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Nicoleta DIACONU

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THE LEGAL COORDINATES OF THE ADOPTION WITH A FOREIGN ELEMENT

Nicoleta DIACONU¹

Abstract

Adoption with a foreign element is a complex institution of private international law, which involves a series of issues regarding the resolution of conflicts of laws in order to establish the applicable material law, as well as on the resolution of conflicts of competence in order to establish the competent authorities to approve, cancel or undo the adoption.

The legal coordinates of the international adoption result from the resolution of the conflicts of laws, the national regulations being uneven, although within the international or regional organizational structures there are concerns in the sense of legislative uniformity in the field.

The purpose of international regulations is to create an adequate protection mechanism for minors, with the basic principle - the best interests of the minor.

Keywords

International adoption; the best interests of the child; private international law; conflict of laws; international regulations.

1. Introductory aspects regarding the characteristics of adoption with a foreign element

The family is a basic social form, which influences the entire personality of its members. The family is required as the factor with the strongest influence on the physical and mental development of the child, as a member of the respective family.

Family relationships result from marriage, natural kinship and adoption and involve both aspects of a patrimonial nature and aspects of a non-patrimonial nature.

¹ PhD Prof. Univ. "Spiru Haret " Bucharest, Associate teacher - "Alexandru Ioan Cuza" Police Academy, e-mail: nicoled58@yahoo.com

For the harmonious development of the human personality, the child must grow up in a family environment that ensures an adequate climate of care, affection and education. If this is not possible due to a complex of circumstances, the domestic and international legislation contains legal rules that create the possibility of alternative care of the child in the form of family placement, adoption or entrustment to a specialized institution for children. In choosing one of these solutions, it is necessary to take into account the best interests of the child, as well as their ethnic, religious and linguistic origin.

Adoption is the most appropriate form to provide the child with affection, care and education within a permanent family. Through adoption, the adopters assume the obligations and responsibilities of the natural parents - to provide the child with a healthy family environment.

Adoption plays an important social and family role, contributing not only to taking over the responsibility of society in raising, educating and educating children without parental care, but also to establishing an atmosphere of happiness, love and understanding, similar to that ensured by the natural family life. (Aniței, 2010, p. 263)

Adoption is a complex institution, a special form of child protection, with sociological, legal, economic and social effects.

The institution of adoption may be subordinated to national law when there are no elements of foreignness, or it may be governed by the legal rules of private international law, when it presents foreign elements.

The purpose of the internal / international regulations is to create an adequate protection mechanism for minors, having as basic principle - the best interest of the minor.

Unlike the adoption of national law, without elements of foreignity, which is subject only to national law, international adoption involves a number of conflicting aspects, namely: the problem of resolving conflicts of laws in order to establish the applicable law and the problem of resolving conflicts of international competence in with a view to establishing the competent authorities to approve, cancel or reverse the adoption.

As a legal institution, international adoption is regulated by the legal norms of private international law, which govern international relations with an element of foreignness.

Adoption with international, foreign or foreign elements means the adoption which refers to one of the following facts: the adoption, the cancellation or the cancellation of the adoption takes place abroad, or the adoptee, the adopter or both have their domicile abroad.

Law no. 273/2004 on the legal status of adoption defines international adoption as - the adoption in which the adopter or the adoptive family and the child to be adopted are habitually resident in different states, and, following the adoption approval, the child will have the same habitual residence with that of the adopter ”.²

International adoption is a controversial topic because, in some cases, this form of child protection lacking parental care is associated with trafficking in human beings. This implies the need to set up a system of legislative and institutional safeguards, so that the regulations adopted in the field establish adequate control by the national authorities at the conclusion of the adoptions, regarding the fulfillment of the legal requirements and the imperative for the adoption to be concluded in order to protect the best interests of the child.

International adoption highlights the economic imbalance between the highly industrialized countries which, against the backdrop of declining birth rates and changing mentalities, constitutes the "demand" for children of all cultures, religions, races and countries with difficult social-economic conditions, political instability, but with a political instability. galloping demographics, representing the "offer" for such children. The assertion that international adoption can be a means of protecting the child without the family environment in his / her country of origin risks translating into the idea that international adoption would be a means for families in developed countries to adopt children from poorly developed countries. (Miron, 2018)

2. International legal instruments regarding the alternative protection of children and the regulation of international adoption

The international society paid special attention to the creation of an international legal framework that would provide real protection to the child, as a holder of fundamental rights.

Given that the general legal instruments adopted at international level have as a central element the principle of equality and non-discrimination in the protection of human rights, it could be appreciated that specific regulations, which protect certain categories of persons, would create discrimination positive, that is, a privileged situation. In fact, the special protection is imposed precisely because of the inequalities created

² Art.2 letter d - Law no.273 / 2004 regarding the legal regime of the adoption.

during the historical evolution, as a way of rectifying these inequities. (Purdă & Diaconu, 2016, p. 178)

Individuals in need of special legal protection fall into vulnerable categories, of which special attention is required. This category also includes children, who need a special national and international legal framework, to ensure their protection of fundamental rights.

Thus, within international structures such as the UN, the Conference of Private International Law in The Hague, the Council of Europe or the European Union, a series of regulations have been adopted aimed at the special protection of children.

* The UN Convention on the Rights of the Child, adopted by the UN in 1989, supplemented by 2 Additional Protocols in 2000, is a legal instrument that covers the entire range of rights and freedoms and establishes an effective legal protection system for children;

* The conventions of the Hague Conference on Private International Law have an influence on the legal systems, providing an inspiration for efforts to unify regional international private law. Conventions on the protection of children were adopted at the Conference, respectively:

- The Hague Convention of 25 October 1980 on the civil aspects of the international abduction of children;

- The Hague Convention of 29 May 1993 on the Protection of the Child and Cooperation on International Adoption;

* The Council of Europe has adopted a series of treaties addressing a wide range of issues related to the specific rights of the child. These include:

- European Convention on the Legal Status of Children Born Outside Marriage, October 15, 1975;

- Convention on Personal Relationships Concerning Children, May 15, 2003;

- Convention on the exercise of the rights of the child, January 25, 1996;

- Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (Lanzarote Convention), 25 October 2007;

- Council of Europe Convention on the Adoption of Children, 1967;

- The revised European Convention on the Adoption of Children, adopted in Strasbourg on 27 November 2008, states that "the competent authority does not approve the adoption unless it has formed the belief that the adoption is in the best interests of the child". The Convention also stipulates that adoption should not be approved by the competent authority without "the child's consent, which is considered to be sufficiently

understood by law." In addition, the child who is deemed not to understand this "is consulted as far as possible and his opinion and wishes are taken into account taking into account his maturity".

Each child has the right to life, education, harmonious development and family life, the Convention on "the principle of the best interests of the child" (art. 3). This principle was also integrated in the Romanian legislation, prevailing in all the actions and decisions regarding the children, taken by the public authorities and the authorized private bodies, as well as in the cases solved by the courts. Moreover, the principle of the best interests of the child is imposed also in relation to the rights and obligations of the child's parents, other legal representatives, as well as any persons to whom the child has been legally placed, in his determination having view at least the following:

- the needs of physical, psychological development, education and health, security and stability and belonging to a family;
- the opinion of the child, depending on the age and the degree of maturity;
- the child's history, taking into account, in particular, the situations of abuse, neglect, exploitation or any other form of violence against the child, as well as the potential risk situations that may occur in the future;
- the ability of the parents or persons to take care of the child's upbringing and care to meet his or her concrete needs;
- maintaining personal relationships with the persons with whom the child has developed attachment relationships.

* At EU level, the Lisbon Treaty (2007) explicitly promotes the protection of the rights of the child (art. 2), and art. 24 of the Charter of Fundamental Rights, establishes that all children have the right to the protection and care needed to ensure their well-being, and they can freely express their opinion, which is taken into consideration according to their age and maturity. In all actions concerning children, whether carried out by public authorities or by private institutions, the best interests of the child must be considered paramount. The Charter also states that any child has the right to regularly maintain personal relationships and direct contact with both parents, unless they are contrary to his or her interest.

In EU law, the ECJ has decided that the Brussels II bis Regulation applies to decisions to place a child in an alternative protection framework. As mentioned in Chapter 5, the Brussels II bis Regulation has an approach based on the principles of the rights of the child, stressing that the equality of all children, the best interests of the child and the right to be heard should be taken into account.

* From the coordinated analysis of international and European regional regulations, a number of general principles regarding alternative protection are distinguished. (Agenția pentru Drepturi Fundamentale a Uniunii Europene și Consiliul Europei)

- Temporary character of alternative protection measures. Alternative protection is a protective measure that guarantees the temporary safety of children and facilitates their return to their families, when possible. (United Nations, 2015) Therefore, this should ideally be a temporary solution. At times, this is a protective measure until family reunion, for example in the case of unaccompanied migrant children.

- The alternative nature of the measures. International law confirms that family care (such as family placement) is the optimal form of alternative care to ensure the protection and development of children. (United Nations, 2006)

- The principle of child representation. The right of the child to a guardian / guardian or representative is essential to ensure his broader rights.

- The principle of the best interest of the child. In Article 24 of the Charter of Fundamental Rights of the EU, the legal obligation to take positive measures is implicit in order to guarantee that the decision-making process regarding the placement of a child (United Nations, 2013) is based on his or her best interests and opinion. (United Nations, 2009)

- States' obligation to comply with international regulations. Article 4 of the Convention on the Rights of the Child requires states to take "all necessary legislative, administrative and other measures" to implement the Convention. This also applies in the context of alternative protection.

3. Determining the law applicable to foreign element adoption

Romanian private international law establishes the rules to determine the law applicable to family relationships with a foreign element. Some family relationships are specifically regulated by legal norms of the European Union.

The personal status of the natural person, which is subject to its national law, includes: - family status (formed from family relationships); - individual status (formed by the civil status and the capacity of the natural person).

In Romanian private international law, conflicts of laws regarding family relationships are regulated by the provisions of art. 2.585-2.612 of the

Civil Code, as well as by the provisions of art. 4 and 42 of Law no. 119/1996 regarding the civil status documents.

The general legal framework of adoption with a foreign element is represented by the disposition art.2607-2.610 of the Civil Code.

These regulations establish the applicable law regarding the following aspects of adoption: (Diaconu, 2013, p. 227); (Anitei, 2018, pp. 17-20)

- the substantive conditions of the adoption;
- the form conditions of the adoption;
- the effects of adoption (the same law also applies to the dissolution of adoption);
- nullity of adoption.

The international adoption procedure is regulated by the provisions contained in articles 60-74 of Law no.273 / 2004 regarding the legal regime of the adoption.

3.1. Perfecting adoption

For the valid conclusion of an adoption, it is necessary to fulfill some substantive and formal conditions.

a) The substantive conditions

According to art. Article 2.607 of the Civil Code, the substantive conditions required for the conclusion of the adoption are established by the national law of the adopter and the one to be adopted. They must also fulfill the conditions that are mandatory for both, established by each of the two national laws mentioned.

The substantive conditions required for the spouses to adopt together are those established by the law which governs the general effects of their marriage. The same law also applies if one spouse adopts the other's child.

It follows that the adopter and the one to be adopted must meet the conditions provided by his national law and cumulatively the mandatory conditions for both, stipulated in both laws.

From the analysis of the text, it follows that an unmarried natural person, two spouses together, or a married person adopting the child of his or her spouse may have the status of adopter.

Spousal adoption is the most frequent and most effective, because it provides the child with a suitable family environment, similar to the family of origin. The law does not allow the adoption of a child by two concubines, which constitutes an impediment to adoption, whose violation is sanctioned with the absolute nullity of the adoption.

According to the provisions contained in art.60 of Law 273/2004 regarding the legal regime of adoption, the international adoption of the child with the habitual residence in Romania by a person / family with the habitual residence abroad can be authorized only for the children who are in the A.N.P.D.A. and only in the following situations:

a) the adopter or one of the spouses of the adoptive family is related to the fourth degree including the child for whom the opening of the adoption procedure was approved;

b) the adopter or one of the spouses of the adoptive family is also a Romanian citizen;

c) the adopter is the spouse of the natural parent of the child whose adoption is requested.

International adoption is allowed for the children for whom the application for the adoption procedure has been admitted and an adopter or adoptive family with habitual residence in Romania or one of the persons previously provided cannot be identified, within one year from the date the definitive stay of the court decision admitting the request to open the adoption procedure.

A questionable situation is the adoption of children by a couple of same-sex people.³

By art. 7 of the revised European Convention on the Adoption of Children, it is mentioned that the legislation may allow the adoption of a child: a) by two persons of different sex who are married to one another, or when there is such an institution, who have concluded a registered partnership ; b) by one person.

States may extend the scope of this Convention to couples of the same sex who are married to each other or have entered into a registered partnership. They also have the possibility of extending the scope of this Convention to couples of different sexes and same sex who live together in a stable relationship.

b) Form conditions

The form of adoption is subject to the law of the state in whose territory it is concluded (art.2.609 of the Civil Code). This provision represents an application of the conflict rule *locus regit actum*.

³ In Romanian law, it is not possible to adopt a child by a same-sex couple, because the rules of public order in private international law intervene. In some countries of the European Union civil union between same-sex persons is allowed, and in other countries same-sex marriage is allowed, the trend is constantly increasing.

The adoption procedure is subject to the law of the place of its conclusion, regarded as "lex fori". Also, the proof of adoption is subject to the law of the place of its conclusion. (Anitei, 2018, pp. 19-41)

3.2. International adoption procedure

The procedure for international adoption of a child with habitual residence in Romania is carried out in accordance with the provisions of the Hague Convention on the protection of children and cooperation in the field of international adoption. (Anitei, 2019)

The Romanian central authority in the field of international adoption is the National Authority for the Protection of the Rights of the Child and Adoption (ANPDCA)

Currently, the adoption of Romanian children by persons residing outside the Romanian state can be done only under certain strict conditions, which limit the access of adoptive families from abroad to the lists of adoptable children in Romania. Each country has its own requirements for adoptive parents.

As per disposition included in art. 64-74 of Law no.273 / 2004 regarding the legal regime of adoption, the international adoption procedure is carried out in two stages:

- The preliminary administrative stage (provided in art. 64-71);
- The stage of approval of the adoption by the court (stipulated in articles 72-74).

a) The preliminary administrative stage

The requests of persons or families who have their habitual residence in the territory of another State, part of the Hague Convention, and who wish to adopt a child from Romania, are sent to the National Authority for the Protection of the Rights of the Child and Adoption (ANPDCA) through the central competent authority of the state respectively or its accredited organizations.

In the case of the states that are not parties to the Hague Convention, the applications for adoption shall be transmitted to the ANPDCA through the authority designated with attributions in the field of international adoption or through organizations accredited for this purpose in the receiving state.

The requests transmitted by the ANPDCA must be accompanied by the documents attesting the fulfillment of the conditions provided by the

law, as well as by the documents provided in the methodological norms for applying this law.

The initial and practical matching of the child with the adopter or the adoptive family with the habitual residence abroad is made by the adoptions and post-adoption compartment in the structure of the direction from the child's domicile. The matching methodology, as well as the criteria on the basis of which it is achieved, is approved by the methodological norms for applying this law

The person or family selected as a result of the initial match is obliged to move to Romania and to live effectively on the territory of the country for a period of at least 30 consecutive days, in order to achieve the practical match with the child. At the expiration of the term, the direction in which the territorial domicile of the child is domiciled will draw up a report on the evolution of the relations between the child and the adopting person or family. ANPDCA will notify the competent central authorities or accredited organizations in the receiving state of the selection of the adopter or the adoptive family.

Once notified, ANPDCA will request the competent central authority or accredited organization in the receiving state to communicate the following:

- the agreement of the adopter or the adoptive family regarding the selection;

- the agreement on the continuation of the adoption procedure;

- the document that results from the guarantees that the adoptee has the possibility to enter and permanently reside in the receiving state.

b) Approval of the international adoption by the court

The request for approval of the adoption is submitted by the ANPDCA to the court.

Judging the applications for approval of the international adoption is made by citing the direction in which the territorial area is the domicile of the child, the person or the adoptive family, as well as the ANPDCA.

ANPDCA has the obligation to ensure that the adoptee will benefit in the foreign country of the same legal situation as that of a biological child of the adopter; When deciding on the application for approval of the adoption, the court will also consider the document attesting the fulfillment of this obligation.

Based on the irrevocable court decision to approve the adoption, ANPDCA issues, at the request of the adopter / adoptive family, within 5 days, a certificate attesting that the adoption is in conformity with the norms of the Hague Convention.

Moving the adoptee from Romania to the state where the adopter or the adoptive family has his habitual residence is possible only when the decision to approve the adoption is final. The adoptee only travels with the adopter or at least one of the spouses of the adoptive family, in conditions of safety appropriate to the needs of the adoptee.

c) International adoption of an elderly person

In these situations the provisions of the Hague Convention do not apply. According to art.455 of the Civil Code of Romania, "the person who has acquired full capacity to exercise can be adopted, if it was raised during the minority by the one who wants to adopt it".

The proof that the major person was raised during the minority by the one who wants to adopt it can be made before the court with any means of evidence admitted by the law (witnesses, documents, etc.).

Another substantive condition is provided by art. 460 of the Civil Code according to which: "The adopter must be at least 18 years older than the adopted one. For good reasons, the guardianship court may approve the adoption even if the age difference between the adoptee and the adopter is less than 18 years, but not less than 16 years".

The parties to the approval process of the major's adoption are the adopter and the major person whose adoption is requested.

The biological parents of the elderly person do not have the quality of part in this process and their consent is not necessary for the adoption of the elderly person.

Regarding the recognition abroad of an international adoption of the major approved in Romania, the provisions of the foreign legislation will be applicable.

3.3. The effects of adoption

According to the provisions of art. 2.608 of the Civil Code - the effects of the adoption, as well as the relations between the adopter and the adoptee are governed by the national law of the adopter, and in the case of the adoption agreed by the spouses, the law governing the general effects of the marriage is applicable. The same law governs the dissolution of adoption.

Regarding the effects of adoption, we consider that certain specifications are required regarding the acquisition and loss of Romanian citizenship through adoption.

According to the provisions of Law no. 21/1991 regarding the Romanian citizenship, the following situations are distinguished:

a) The foreign minor or without citizenship adopted by a Romanian citizen or, if adopted by two spouses, at least one being Romanian - acquires, under certain conditions, Romanian citizenship;

b) The Romanian minor, adopted by a foreign national, loses Romanian citizenship, if the adopter expressly requests it and if the adoptee is considered according to the foreign law, that he has acquired foreign nationality;

c) The loss of the Romanian citizenship by the adopter produces on the citizenship of the adoptee the same effects as in the case of the natural parents also, the acquisition of the Romanian citizenship by the adopter produces on the citizenship of the adoptee the same effects as in the case of the natural parents.

3.4. Nullity of adoption

The law applicable to the invalidity of the adoption is determined by the disposition of article 2.610 of the Civil Code, according to which, the nullity of the adoption is subject, for the substantive conditions, to the laws applicable to the substantive conditions, and for the non-observance of the conditions of form, the law applicable to the adoption form.

Regarding the effects of the nullity of the adoption on the citizenship, we distinguish the following situations:

a) The minor who has not attained the age of 18 years - and who by adoption acquires Romanian citizenship, in the case of the nullity of the adoption it is considered that he was never a Romanian citizen, if he resides abroad or if he leaves the country to reside abroad (according to art 7 paragraph 1 - of Law no. 21/1991). From the analysis of the provisions of the law, it follows that, if the adoptee has reached the age of 18 or if he is under this age but resides in the country, he maintains his Romanian citizenship.

b) In the case of a Romanian citizen adopted by a foreigner, if the adoption nullity intervenes, the minor who did not turn 18 is considered to have never lost Romanian citizenship (according to art. 29 paragraph 2 - Law no. 21/1991).

It turns out that if the adoptee is over 18, or if he is under 18 but does not live in the country, the invalidity of the adoption does not have any effect on his citizenship, remaining with foreign citizenship.

3.5. Reversal of adoption

According to the provisions of art. 2.608 the last sentence of the Civil Code, the adoption is subject to the law that regulates the effects of the adoption, that is to say the national law of the adopter or the law of the effects of the marriage of the spouses, in case of the adoption dissolution agreed by the spouses.

Regarding the effects of the adoption of the citizenship, we distinguish the following situations:

a) The foreign minor under the age of 18 adopted by a Romanian citizen, in the case of the adoption, loses the Romanian citizenship on the date of the adoption adoption if he resides abroad or leaves the country to reside abroad (according to art. 7 paragraph 2 - Law no. 21 / 1991).

It turns out that if the adoptee is over 18 years old or if he is under 18 but resides in the country, the dissolution of the adoption does not produce effects on the citizenship, preserving the Romanian citizenship.

b) The Romanian minor under the age of 18 adopted by a foreign national, in the case of the adoption dissolution, regains the Romanian citizenship at the date of the adoption dissolution, if he resides in the country or if he returns to reside in the country (according to art. 7 last paragraph - Law no. 21/1991).

It turns out that, in some situations, the dissolution of the adoption does not produce effects on the citizenship acquired by an adopted Romanian citizen by a foreign citizen adopter.

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