

The Legal System in Relation to International Adoption in Spain: Present and Future

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SUMMARY: I. INTRODUCTION. II. CONCEPT. III. PUBLIC ENTITIES AND ACCREDITED BODIES. IV. CAPACITY AND REQUIREMENTS FOR INTERNATIONAL ADOPTION. V. RULES OF PRIVATE INTERNATIONAL LAW RELATING TO INTERNATIONAL ADOPTION. VI. FUTURE PROSPECTS. VII. BIBLIOGRAPHY CONSULTED.

Resumen: Las adopciones internacionales son un supuesto cada vez más común en una sociedad globalizada. El ordenamiento jurídico español mediante la Ley de Adopción Internacional resuelve de forma plena los problemas clásicos del Derecho internacional privado. Además, se prevé un nuevo reglamento que desarrolle los aspectos más complejos como el régimen de acreditación de las entidades de certificación.

Abstract: International adoptions are an increasingly common assumption in a globalized society. The Spanish legal system through the International Adoption Act fully resolves the classical problems of private international law. In addition, a new regulation is planned to develop the more complex aspects such as the accreditation regime of certification entities.

Résumé: Les adoptions internationales sont une hypothèse de plus en plus courante dans une société mondialisée. Le système juridique espagnol à travers la loi de l'adoption internationale résout pleinement les problèmes classiques du droit international privé. En outre, une nouvelle réglementation est prévue pour développer les aspects plus complexes tels que le régime d'accréditation des organismes de certification.

Palabras clave: Adopción internacional, Derecho internacional privado, reglamento, entidad de certificación.

Keywords: International adoptions, private international law, regulation, certification entities.

Mots-clés: adoptions internationales, droit international privé, réglementation, organismes de certification.

I. INTRODUCTION

The economic and demographic circumstances of certain countries, in which many children are not given the possibility of having a favorable environment for their development, together with the fall in the birth rate in Spain, have caused that, in recent years, the number of foreign minors adopted by Spaniards or residents in Spain has increased significantly.

The increase in the number of adoptions constituted abroad is, in turn, a major legal challenge for the legislator, who must provide the necessary regulatory instruments to ensure that adoption takes place with the utmost guarantees and respect for the interests of the children to be adopted, enabling the harmonious development of the child's personality in the context of a favourable family environment; all this in the context of the most scrupulous legal certainty, which is always in the interests of all those involved in an international adoption, especially and first and foremost for the benefit of the adopted child.

It is necessary to emphasize the significance of the principles contained in the United Nations Convention on the Rights of the Child, dated 20th November 1989, in the United Nations Declaration on the Social and Legal Principles relating to the Protection and Welfare of Children, with special reference foster placement and adoption, nationally and internationally (General Assembly Resolution 41/1985, dated 3rd December 1986), in the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, concluded at The Hague on 29th May 1993, ratified by Spain by Instrument dated 30th June 1995.

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In application of the Constitution and of the international legal instruments in force for Spain, Law 54/2007, dated 28th December, on International Adoption (*Ley 54/2007, de 28 de diciembre, de Adopción Internacional*, hereinafter "LAI") conceives international adoption as a measure to protect minors who cannot find a family in their countries of origin and establishes the necessary and adequate guarantees to ensure that international adoptions are carried out, first and foremost, in the child's best interests and with respect for his/her rights. It is also intended to prevent the abduction and sale or trafficking of children, while ensuring non-discrimination against the child on grounds of birth, nationality, race, sex, disability or illness, religion, language, culture, opinion or any other personal, family or social circumstance.

II. CONCEPT

According to Article 1.2 of the LAI, international adoption is understood as "that in which a minor who is considered to be adoptable by the competent foreign authority and is habitually resident abroad is or will be relocated in Spain by adopters who habitually reside in Spain, either after adoption in the State of origin or for the purpose of constituting such adoption in Spain".

III. PUBLIC ENTITIES AND ACCREDITED BODIES

1. *Intervention of public entities*

Article 5 of the LAI states that, with regard to international adoption, it is the responsibility of Public Entities to:

- a) Organize and provide information on legislation, requirements and necessary formalities in Spain and in the countries of origin of the minors, ensuring that this information is as complete, correct and up-to-date as possible and freely accessible to the families involved and by accredited bodies.
- b) Provide families with the necessary training throughout the entire process to enable them to understand and deal with the implications of international adoption, preparing them for the proper exercise of their parental responsibilities once such adoption is established. They may delegate this function to accredited bodies or duly authorised institutions or entities.
- c) Receive applications for adoption in any case, and its processing, either directly or through accredited bodies.
- d) Issue, in any case, and following preparation, the certificates of suitability of the psychosocial report of the persons offering themselves for adoption, either directly or through duly authorised institutions or entities, and, where required by the adoptee's country of origin, the monitoring commitment.
- e) Receive the assignment of the minor from the competent authorities of the country of origin containing information on his/her identity, adoptability, social and family environment, medical history and particular needs, as well as information concerning the granting of consents of persons, institutions and authorities required by the legislation of the country of origin.
- f) Give approval concerning the adequacy of the characteristics of the minor assigned by the competent body of the country of origin with those appearing in the psychosocial report accompanying the certificate of suitability.
- g) Provide technical support throughout the international adoption process for minors and persons offering themselves for adoption, with particular attention being paid to persons intending to adopt or having adopted minors with special characteristics or needs. During the stay of the adopters abroad, they will have the collaboration of the Foreign Service.

- h) Carry out the monitoring reports required by the minor's country of origin, which may be entrusted to accredited bodies or other approved entities.
- i) Establish qualified resources for post-adoptive support and mediation in the search for origins, for the adequate care of adoptees and adopters, which may be entrusted to accredited bodies or authorized entities.
- j) Report mandatorily to the General State Administrations on the accreditation of bodies, as well as controlling, inspecting and preparing guidelines for the follow-up of bodies whose headquarters are located in the geographic area for those intermediary activities carried out in their territory.

In addition, in their actions regarding international adoption, the Public Entities will promote measures to achieve maximum coordination and collaboration among them. In particular, they will endeavour to homogenise procedures, terms and costs.

The Public Entities will provide the General State Administration with statistical information on the processing of international adoption cases.

2. The intermediation activity in international adoption

Article 6 of the LAI states that international adoption intermediation is deemed as "any activity with the objective of liaising by putting in contact or in relation persons who offer themselves for adoption with the authorities, organizations and institutions of the country of origin or residence of the adoptable minor and to provide sufficient assistance for the adoption to take place".

The role of intermediation in international adoption may be carried out: (a) by Public Entities directly with the central authorities in the countries of origin of minors which have ratified the Hague Convention dated 29th May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, provided that at the administrative stage in the country of origin no natural or legal person or body which has not been duly accredited is involved; or (b) by duly accredited bodies.

No other person or entity may act as an intermediary for international adoptions.

However, the General State Administration, in collaboration with Public Entities, may establish that, in respect of a particular State, only international adoption applications through bodies accredited or authorized by the authorities of both States will be processed.

According to Article 6.3 of the LAI, the functions to be performed by accredited bodies for intermediation will be the following:

- a) Informing the interested parties about international adoption.
- b) Counsel, training and support to the persons who offer themselves for adoption about the significance and implications of adoption, about the relevant cultural aspects and about procedures that must necessarily be carried out in Spain and in the countries of origin of the minors.
- c) Intervention before the competent authorities, both Spanish and foreign, in the processing of adoption applications.
- d) Intervention in the processing and carrying out of the corresponding procedures for compliance with the post-adoptive obligations established for adopters in the legislation of the country of origin of the adopted minor, which will be entrusted to them in the terms established by the Spanish Public Entity where the family offering itself for adoption resides. Accredited bodies may enter into co-operation agreements between themselves to resolve situations that have arisen or to better fulfil their aims.

In international adoptions, financial benefits other than those required to cover strictly the necessary expenses of the intermediation and approved by the General State Administration and Public Entities may never occur.

IV. CAPACITY AND REQUIREMENTS FOR INTERNATIONAL ADOPTION.

1. Suitability of adopters

Suitability, as provided for in Article 10.1 of the LAI, is construed as "the capacity, aptitude and adequate motivation to act as a parent, attending to the needs of the child adopted, and to accept the peculiarities, consequences and responsibilities involved in adoption".

The meaning of the terms adequacy and aptitude for adoption referred to in Article 5 of the 1993 Convention above mentioned is clarified by the explanatory report of the Permanent Bureau of The Hague in relation to that Convention. Adequacy entails the capacity or compliance with legal requirements while aptitude entails the satisfaction of the socio-psychological qualities necessary in order to ensure the success of the adoption, since its failure will bring a second victimization of the child, which by no means is appropriate for his/her interest.

For that purpose, the declaration of suitability will require a psychosocial assessment of the personal, family and relational status of the persons offering themselves for adoption, their ability to establish stable and secure bonds, their educational skills and their ability to care for a minor in accordance with his/her particular circumstances, as well as any other useful elements related to the uniqueness of international adoption. Likewise, this psychosocial assessment must listen to the children of those who offer themselves for adoption, in accordance with the provisions of Article 9 of Organic Law 1/1996, of 15 January, on the Legal Protection of Minors, which partially modified the Civil Code and the Code of Civil Procedure.

Public Bodies will ensure the necessary coordination in order to homogenise the criteria for assessing suitability. In the suitability judgment not only do objective aspects converge (age, sex, means of living, social and family environment), but also subjective aspects, because, for example, simple desires and motivations are developed and speculated on. That is why courts have held that suitability cannot be established as a strict and exclusionary concept which ends up conditioning and limiting the possibility of adoption. It has therefore been stated that the judgment of suitability must pass through the sieve of logic (SAP (Provincial Court Judgment) Badajoz 114/2017).

The declaration of suitability and the psychosocial reports relating thereto will be valid for a maximum period of three years from the date of their issue by the Public Entity, provided that there are no substantial changes in the personal and family situation of the persons who offer themselves for adoption and gave rise to such declaration, subject to the conditions and limitations established, where appropriate, in the autonomous legislation applicable in each case. It must be understood that suitability is a dynamic concept that does not necessarily remains always the same, but which is conditioned by many personal, relational and external circumstances of the persons who desire to adopt, and which is affected by the passage of time and by what may happen in those persons' lives because of various eventualities, some more predictable than others, since it has to put in relation a specific family with a concrete minor, so that depending on the peculiarities of the child there will be applicants who, due to their characteristics, circumstances and capacities, will be adequate while others will not be (STSJ (Justice High Court Judgment) Catalonia 54/2012).

Once three years have passed, the declaration is no longer valid, and a new declaration will be required. This new declaration is not a mere update which only determines that there has not been a substantial change in the objective circumstances relating to the personal and family situation of the applicants. Every aspect that was evaluated in order to give the first positive assessment of suitability must be reassessed, and therefore verified, at least the subject of the psychosocial report (STS (Supreme Court Judgement) 138/2014; SAP Toledo 290/2012).

The Public Entities are responsible for declaring the suitability of the persons who offer themselves for adoption on the basis of the psychosocial assessment, which will be subject to the conditions, requirements and limitations established in the corresponding legislation.

Persons who offer themselves for adoption may be assessed and, if appropriate, declared suitable for domestic adoption and international adoption at the same time, as the processing of their application for both areas is compatible.

2. Pre- and post-adoptive obligations of adopters

According to Article 11 of the LAI, persons who offer themselves for adoption must:

1st) Attend the information and preparation sessions organised by the Public Entity or by the accredited body prior to applying for the declaration of suitability.

2nd) Provide, in due time, the information, documentation and interviews that the Public Entity, accredited body or authorized entity requires for the preparation of post-adoptive monitoring reports required by the Public Entity or by the competent authority of the country of origin. The non-cooperation of the adopters at this stage may give rise to administrative sanctions provided for in regional autonomous legislation and may be considered as a cause of unsuitability in a subsequent adoption process.

3rd) Comply with the post-adoptive procedures established by the legislation of the country of origin of the adopted minor, for which they will receive the necessary assistance and advice from the Public Entities and accredited bodies.

3. The right to know one's own biological origins

Adopted persons, once they reach legal age or during their minority through their legal representatives, as established in Article 12 of the LAI, have the right to know the data about their origins held by Public Entities, without prejudice to any limitations that may derive from the legislation of the countries of origin of the minors. This right will be exercised with the advice, assistance and mediation of the specialized services of the Public Entity, accredited bodies or entities authorized for this purpose.

The competent public bodies will ensure that the information at their disposal concerning the child's origins is properly kept, in particular information concerning the identity of his/her parents, as well as the medical history of the child and his/her family.

Accredited bodies which have intermediated in the adoption will inform the public bodies of the data available to them on the origins of the child.

V. RULES OF PRIVATE INTERNATIONAL LAW RELATING TO INTERNATIONAL ADOPTION

Title II of the LAI refers to the "Rules of Private International Law Concerning International Adoption" and deals with the three key international private-law issues: 1) "Competence to constitute intercountry adoption" (Articles 14 to 17 of the LAI); 2) "Law applicable to the adoption" (Articles 18 to 24 of the LAI); and 3) "Effects in Spain of an adoption constituted by foreign authorities" (Articles 25 to 31 of the LAI). Now we will look at each of these issues:

1. Competence to constitute intercountry adoption

A) International judicial competence to constitute adoption in international cases.

The international adoption procedure before the Spanish Authority has two completely different phases in Spain: the administrative phase prior to adoption and the constitution of adoption by a Spanish judge.

In general, the Spanish Courts will be competent for the constitution of adoption in the following cases:

- a) Where the adoptee is Spanish or has his/her habitual residence in Spain.
- b) When the adopter is Spanish or has his/her habitual residence in Spain. In this sense, it is sufficient for the Spanish authorities to be declared competent if one of the adopters has Spanish nationality or resides in the Spanish territory.

The Spanish nationality and the habitual residence in Spain will be assessed, in any case, at the time of submission to the Public Entity of the application for adoption.

B) International judicial competence for the declaration of nullity or conversion to full adoption of a non-full adoption in international cases.

The Spanish Courts will be competent to declare the nullity of an adoption in the following cases:

- a) When the adoptee is Spanish or has his/her habitual residency in Spain at the time of submitting the application.
- b) When the adopter is Spanish or has his/her habitual residency in Spain at the time of submitting the application.
- c) When the adoption has been constituted by a Spanish authority.

If the law applied to the adoption provides for the possibility of simple or non-full adoption (those constituted by a competent foreign authority whose effects do not substantially correspond to those provided for adoption in Spanish legislation), the Spanish Courts will be competent to convert simple adoption into full adoption in the cases indicated in the previous section. It should also be borne in mind that this procedure belongs to the voluntary jurisdiction and so there is no litigation.

C) Objective and territorial competence of the jurisdictional body

The determination of the competent jurisdictional body objectively and territorially for the constitution of international adoption will be carried out in accordance with the rules of voluntary jurisdiction; or, where appropriate, it will be a matter for the court chosen by the adopters.

D) Competence of Consuls in the constitution of international adoptions

Provided that the host State does not object to that nor prohibits it under its legislation, in accordance with the International Treaties and other applicable international provisions (i. e. not contrary to the public order of that State), Consuls (or Ambassadors) may constitute adoptions in the event that the adopter is Spanish, the adoptee has his/her habitual residence in the relevant consular district concerned and the previous proposal of the Public Entity is not necessary. The nationality of the adopter and the habitual residence of the adoptee will be determined at the time the adoption proceedings are commenced.

This is not a common procedure as the adoption is usually initiated before the foreign authority, while seeking the declaration of suitability in Spain.

The legislation on voluntary jurisdiction will be applicable in the processing and resolution of these adoption proceedings.

2. Law applicable to the adoption

A) Law applicable to the constitution of the adoption

The constitution of the adoption by the competent Spanish authority will be governed by the provisions of the Spanish substantive law in the following cases:

- a) When the adoptee has his/her habitual residence in Spain at the time of constitution of the adoption.
- b) When the adoptee has been or will be transferred to Spain in order to establish his/her habitual residence in Spain.

With regard to the situation of adoptions through figures not recognized in Spanish law (Kafala) they can be recognized in Spain if they have been validly constituted by a foreign authority, provided that they do not infringe Spanish international public order and the documents in which they appear are duly legalized and translated into the Spanish official language (arts. 323 and 144 LEC 1/2000). However, they can never be recognised in Spain as "adoptions", but rather, through the characteristic legal technique of private international law of "functional qualification", it can be understood that such institutions, unknown to the Spanish legal system, have, in foreign law, a function similar to that which family placement performs in Spanish law, as "family placement means full participation of the child in the family life and imposes on the persons who foster him or her the obligations to look after the child, keep him or her in their company, provide nurture, education and provide a comprehensive education, either with a transitory character - simple family placement - or with a permanent character - permanent family placement-, but which neither creates new bonds of parenthood, nor breaks the previous ones, nor deprives parents of their parental authority" (SAP Barcelona 269/2008).

B) Capacity of the adoptee and necessary consents

The capacity of the adoptee and the necessary consents of all the persons involved in the adoption will be governed by the national law of the adoptee and not by Spanish substantive law in the following cases:

- a) If the adoptee has his/her habitual residence outside Spain at the time of the constitution of the adoption.

Therefore, if the adoption is carried out before a foreign authority, the law of the State of the adoptee's habitual residence should apply.

- b) If the adoptee does not acquire Spanish nationality by virtue of the adoption, even if he or she resides in Spain.

The application of the adoptee's national law provided for in the first paragraph of that Article will proceed only when the competent Spanish authority considers that this facilitates the validity of the adoption in the country corresponding to the adoptee's nationality.

The application of the adoptee's national law provided for in the first paragraph of that Article will not apply in the case of stateless adoptees or whose nationality is undetermined.

In the case of minors whose national law prohibits or does not provide for adoption, the constitution of the adoption will be refused, except when the minor is in a situation of helplessness and guardianship by the Public Entity.

C) Consent, hearings and authorisations.

The Spanish authority competent for the constitution of the adoption may also demand, in addition, the consents, hearings or authorisations required by the national law or by the law of the habitual residence of the adopter or the adoptee, provided that the following circumstances occur:

a) That the requirement of such consents, hearings or authorizations brings benefits for the adoptee's interest. It will be understood that there exists "adoptee's interest", particularly, if the taking into account of foreign laws facilitates, according to judicial criteria, the validity of the adoption in other countries connected with the case and only to the extent that this is so.

b) That the requirement of such consent, hearings or authorizations be requested by the adopter or by the Public Prosecutor's Office.

The two previous sections are intended to establish exceptions from the general rule of application of the Spanish Law to the constitution of the adoption in order to avoid *adopciones claudicantes* (limited adoptions).

D) Law applicable to the conversion and nullity of the adoption

The law applicable to the conversion of the non-full adoption into a full one and to the nullity of the adoption will be the law applicable to its constitution.

E) Spanish international public order

Under no circumstances will a foreign law be applied when it is manifestly contrary to Spanish international public order. To that end, the minor's best interests and the substantial bonds of the case with Spain will be taken into account. The aspects of adoption which may not be governed by a foreign law because the same is contrary to Spanish international public order will be governed by Spanish substantive law.

F) International cooperation of authorities

When the foreign authority that will constitute the adoption, being the adopter Spanish and resident in that country, requests information about him/her from the Spanish authorities, the Consul may request it from the authorities of the last place of residence in Spain, or provide information held by the Consulate or obtain it by other means.

3. Effects in Spain of adoption constituted by foreign authorities.

A) International regulations

The adoption constituted by foreign authorities will be recognised in Spain in accordance with the provisions of the international Treaties and Conventions and other rules of international origin in force for Spain, and, especially, the Hague Convention dated 29th May 1993 on Protection of Children and on Co-operation in Respect of Intercountry Adoption.

B) Requirements for the validity in Spain of adoptions constituted by foreign authorities in the absence of international regulations

In the absence of international Treaties and Conventions and other rules of international origin in force for Spain that are applicable, the adoption constituted by foreign authorities will be recognized in Spain as an adoption if the following requirements are met:

1º) The adoption has been constituted by a competent foreign authority. The foreign authority will be deemed to be competent if the case presents reasonable bonds with the foreign State whose authorities have constituted it.

2º) The adoption does not violate public order.

For these purposes, Spanish public order will be deemed to have been breached by those adoptions in whose constitution the minor's best interests have not been respected, in particular when the necessary consents and hearings have been dispensed with, or when it is established that they were not informed and free or were obtained by payment or compensation,

When the adopter or the adoptee is Spanish, the adoption constituted by a foreign authority must have the legal effects corresponding, in a substantial way, to the effects of the adoption regulated in Spanish law. The legal name of the institution in the foreign law will be irrelevant.

In particular, the Spanish authorities will ensure that the adoption constituted by a foreign authority results in the extinction of substantial legal bonds between the adopted child and his/her former family, that it makes the same bonds of filiation arise as those of filiation by nature, and that it is irrevocable by the adopters.

When the foreign law admits that the adoption constituted under it may be revoked by the adopter, it will be an indispensable requirement that the adopter, prior to the transfer of the minor to Spain, renounces the exercise of the right to revoke it. The resignation must be formalised in a public document or before the Registrar of the Civil Registry.

When the adopter is Spanish and resident in Spain, the competent Spanish Public Entity must declare its suitability prior to the constitution of the adoption by the foreign competent body. Such declaration of suitability will not be required in cases where if the adoption had been made in Spain it would not have been required.

If the adoptee is Spanish at the time of constitution of the adoption before the competent foreign authority, the consent of the Public Entity corresponding to the last residence of the adoptee in Spain will be required.

The document evidencing the adoption before a foreign authority must meet the formal requirements of authenticity consisting of the legalization or apostille and its translation into Spanish official language. Exceptions are Documents exempted from legalization or translation under other applicable regulations.

C) Control of the validity of the adoption constituted by a foreign authority.

The Spanish public authority before which the validity of an adoption constituted by a foreign authority is raised and, especially, the Officer of the Civil Registry at which inscription of the adoption constituted abroad for recognition in Spain, will, incidentally, control the validity of such adoption in Spain in accordance with the rules contained in the Hague Convention dated 29th May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption, through the presentation of the certificate and that the cause of non-recognition has not been incurred in.

In cases of minors coming from countries which are not signatories to the Convention, the Officer of the Civil Registry will carry out this incidental control by verifying whether the adoption meets the conditions for recognition.

D) Requirements for the validity in Spain of foreign decisions on conversion or nullity of an adoption.

Decisions of the foreign public authority establishing the conversion or nullity of an adoption will have legal effect in Spain.

E) Inscription of the adoption in the Civil Registry.

When the international adoption has been constituted abroad and the adopters have their habitual residence in Spain, they must apply for birth registration of the child and of adoption in accordance with the provisions contained in the Civil Registry Act for the adoption to be recognised in Spain.

F) Simple or non-full adoption legally constituted by a foreign authority.

Simple or non-full adoption by a foreign authority will take effect in Spain, whether as a simple or non-full adoption.

The law designated by Article 9.4 of the Civil Code will determine the existence, validity and effects of such adoptions, as well as the attribution of parental authority.

Simple or non-full adoption will not be registered in the Spanish Civil Registry as an adoption and will not entail the acquisition of Spanish nationality in accordance with Article 19 of the Civil Code.

The simple or non-full adoption constituted by a competent foreign authority may be converted into the adoption regulated by Spanish law when the pertinent requirements are met, through voluntary jurisdiction proceedings. Conversion will be governed by the law determined in accordance with the law of its constitution.

In order to request the corresponding judicial proceedings, the previous proposal of the competent Public Entity will not be necessary.

In any case, for the conversion of a simple or non-full adoption into a full adoption, the Judge in charge will examine the concurrence of the following matters:

- a) That the persons, institutions and authorities whose consent is required for the adoption have been adequately counselled and informed of the consequences of their consent, of the effects of the adoption and, especially, of the termination of the legal bonds between the minor and his/her family of origin.
- b) That such persons have given their consent freely, in the manner provided for by law, and that such consent has been provided in writing.
- c) That the consents have not been obtained by payment or compensation of any kind and that such consents have not been revoked.
- d) That the consent of the mother, when required, has been given after the child's birth.
- e) That, taking into account the age and degree of maturity of the minor, he/she has been adequately counselled and informed about the effects of the adoption and, when required, his/her consent to the same.
- f) That, taking into account, the minor's age and degree of maturity, he/she has been heard.
- g) That, when the consent of the minor about the adoption must be obtained, it should be ascertained that the child freely expressed his/her consent, in the form and with the formalities provided for by law, and without any price or compensation whatsoever having been paid.

G) International public order

In no case will the recognition of a foreign decision of simple or non-full adoption proceed if it produces effects manifestly contrary to the Spanish international public order. To that end, the minor's best interests will be taken into account.

VI. FUTURE PROSPECTS

On 25 November 2017, the draft Royal Decree approving the International Adoption Regulation was submitted for public inquiry. This Regulation is expected to be passed during the first quarter of 2018, entering into force in the following three months.

The main objective of the Regulation is to establish the procedures for the adoption of minors. The Directorate General will be competent to resolve the commencement or resumption of the processing of adoption proceedings with a given country, or to suspend or paralyse them, for which purpose it will request a report from the Ministry of Foreign Affairs on relevant information of a given country, in addition to enabling the conclusion of administrative agreements to facilitate reciprocal relations.

Various criteria are established to determine the number of cases to be processed annually, which are the following:

- a) The need for international adoption in that country and the profile of adoptable minors.
- b) The number of adoptions constituted by third countries in the last three years.
- c) Reports from public or private national and international bodies on the situation of political and social stability in the country of origin, as well as on the legal certainty and practices used in the processing of international adoption procedures.
- d) The number of adoptions constituted in the last two years for which information is available.
- e) The number of cases not yet allocated.

It is carried out under the regime of entities accredited for intermediation in international adoption, whose scope of action is limited throughout the national territory, and in the states where they have been accredited. Those entities may develop other social services related to the protection of children, provided that they are differentiated in their statutes with respect to the activity of intermediation.

The functions of accredited entities in Spain and in the countries of origin are developed, as well as their obligations, which are based mainly on functions of advice, control and information to the authorities and adopters.

The economic regime of the accredited entities is established, which refers to:

- a) Income from persons offering themselves for adoption, which may not exceed the actual costs and expenses of the adoption and which must be duly justified.
- b) Periodic financial remuneration by the persons who offer themselves for adoption during the period of validity of the contract signed with the persons offering themselves for adoption to cover indirect costs.

A triple criterion is established for the entities which seek to be accredited according to general criteria, economic-financial criteria and technical criteria.

There are two means by which they can be accredited: by means of a public contest launched by the Directorate General, or provisionally by means of direct, exceptional accreditation, at the request of the entity concerned without the need to launch a public contest when:

- a) The public contest has been declared unsuccessful either because no applications have been submitted or, even when applications have been submitted, because no entity meets the requirements to be accredited.

b) The Directorate General deems there are reasons of recognized urgency in relation to the lack of protection and viability of adoption of minors.

c) As it is an activity specialized to promote the adoption of minors with special difficulties or due to other special circumstances, only one entity may be entrusted with the activity of intermediation.

The accreditation will be granted for a period of two years and it will be effective when the competent authorities of the country of origin either take a decision authorizing the body to act in that country or issue a document stating that they will not oppose such action, in the case of countries that are not signatories to the Hague Convention dated 29th May 1993. The accreditation will be extended for periods of two years, unless the body requests a waiver with a period of six months prior to the expiration date of the accreditation, provided that the processing of the cases initiated prior to that application is not undermined.

The suspension of accreditation is envisaged for an entity when there are significant legislative changes in the country of origin, or when a significant disproportion between the number of cases that the body is processing and the number of assignments it is obtaining is established or foreseen.

Accreditation may be withdrawn for a country when the entity:

a) Does not longer meet the requirements and established conditions.

b) Does not comply with the obligations and/or functions set forth in these regulations or has not complied with other legal provisions.

c) Has not initiated the processing of any international adoption proceedings during the two-year period.

d) Has been disqualified by the competent authorities in the country of origin for which it was accredited.

e) Has not obtained accreditation through a public competition.

The body whose accreditation is withdrawn for reasons attributable to it may not reapply for accreditation for a period of five years. In addition, it is subject to a number of obligations following its withdrawal.

It is possible to establish cooperation agreements between several intermediation entities, for which it is necessary to notify the Directorate General of the operation.

The Regulation itself regulates the content of the contract between the entity and the persons who offer themselves for adoption. The basic model contract will be type-approved.

The contract must have a general part stipulating the rights and obligations of the parties, and a specific part stipulating the costs associated with the processing.

The National Register of Accredited Bodies of International Adoption and of Complaints and Incidents is created at national level. This register consists of two sections: a) Section One: register of accredited bodies, in order to collect all the identifying information of the accredited bodies and b) Section Two: register of complaints and incidents, which will record the complaints and incidents made by users of intermediary organizations in relation to the services provided by those organizations in the country of origin, as well as decisions of approval or rejection.

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