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The Spanish Intercountry Adoption: an Approach to the Law 54/2007

SUMMARY

The International Adoption Act (Law 54/2007, of December 28, hereinafter the IAA), is the first special Private International Law (PIL) act issued in Spain. The previous system was characterized by being dispersed. The IAA put an 'end to the regulatory dispersion characteristic of the previous legislation', inspired by the 'interests of the minor' as a guide to all adoption processes.

Key words: adoption, intercountry adoption, jurisdiction, PIL, IAA.

Słowa kluczowe: adopcja, adopcje międzynarodowe, jurysdykcja, prawo prywatne międzynarodowe.

Introduction

The legal regulation applicable to the international adoption, as an institution that creates a legal filiation link, is contained in the International Adoption Act (Law 54/2007, of December 28. This act aims to establish a general and complete catalogue of rules on the matter. So it regulates: a) The jurisdiction of the Spanish judicial and consular authorities; b) The applicable law; c) Recognition of adoptions constituted by foreign authorities¹.

¹ Regarding the IAA, *vid.* A. L. Calvo Caravaca, J. Carrascosa González, *La Ley 54/2007 de 28 de diciembre 2007 sobre adopción internacional (Reflexiones y comentarios)*, Comares, Granada, 2008; S. Álvarez González, "Reflexiones sobre la Ley 54/2007 de adopción internacional", *Diario La Ley*, 26 marzo 2008, *on line version*; ID., "La Ley de adopción internacional. Reflexiones a la luz de su texto, de sus objetivos y de la comunión entre ambos", *AEDIPr*, vol. VII, 2007, pp. 39-69; E. Gómez Campelo, *La Ley 54/2007 de adopción internacional: un texto para el debate*, Ed. Reus, Zaragoza, 2009; C. Espluges Mota, "La nueva ley española de adopción internacional de diciembre de 2007: ¿una ocasión perdida?", *RDIPP*, 2008-2, pp. 363-380.

However, the legal regime established by the IAA must be supplemented by the rules adopted by the Autonomous Regions² and by multilateral agreements. In particular, with the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, with the European Convention on the Adoption of Children, of 27 November 2008 (which mainly provide common principles of material law) or with bilateral agreements, such as the Agreement on adoptions with the Republic of Bolivia of 29 October 2001, the Convention on cooperation in matter of adoption with the Socialist Republic of Vietnam of 5 December 2007, or the Russian-Spanish agreement on cooperation in the adoption of Russian children of 9 July 2014, as well as other bilateral agreements of general scope also applicable to the intercountry adoption³.

The IAA in many places is confusing and adopts legislative policy options sometimes highly critizable from the point of view of its complexity but also from the point of view of its effects over the "interest of the minor". The whole adoption process is subject to a high degree of public intervention of the national or regional entities, or accredited entities. Moreover, the IAA excludes the adoption of foreign children or with habitual residence in another State when certain circumstances concur, such as when the country in which the minor to be adopted has his habitual residence is subject to armed conflict or immersed in a natural catastrophe; if the country does not have a specific authority to control and guarantee adoption; or when the country does not provide adequate guarantees for adoption and the adoption practices and formalities there do not respect the minor's interest, or do not fulfil the international ethical and legal principles.

As said before, from the point of view of the applicable legal regime, the IAA is organized around the three basic and classic problems of Private International Law a) The international jurisdiction of the Spanish authorities for the establishment of adoption; b) The applicable Law; c) The recognition of adoptions established abroad.

² The Autonomous Regions have responsibilities in matters concerning the protection of minors and various aspects of administrative dossiers relating to international adoptions: the involvement of minor-protection agencies, intermediation in international adoptions, accreditation, monitoring and verification of International Adoption Collaborating Agencies, the relationship between the latter and people wanting to adopt, the suitability of prospective parents, the post-adoptive obligations of adopters, etc., are all aspects regulated by the Autonomous Regions, usually in more detail and more precisely than the IAA itself. In fact, an important part of the Spanish Academia considers that most of Title I of the IAA, which regulates these same aspects, is not constitutional, as it invades the jurisdiction of regional legislators (*Vid.* S. Álvarez González, 'La Ley de adopción internacional...', *op. cit.* at 43-47).

³ Related to the minor's protection in the international conventions, *vid.* E. Pérez Vera, "El Convenio sobre los derechos del niño", *Garantía internacional en los derechos sociales*, Madrid, Ministerio de Asuntos Sociales. Documentos Internacionales 1990; E. Pérez Vera, "El menor en los Convenios de la Conferencia de La Haya de Derecho Internacional Privado", *REDI*, vol. XLV, 1993; M. Aguilar Benítez de Lugo, "La familia en los Convenios de la Conferencia de La Haya de Derecho Internacional Privado", *REDI*, vol. XLV, 1993-1, pp. 7-37; H. Van Loon, "Rapport sur l'adoption d'enfants originaires de l'étranger", *Actes et documents de la dix-septième session de la Conférence de La Haye de Droit International Privé*. Bureau Permanent de la Conférence, 1994.

The international jurisdiction of the spanish authorities for the establishment of adoption

The IAA includes international jurisdiction rules similar to those provided in Article 22.3 LOPJ. In this sense, the international jurisdictional criteria for adoption are the same as under the former legislation: the adopter or child must either be of Spanish nationality or habitually resident in Spain. At least in theory, this allows adoptions without a reasonable link with Spain, so the objective of internationally strong adoption runs a serious risk of not being met⁴. Specifically, the IAA combines alternatively four rules of jurisdiction: the Spanish authorities are competent to constitute an adoption either when the adopter (i) either is Spanish or (ii) has his habitual residence in Spain; or when adopting (iii) either is Spanish or (iv) has his habitual residence in Spain. This link with the Spanish territory shall be assessed, in any event, at the time of submitting the application of adoption to the competent Public Body (art. 14.2). Because of being a procedure in matters of Voluntary Jurisdiction, the general rule of the defendant's domicile or of the party's autonomy are excluded.

From a practical point of view, unless the child is already living in Spain, this option implies the removal of the child from their country of origin to Spain, usually under the legal cover of a simple adoption or of any other measure of foster care constituted abroad.

Moreover, the IAA remains the possibility of Consuls constituting adoptions, in the event of the adopting parent being a Spaniard and if the person to be adopted is habitually resident in the relevant consular district, provided the host State does not oppose this, nor prohibit it under its laws (art. 17). In any case, the citizenship of the adopting parent and of the habitual residence of the adopted person shall be determined at the time of commencing the administrative adoption proceedings.

Special rules for amendment, review, declaration of nullity or conversion from simple adoption⁵ into full adoption are also provided:

- (i) In relation to the declaration of nullity, the Spanish Courts and Tribunals shall be competent according to the same four forums set of rules explained before, or when the adoption has been constituted by a Spanish authority (Article 15.1.)

⁴ S. Álvarez González, 'The new international adoption system in Spain', *Yearbook of Private International Law*, Volume 10 (2008), p. 421; "Reflexiones sobre la Ley 54/2007, de adopción internacional", *Diario La Ley Digital* nº 6910, 25 de marzo 2008, año XXIX. A. L Calvo Caravaca, J. Carrascosa González, *La Ley 54/2007 de 28 de diciembre 2007...*, op. cit. pp. 84- 90, advocate the application of the "disconnection clause" to justify the declaration of non-jurisdiction of the competent Court in cases where the connection of the adoption with the Spanish territory is only formal.

⁵ According to art. 15.4 IAA, "Simple or less than full adoption shall be understood as that constituted by a competent foreign authority whose effects materially coincide with those foreseen for adoption under the Spanish Law.

- (ii) In relation to the amendment or review of an adoption, the Spanish Courts and Tribunals will have jurisdiction in the same cases stated in the previous paragraph, even if the adoption has been constituted before by a foreign jurisdiction as long as that adoption has been recognized in Spain (Article 15.3.).
- (iii) Finally, if the law applied to the adoption foresees the possibility of a simple adoption, the Spanish Courts and Tribunals shall be competent for conversion from simple adoption into full adoption in the same cases in which they have jurisdiction to declare the nullity of the adoption (Art. 15.2).

The applicable law

As for the applicable law, the IAA establishes an unnecessarily complex system. On one side it is based on the application of the Spanish law when the adoptee has or will have after adoption the habitual residence in Spain (art. 18). This solution is complemented by special connections in the field of capacity and of the adopting necessary consents in order to ensure the recognition of the adoption constituted in Spain in other States. Thus, it is expected that the capacity of adopting and the consent for adoption shall be governed by the national law of adopting, and not by the Spanish law, if the person to be adopted was habitually resident abroad or if the adoptee, resident in Spain, does not acquire Spanish citizenship after the adoption (art. 19.1).

A contrario sensu, it seems that the Spanish law will govern the limits on the ability of the adopter. However, this assessment is subordinated to the Spanish authority considering that it facilitates the effectiveness of the adoption in the State of the nationality of the adoptee (art. 19.2). It is also allowed to combine the application of Spanish law with the law or foreign laws relating to nationality or habitual residence of the adopter or adopting in matters of consent, hearings and authorizations when it facilitates the recognition of the Spanish adoption in other countries and whenever it is requested by the adopter or by the prosecution (art. 20).

In the unlikely event that the adoptee is not habitually resident in Spain or is not going to be relocated to Spain the constitution of the adoption shall be governed by the Law of the country that has formerly been, or to which the person to be adopted is to be relocated in order to establish habitual residence in that country. If this criterion fails, it will be governed by the Law of the country of habitual residence of the person to be adopted. This solution is also complemented by the possibility of taking into account the requisites of capacity of the person to be adopted and the necessary consent of all the subjects involved in the adoption foreseen in the national law of the person to be adopted, in the event of that authority considers that observing such requisites facilitates the validity of

the adoption in the country of the nationality of the person to be adopted (Art. 21.2). Moreover, the Spanish authority may also take into account the consents hearings or authorizations required by the national law or by the law of the habitual residence of the adoptive parent or of the person to be adopted, in the event of that authority considers that observing those requisites facilitates the validity of the adoption in other countries related to the case (art. 21.3).

The law designated in accordance with the above rules governing the constitution of the adoption and conversion, revision or annulment (Art. 22) but in no case will the foreign law be applicable if it is contrary to public policy, taking into account primarily the minor's interest (art. 23).

Effectiveness of foreign adoptions

Previous to the analysis of the IAA rules in this field, it is necessary to point out that the effectiveness of the IAA is limited to the recognition of adoptions constituted by foreign authorities of States that have not signed an agreement in this matter with Spain. As for the recognition in Spain of adoptions constituted abroad, and without prejudice to the prevailing application of the Hague Convention of 29 May 1.993 or other bilateral conventions, the IAA makes a distinction between the effects of a full adoption and a simple adoption:

The effectiveness of full foreign adoption

When the effects of the foreign adoption are similar to the effects of a full adoption under the Spanish Law, the legal treatment of the recognition is, once again, unnecessarily complex⁶.

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

1. *The adoption must have been constituted before a competent public authority, judicial or otherwise* (Art. 26.1.1 IAA): Its international jurisdiction will be controlled. Firstly, the constituent authority must be competent in accordance with its own law. In other words, it is deemed that a foreign authority that constituted the adoption is internationally competent if the criteria established in its own laws were respected in the constitution of the adoption. Secondly, although formulated in a negative way, the Spanish judge must check whether those jurisdiction criteria applied by the judge of origin are based on reasonable connections. The meaning and scope of this general and undefined condition introduces a high degree of uncertainty. The Law refers to "reasonable connection of origin", as for the authority of the State of the nationality or habitual residence of the child. The IAA also alludes to "family background" (for example, the

⁶ Systematizing the correspondence test, RDGRN of 6 May 2009 or 28 April 2010.

nationality or residence of the biological parents of the child) and to other connections “of a similar nature”⁷.

2. *The adoption must have been constituted in accordance with the law or laws designated by the conflict-of-laws rule of the State of the constituent authority (Art. 26.1.2 IAA):* In this sense, it does not matter whether the authority of origin applies conflict-of-laws rules different from those envisaged by 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. This control is based on the wrong idea 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, leading to review of the substance of the case⁸. Fortunately, the IAA allows for corrections for filling out a consent form or declaration required under the foreign law. The LAI provides that if the Spanish authority notes that no declaration of will has been provided, or that the consent required by the foreign Law that regulates the constitution of the adoption has not been provided, that requisite may be completed in Spain before the competent Spanish authorities pursuant to the criteria set forth in the IAA or before any other competent foreign authority.
3. *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, irrespective of their denomination in the foreign country (Article 26.2 IAA):* In the absence of this equivalence of effects, the adoption will not be recognized as such, at least not as an adoption regulated by Spanish law. In particular, the Spanish authorities shall ensure that the adoption constituted by a foreign authority causes extinction of the material legal bonds between the adopted person and his former family, which make the same ties of filiation arise as those of biological filiation and that are irrevocable for the adoptive parents (if the foreign Law admits that the adoption constituted under its auspices may be revoked by the adoptive parent, it shall be an indispensable requisite that, prior to bringing the minor to Spain, the parent renounce to the exercise of the power to revoke it. The renunciation shall be formalized in a public deed by appearance before a Civil Registry Officer.
4. *Where the adoptive parent is a Spaniard and resident in Spain, the competent Spanish public body shall declare his suitability prior to the adoption being*

⁷ Given this breadth and lack of definition, the reference to “reasonable criteria” could include, although the IAA 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 (P. Rodríguez Mateos, A. Espiniella Menéndez, “Spanish Practice in Respect of Intercountry Adoption”, *Spanish Yearbook of International Law*, Volume XV, 2011, p. 131).

⁸ R. Arenas García, C. González Beilfuss, “La Ley 54/2007 de 28 de diciembre de adopción internacional: entre la realidad y el deseo”, *REEL*, No. 17, 2009, p. 25.

constituted by a competent foreign body (Art. 26.3 IAA): This requirement is waived where such a declaration is unnecessary when the adoption is constituted before Spanish authorities. The lack of a competency declaration cannot be corrected after the constitution of the adoption. Nevertheless, it seems improper that consent with the assignment proposal made by the child's authorities is not requested from the Spanish public authority.

5. *If the child to be adopted is Spanish, consent from the public official corresponding to the child's last place of residence in Spain is required* (Article 26.4 LAI): Should the person to be adopted be a Spaniard at the time of constituting the adoption before the competent foreign authority, consent by the relevant Public body of the last place of residence of the person to be adopted in Spain shall be required.
6. *The adoption must appear on an authentic public document translated into an official Spanish language* (Article 26.5): In this sense, the document recording the adoption constituted before a foreign authority shall fulfill the formal requisites of authenticity consisting of legalization or apostille and translation into an official Spanish language. However, the IAA reserves any provision which exempts compliance with these requirements which is consistent with the flexibility of the regulation governing the register regarding these requirements⁹.

The effectiveness of simple foreign adoption

The effectiveness of simple adoption is regulated in article 30 IAA. Article 30.1 IAA advocates the extension of its effects and allows it in Spain as such simple adoption with the content provided for under the national adoption law. According to this provision, simple or legally less full adoption constituted by a foreign authority shall take effect in Spain as a simple adoption if it complies with the national law of the person adopted pursuant to art. 9.4 of the Spanish Civil Code. The national law of the person adopted under simple or less full terms shall determine the existence, validity and effects of these adoptions, as well as the attribution of parental authority. However, simple adoptions shall not be subject to inscription at the Spanish Civil Registry as adoptions, nor shall they give rise to acquisition of Spanish citizenship.

Article 30.4 LAI allows simple foreign adoption to be used as a tool for conversion to full Spanish adoption. The conversion shall be governed by the law determined according to the IAA. In all cases, the competent Spanish authority shall examine the concurrence of the following particulars:

⁹ Articles 86 to 89 RRC

- a) That the persons, institutions and authorities whose consent is required for the adoption have been duly counselled and informed of the consequences of their consent, on the effects of the adoption and, specifically, regarding extinction of the legal bonds between the person and his family of origin;
- b) That such persons have freely declared their consent, in the legally foreseen manner, and that said consent has been provided in writing;
- c) That the consents have not been obtained by payment or compensation of any kind whatsoever and that such consents have not been revoked;
- d) That consent by the mother, when required, has been provided after the child's birth;
- e) That, taking into account the child's age and degree of maturity, he has been appropriately counselled and informed of the effects of the adoption and, when required, his consent thereto has been secured;
- f) That taking into account the child's age and degree of maturity, he has been heard;
- g) That, when consent from the minor must be secured in an adoption, that he freely declared, in the manner and with the legally foreseen formalities, be examined and without there having been a price or compensation of any kind whatsoever.

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