Post-adoptive obligations

Once the adoption is constituted by a Spanish authority or the adoption ruling by a foreign authority is recognised, a filiation tie exists which is equivalent to biological filiation. Therefore, the nature and content of the filiation and paternal-filial relations are governed by the same rules as biological filiation, especially by Article 9(4) of the Civil Code which remits to the national law of the child and, failing that, the law on habitual residence. Child protection and parental responsi-

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[106] Official State Gazette No. 161, 5-VII-04.

[107] If the purpose of this practice is to protect the secrecy of the adoption data, it would not make sense to use the domicile of the adopting parents as the place of birth if that domicile were located outside of Spain. In that case, birth could not be established in Spain and the intended aim of privacy would not be achieved. However, there are other cases in which the logic of this latter argument is not so clear. Imagine two Spaniards who reside and have their domicile in a foreign State during most of their lives. If that state figures as the place of birth, the privacy of the adoptive filiation would indeed be preserved.

[108] See Article 16.3 LRC introduced by Additional Provision 7 of Law 24/2005 of 18 November 2005 regarding reform to boost productivity (Official State Gazette, 19-XI-05)].

[109] This Central Register has residual jurisdiction when the place of birth does not correspond with any consular Register or the latter cannot operate for some extraordinary reason. Where the applicant has legal domicile in Spain, in accordance with the Resolution-Circular of 15 July 2006, the entry may initially be made in the Central Register and then later, transferred to the Consular Register. See the Instruction of the DGRN of 28 February 2006 (Official State Gazette, 24-III-06) and the Resolution-Circular of the DGRN of 15 July 2006 on recognition and entry of intercountry adoptions in the Spanish Civil Register (Official State Gazette, 30-VIII-06). In the doctrine, see S. Álvarez González, "Reconocimiento e inscripción en el Registro Civil de las adopciones internacionales", *REDI*, vol. LVIII, 2006, pp. 683–710.

bility measures are also governed by the national law of the child (*ex* Article 9.6 of the Civil Code), except for provisional or urgent measures which are subject to the law on habitual residence. However, despite the equality of biological and adoptive filiation, specific cases and circumstances could arise after the constitution of the adoption.

First of all, the Spanish public entity or the foreign entity of origin may request follow-up reports meaning that the adopting parents are under obligation to participate in interviews and submit information and documentation deemed appropriate (Article 20 of the 1993 HC and 11.1 of the LAI). Having regard to post-adoptive follow-up required by the State of origin, the Spanish public entity and the ECAIs provide the guidance needed (Article 11.2 LAI), in this latter case, in the terms laid down in the intermediation contract. For there to be post-adoptive obligations required by the Spanish entity, the adoption must be constituted by the Spanish authorities or by foreign authorities and recognised in Spain. In any case, national legislation does not provide for penalties which could arise from failing to comply with these obligations.

Secondly, after the constitution or recognition of the adoption, the right to know one's biological origins could be exercised. The LAI appears to be based on a unilateral rule which is applicable irrespective of the law governing the constitution. Hence, the Spanish public entities will release the date in their possession regarding the origin of the child while offering counsel, help and mediation through specialised services. In fact, public entities are under obligation to preserve the information on the origin of the child, including the identity of the biological parents and the medical history of the child and his/her family. Moreover, the ECAIs are under obligation to furnish all data concerning the origin of the child to the public entity. However, the LAI has two ways of overcoming the "limitation" which could arise from the law of the child's State of origin. First of all, when the authorities of the State of origin assign the child and make the corresponding communication to the Spanish public entity, data which may not be divulged may be reserved. Second of all, these data may be communicated to the Spanish public entity under the reservation that under no circumstances may they be revealed, the latter assuming said reservation under Article 12 LAI.

And lastly, we would note that the constitution of a first adoption may condition second adoptions. There are two standard cases. The first is that the adopting parents who have already undergone the process of an intercountry adoption and undertake to adopt a second child, may be exempted from the training courses at the administrative stage of applying to adopt. The second is that the child adopted by a single parent is later adopted by that parent's spouse or common law partner. In the light of the opposition of some States to adoptions by same-sex couples, this practice has led to irregular practices: one member of the couple applies to adopt. If the State of origin recognises Spanish adoptions or the foreign adoption is constituted allowing the departure of the child and possible residence in Spain and/or Spanish nationality, then the other member of the couple applies to adopt the child of his/her spouse. While technically legal, this practice certainly does circumvent the will of the authorities of the foreign State who have recognised

the Spanish adoption or who have constituted it themselves. Indeed, it can cause distrust in processing intercountry adoption adoptions with Spain leading to refusal to assign children to single parents.

3. Decisions affecting the constitution of the adoption: conversion, voidness and review

The LAI regulates aspects concerning the voidness, modification, review or conversion of adoptions, from the point of view of international jurisdiction (Article 15), applicable law (Article 22) and recognition of decisions (Articles 28 and 39). The said regulation is based on two rules: the Spanish authorities may *enact* resolutions which affect Spanish or foreign instruments of constitution and may also *recognise* foreign judgements affecting foreign or Spanish instruments of constitution.

Having regard to international jurisdiction, the LAI describes the cases in which a Spanish authority may nullify, amend, convert or review an adoption. Specifically, *voidness* may be declared by a Spanish authority when the child or the adopting parents are Spanish or were residing in Spain when the voidness request was submitted. If the adoption is constituted by the foreign authority of the place of residence of the adopting parents and the child, one may wonder to what extent the Spanish authority should be considered competent to nullify the adoption based solely on the fact that the adopting parents, for instance, are Spanish. Also, the Spanish authorities are competent to nullify an adoption also constituted by a Spanish authority (Article 15.1 of the Civil Code) but in this case without having to meet the aforementioned competency criteria. These are cases where Spanish nationality was lost or place of residence changed between the time of the constitution of the adoption and the lodging of the voidness request. Despite the fact that there are no ties between the authority which constituted the adoption and the family place of residence after the adoption, it makes sense to give the Spanish authorities competence in the voidness proceeding. It should be recalled that voidness of the act is retroactive to the time of the constitution of the act, and the said constitution was performed by a Spanish authority.

Having regard to the jurisdiction of Spanish courts to *convert* a simple adoption into full adoption, the LAI provides for the same fora as for voidness.[110] Therefore, not only do they have jurisdiction when the adopting parents or the child are Spanish or reside in Spain, but also when the adoption is constituted by virtue of Spanish authority. Jurisdiction comes into play in this latter case even if the simple adoption has been cut off from the Spanish legal system owing to the nationality or residence of the adopting parents or the child at the time of the conversion. We contend that the constitution of the adoption implies a stable tie with the Spanish legal system, irrespective of any disconnection resulting from the family situation. In cases of *revision or modification*, another competency criterion is added to these: where the adoption was constituted by a foreign authority and then recognised in

[110] Providing that the law applied to the adoption includes the possibility of simple adoption.

Spain (Article 15.3 *in fine*). This criterion has the drawback of converting a rule of procedure, i.e. that the adoption was previously recognised, into a competency forum.[111] We would recall that recognition of the foreign adoption may be due to different causes, most of which are insufficient in attributing competency to Spanish courts. Hence, for example, if in Spain there is a case concerning the inheritance of an alien because he owns real estate in Spain (Article 22.3 LOPJ) and the recognition of an adoption is raised for the declaration of heirs, this fact is not sufficiently significant to give Spanish courts the jurisdiction to review or modify the adoption. Neither is it clear why the prior recognition of the adoption is a competency criterion for review or modification but not for the conversion of a simple adoption into a full one.

The Law applicable to conversion, voidness and review is the same as for the constitution of the adoption (Article 22 LAI). It is not clear whether the determining factor is the habitual residence of the child at the time when the review, voidness or conversion request is lodged or when the adoption was initially constituted. Neither is it clear if it is the habitual residence resulting from the adoption or the possible habitual residence which would result from the declaration of nullity, conversion or review.[112]

Application of Spanish dispute rules to determine the voidness of adoptions constituted by foreign authorities generates the risk of nullifying adoption which are perfectly valid in the State of constitution. In this case, one should not expect the said State to recognise the voidness declared by a Spanish judge just as one could not expect Spain to recognise a foreign declaration of nullity with regard to a valid adoption in Spain. Two separate decisions may be distinguished from the perspective of applicable law: one having to do with the voidness or validity of the act in accordance with the legal system of constitution;[113] the other concerning whether an act which is valid in the State of constitution is recognised on

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[111] Despite the fact that some authors do not consider this as a different jurisdiction rule but rather a rule of procedure (*cf.* R. Arenas García and C. González Beilfuss, *loc. cit.*, p. 16). However, a literal reading of the LAI leaves no doubt that Spanish courts shall have jurisdiction where the requirements laid down in Article 15(1) are met and "also when, furthermore" (*sic*), the adoption constituted by a foreign authority has been recognised in Spain.

[112] Other unclear issues can be found in E. Alonso Crespo, "Ley de adopción internacional: formas de dejar sin efecto – o variar – una adopción de este tipo (nulidad, modificación o revisión, conversión) y sus consecuencias", *La Ley*, No. 6925, 15-IV-2008, pp. 1–9, esp. pp. 4–5.

[113] The competent legal system in accordance with the theory of P. Picone [see "La méthode de la référence à l'ordre juridique compétent en droit international privé", *R. des C.*, t. 197, 1986 (II), pp. 229–420, esp. pp. 287 and subsequent]. Supporting that this theory fits in the LAI despite the literal reading of Article 22, see A.L. Calvo Caravaca and J. Carrascosa González, "Modificación, revisión, nulidad y conversión de la adopción internacional y la Ley 54/2007, de 28 de diciembre", *B.I.M.J.*, núm. 2073, 2008, pp. 3857–3878, esp. p. 3866. However, assuming this could be a *contra legem* interpretation, see N. Marchal Escalona, "Disolución de la adopción en el Derecho internacional privado español", *AEDIPr.*, t. VIII, 2008, pp. 97–126, esp. p. 111.

not in Spain, the place where the voidness issue is being addressed. This second decision would have a different territorial scope, limited to the authorities of the forum, whose public order cannot be imposed on other States. Whereas regarding the modification, review or conversion of adoptions the initial act must first be recognised, this logic is just the opposite in voidness proceedings.[114] First the validity of the act is determined according to the constituting State and then the issue of recognition is raised in the State of the forum. This inverse order is due to the fact that the main proceeding questions precisely the recognition of the act, i.e. its validity in the constituent State; if it is not valid in the State of origin, it will not be valid in the other country.[115]

Having regard to the transformation of a simple adoption into a full adoption, if Spanish law is applicable, the said adoption is treated as foster care. There are two possibilities if foreign law is applicable. First, that the foreign law governing the transformation is the same one as in the constitution of the simple adoption so that there is no problem of adaptation. Second, that the foreign law governing the transformation is not the same as the initial law. In this case, if the transformation law envisages simple adoption, one would have to assess its equivalence with the initial adoption which is going to be modified. If the transformation law does not envisage simple adoption, one would have to devise a functional equivalency between the initial simple adoption and some child protection measure envisaged in the law governing the transformation (foster care or similar).[116]

Whatever the law governing transformation the LAI, in line with the 1993 HC, requires a series of tangible guarantees. These entail that certain people, institutions and authorities must have consented (in writing) and must have been properly advised and informed, excluding the possibility of revocation of consent or the payment of any amount or any other type of compensation. Also, the mother's consent must have been granted after the birth. Regarding the children, with due consideration for their age and maturity, they must be counselled and informed with regard to the transformation and also heard. In cases where their consent is legally required, their free and legal statement must be safeguarded with no price or compensation.

And finally, recognition of a foreign decision altering an adoption previously constituted by Spanish or foreign authorities, is permitted. It would appear that the legislator wanted to follow the same process as in the act of constitution meaning that, in principle, this could be considered automatic recognition. However, this option is not always justified, especially where there is a judgement regarding the voidness of the adoption. This legal decision is an act of contentious (as opposed to voluntary) jurisdiction meaning that almost certainly there will be an exequatur.

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[114] For a different opinion, see A.L. Calvo Caravaca and J. Carrascosa González, "Modificación, revisión, nulidad…", *loc. cit.*, p. 3866.

[115] *Cf.* N. Marchal Escalona, *loc. cit.,* p. 105.

[116] See R. Arenas García and C. González Beilfuss, *loc. cit.*, pp. 18–19, regarding the difficulties of extending this procedure to the *kafalas.*

If, despite these considerations, recognition of the voidness judgement is subject to the same conditions as the constitution of the adoption, the applicable law according to the State of origin must be checked, i.e. the State where the voidness procedure was filed and not where the adoption was constituted. However, it would be appropriate to check applicable law in accordance with the rules of the State of constitution. In fact, a foreign judgement on voidness must require the application of the rules of the legal system of the State of constitution of the adoption, and not its own rules.

RESUMEN

El presente trabajo analiza la normativa y práctica española en materia de adopción internacional. En particular, se estudian los presupuestos y alcance de la intervención de las autoridades administrativas españolas. Asimismo, se aborda la constitución de la adopción por autoridad española, haciendo referencia a los criterios de competencia judicial internacional y de ley aplicable. Finalmente, se examinan los regímenes, procedimientos y condiciones de reconocimiento de adopciones extranjeras, así como las circunstancias postadoptivas.

Palabras Claves

Adopción internacional.-Intervención de autoridades administrativas. – Constitución por autoridad española: competencia y ley aplicable. – Eficacia en España de adopciones constituidas en el extranjero.

SUMMARY

This paper analyses Spanish regulation and practice in matters of intercountry adoption. It specifically studies the circumstances and scope of the intervention of Spanish administrative authorities. It likewise addresses the constitution of adoption by Spanish authorities making reference to the criteria of international jurisdiction and applicable law. Finally, it examines the systems, procedures and condition applicable to the recognition of foreign adoptions and post-adoptive circumstances.

Keywords

Intercountry Adoption; intervention of administrative authorities; constitution by Spanish authorities: competency and applicable law; effectiveness in Spain of adoptions constituted abroad.

RÉSUMÉ

Cet étude analyse les normes et la pratique espagnoles en cas d'adoption internationale. Il êtude les préssupposes et la poursuite de l'intervention des autorités

administratives espagnoles. Il aussi parle de la constitution de l'adoption par autorité espagnole, en faisant allusion à la competence judiciaire international et le droit applicable. Enfin, s'examinent les régimes, conditions et procedures de reconnaisance des adoptions étrangéres, et aussi les circunstances post-adoptives.

Mots-Clés

Adoption internationale. Intervention des autorités administratives. Constitution par autorité espagnole: competence judiciaire internationale et droit applicable. Efficacité à l'Espagne des adoptions étrangéres.