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EDITORIAL

Adoption by nationals residing abroad: a mind-boggler for private international law 

When people living outside their country of origin adopt a child from this same country, it frequently happens that national regulations are inconsistent with those at the international level, particularly the Hague Convention of 1993 (HC-1993). If the responses vary according to the situation, the best interests of the child, here too, should be the primary consideration.

Since numerous communities resulting from immigration are now well-established in their receiving societies, it is increasingly frequent to see their nationals initiate procedures for adopting a child from their country of origin. This situation raises several sensitive issues, as much in the application of international law as in the safeguard of the child's best interests.

Different situations

When foreign candidates for adoption wish to adopt in their country of origin, it is first of all a matter of determining whether or not this country and the future receiving State have ratified the HC-1993.

If this is not the case, the usual norms of international law in the two countries involved will obviously apply, even though it is worth remembering that the Special Commission on the practical operation of the HC-1993, convened by the Hague Conference on Private International Law from 28 November to 1 December 2000, recommended that Contracting States "as far as practicable, apply the standards and safeguards of the Convention to the arrangements for intercountry adoption which they make in respect of non-Contracting States".

The HC regulations should be followed if the latter is in force in both countries, but even in this case, exceptions might arise. Indeed, it is not unusual for States of origin to consider that an adoption in favour of their nationals domiciled abroad, must be subjected to the domestic procedure, thus favouring the nationality of the adopters as a determining criterion.

However, the HC, in its article 2, paragraph 1, states that "the Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being or is to be moved to another Contracting State ("the receiving State"), either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin".

The determining criterion in the HC-1993 is clearly the habitual residence of the parties, as well as the transfer of the child from one country to another, and not the nationality, which therefore has no role to play in the processing of intercountry adoptions. From now on, how can these two antinomic criteria be reconciled?

Domestic or intercountry adoption?

To describe an adoption as domestic or intercountry falls within the sovereignty of each State. It is *per se* understandable that a State would, at the same time, like to offer its adoptable children a family stemming from their own country and to support its nationals abroad by allowing them to proceed down the domestic adoption path, which is often less complicated and faster (if only by avoiding the intercountry adoption waiting lists). Nonetheless, in ratifying international texts, States also commit themselves to applying the principles which they embody, unless an explicit mention of a reservation on this subject has been made. In fact, the HC-1993 is clear in its definition of the intercountry nature of adoption, and, furthermore, does not authorise reservations (art. 40).

Application of the fundamental principles

Although it is not an easy matter to determine whether the requirements of the HC-1993 must be respected in the above-mentioned situation, several arguments plead in favour of the application of the minimum principles of the HC. These principles are in fact those enshrined in article 21 of the Convention on the Rights of the Child, text whose near universal ratification guarantees each child the respect of his/her rights. On this basis, it is a matter of answering in particular, the following questions:

- is the child adoptable?
- has the principle of subsidiarity been respected?
- does “intercountry” adoption respond to the best interests of the child?
- have the biological parents freely given their consent?
- is the procedure free from all improper financial gain?

When it faces this kind of adoption, the receiving State must be able to request guarantees relating to the respect for these fundamental principles from the State of origin. Even if these steps do not exactly conform to those of the intercountry procedure, it is essential that these elements appear in the file, as much in the interests of the child as for legal safety.

Recognition

The application of the domestic adoption procedure to nationals living abroad also deprives the persons concerned of the effects of article 23 of the HC-1993, which provides for full legal recognition of adoptions made in accordance with the HC. Upon its arrival in the receiving country, the adoptive family will therefore have to take the necessary steps to obtain recognition of the domestic adoption made in the country of origin, without having the benefit of often well-practiced procedures based on the HC.

Good cooperation

To the extent that the HC-1993 insists upon close cooperation between Contracting States, Central Authorities must bring everything into play in order to manage these procedures to their best. It is, for example, useful for the national Central Authorities of the countries involved to establish contact with each other so as to inform themselves of this type of procedure and, possibly, to formalise its use – on the basis of article 39, paragraph 2 of the HC for example – in the best of interests of the child and in respect of the rights of everyone.

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