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## INTERNATIONAL ADOPTION IN BRAZIL

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### 1. Initial considerations.

Adoption is an alternative to constitution of natural families originated from a difficulty of a couple to procreate or from the couple's own decision, due to humanitarian, ethical, moral or social reasons<sup>1</sup>.

According to Brazilian law adoption is ruled by the Federal Constitution<sup>2</sup>, the Statute of Child and Adolescent (Law nº 8.069/90) and the Civil Code (Law nº 10.406/02).

The Statute of Child and Adolescent (hereinafter called by its Portuguese abbreviation "ECA") determines full protection to children and adolescents and considers as child, in order to be subject to its effects, a person up to uncompleted 12 (twelve) years old and as adolescent a person with age between 12 (twelve) and 18 (eighteen) years old.

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<sup>1</sup> HOUDALI, Amira Samih Hamed Mohd and PIRES, Victor Paulo Kloeckner. *The international adoption and its regulation by Brazilian legislation*.

<sup>2</sup> **Federal Constitution, article 227.** It is the family, the society and the State duty to assure to the child and the adolescent, with absolute priority, the right to life, health, feeding, education, leisure, qualification for work, culture, dignity, respect, freedom, family and community interaction, as well as keep them safe from any form of negligence, discrimination, exploitation, violence, cruelty and oppression.

... **§5** The adoption will be assisted by the Public Authorities, according to the legislation, which will establish the conditions for its effectiveness by foreigners.

Otherwise, the Civil Code (Law nº 10.406/02) applies when the adoptee is over 18 (eighteen) years old.

### 2. Requirements for Adoption by Foreigners.

The ECA rules the international adoption in its articles 51 and 52, stating, however, that the insertion of the adoptee into a foreign family is a non ordinary measure only acceptable in the adoption method<sup>3</sup>. The reason for this, according to the doctrine, was to maintain the original culture of the adoptee, with the scope to preserve the adoptee's nationality<sup>4</sup>.

According to the mentioned ECA, in order to initiate the adoption process in Brazil the foreigner resident or domiciled abroad is required to prove, by means of document issued by the competent authority of the foreigner respective country, that the foreigner has the proper skills to adopt in accordance to the laws of his/her country, and shall also present a psychosocial study prepared by specialized and accredited agency of his/her country of origin.

From the adoption request, the judicial authority, directly or attending to the request of the State Public Prosecutor, may determine the filing of equivalent applicable law of the country to the Brazilian law, together with the evidence of its validity.

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<sup>3</sup> **Law No. 8.069/90, article 31.**

<sup>4</sup> HOUDALI, Amira Samih Hamed Mohd and PIRES, Victor Paulo Kloeckner, op. cit., loc. cit.

With respect to the documents in foreign language, they shall be attached to the files with the proper certification by the consular authority, verified the applicable international treaties and conventions, and the respective translation prepared by a sworn public translator.

The international adoption may also be subject to prior study and analysis by a state judicial commission of adoption, which will provide a report of qualification to instruct the process of adoption.

Regardless of the nationality of the adopter, adoption will be preceded by an interaction stage with the child or adolescent, during the period established by the judicial authority, observing the peculiarities of the case.

For international adoption the interaction stage must be completed in the country of origin of the child or adolescent and shall last for at least 15 (fifteen) days for children up to two (2) years old and at least thirty (30) days for adoptees over two (2) years old. ECA also establishes that before the adoption is approved the adoptee is not allowed to leave the Brazilian territory.

After accomplishing all the requirements above mentioned, the adoption will be authorized by a court decision which must be registered before the Civil Registry Notary Public Office where the proceeding was entered. No certificate will be provided to the concerned parties, except in the case of protection of rights, according to the judicial authority.

In order to register foreigners interested in adopting a Brazilian child, Brazil employs Agencies of International Adoption, allowing the candidates for adoption to come to Brazil only in the opportunity to meet with the child to be adopted.

However, there are no impediments for adopters to register themselves directly in

the Official Body in Brazil and in their country of origin, being necessary, however, that foreigners initially proceed with the registration in their country of origin and then obtain approval of such request in Brazil.

As last, it is important to clarify that once approved, the adoption is irrevocable and not even the death of the adopters has the capacity of providing the parental power back to the birth parents.

### 3. Dismissal of Parental Power.

The dismissal of parental power<sup>5</sup> constitutes logical assumption of adoption in case of adoptees under 18 (eighteen) years old. This is an expressed requirement of the ECA<sup>6</sup>.

The Civil Code establishes that the parental power may be extinct by: i) death of the parents or the child, ii) emancipation; iii) majority iv) adoption, v) court decision when parents: a) punish the child immoderately; b) leave the child in abandonment; c) act contrary to good moral principles; d) abuse of their

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<sup>5</sup> **Rights and duties arising out of the parental Power.** The parents have the parental power which means both power-duty and right. The expression "paternal power" was replaced by parental power due to the substantial equivalency of the parents on the education of the children and management of the marital entity (Federal Constitution 226, §5) in NERY JUNIOR, Nelson and NERY, Rosa Maria de Andrade. *Noted Civil Code and Special Law*. São Paulo: RT Publisher, 2004, page 732.

<sup>6</sup> **Article 45.** The adoption depends on the consent of the parents or of the legal representative of the adoptee.

**§1** The consent will be dismissed when related to a child or adolescent which parents are unknown or that have been dismissed from the parental power.

**§2** If the adoptee is over 12 (twelve) years old his/her consent is also needed.

authority, not accomplishing with their duties or ruining the property of the child; and, e) being convicted by definitive decision due to a crime which the penalty exceeds two years in prison.

Besides the chances of its natural extinction, the dismissal of the parental power may not be directly imposed in the process for adoption. It is necessary to file a specific lawsuit which will respect the due legal process and will allow broad practice of the right of defense of those involved.

#### 4. International Adoption and the Hague Convention.

The non existence of an effective global regulation for the phenomenon of international adoption, the increase of demand and the worsening economic conditions of the country of origin of the children have contributed to the increase of children traffic worldwide. The traffic expansion and the insecurity with respect to the legality of the judicial proceedings for adoption have caused difficulties for the adoptees and for their regularization in the respective adopters' countries<sup>7</sup>.

The solution to this dangerous situation for the children and their parents came through the national legislation of the various countries involved<sup>8</sup> and by means of new international acts, among which The Hague Convention of 1993 is part and was approved in Brazil by the Legislative

Decree nº 3087/99, regarding protection and cooperation in relation to international adoptions<sup>9</sup>.

The main purpose of the mentioned Convention was to establish a system of administrative and judicial cooperation, before and after the adoptee or the child to be adopted leaves their country of origin, thus being able to protect the fundamental rights of the adoptees and to ensure he or she a best (or at least equivalent) legal status in the host country, the residence country of the adoptive parents<sup>10</sup>.

The main rules for international adoptions to be observed by all signatory countries can be found in Articles 4, 5, 14, 16, 17 and 19 of the mentioned Convention<sup>11</sup>. Those articles, according to the best doctrine, are considered as not only rules but principles, which once accomplished will provide to both involved States the guarantee that there was not any kind of "sale", "traffic", "coercion", "kidnapping" or "induction of abandon", assuring that the adoptive parents are legally and psychologically skilled to have the child adopted<sup>12</sup>.

#### 5. International Adoption in accordance with Civil Code.

In relation to the present matter the Civil Code limits to repeat the rules contained in the ECA, without relevant changes on this matter.

The Civil Code applies exclusively when the adoptee is over 18 (eighteen) years old. According to what is determined by the mentioned law, only those over 18

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<sup>7</sup> MARQUES, Cláudia Lima. *News about the New Hague Convention on International Adoption*. Available at: [http://www.mp.pr.gov.br/cpca/telas/ca\\_igualda\\_de\\_7\\_2\\_1.html](http://www.mp.pr.gov.br/cpca/telas/ca_igualda_de_7_2_1.html). Article accessed on October 14, 2008.

<sup>8</sup> In Brazil as already mentioned the international adoption is ruled by the Federal Constitution (article 227, §5); Law nº 8.069/90 (articles 31, 46 §2, 51 and 52); law 10.406/02 (article 1618 and subsequent).

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<sup>9</sup> MARQUES, Cláudia Lima, op. cit, loc. cit.

<sup>10</sup> Idem.

<sup>11</sup> Refer to the Attachment I, with citation of the text of the articles 4<sup>th</sup>, 5<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> and 19<sup>th</sup>, of the Hague Convention approved to be valid in Brazil by Decree nº 3.087 from June 21<sup>st</sup>, 1999.

<sup>12</sup> MARQUES, Cláudia Lima, op. cit, loc. cit.

(eighteen) years old may adopt and it is also necessary that the adopter is at least 16 (sixteen) years older than the adoptee.

The only reference to international adoption is made in Article 1629, which establishes that adoption by foreigners shall follow the terms and conditions established in the special law<sup>13</sup>.

## 6. Conclusion.

International adoption in Brazil is not the rule but an exception.

Brazilian authorities give preference to adoptions made by Brazilian natural citizens or foreigners residing in the national territory, with the purpose to conserve the culture of the adoptees and in order to preserve their nationality.

Therefore, international adoption in Brazil has a subsidiary character when compared to the domestic adoption and considering that the first one may only occur once discharged all possibilities of maintaining the child with his/her own family or with another family resident in the national territory.

After unsuccessful attempt of all methods for adoption in the country of origin, international adoption will be feasible once the procedure is conducted with strict observance to the local laws related to the matter, as well as to what is established by the Hague Convention, which was ratified by Brazil by means of Decree No. 3.087/1999.

Finally, according to studies and analyzes regarding the international adoption, in Brazil children with age in the range from 0 (zero) to 6 (six) months with physical characteristics similar to those who are

interested in adopting them are the ones with major probability to be adopted. Usually, this requirement is not common for foreigners whom, unlikely Brazilian adopters, do not oppose to adopt older children and with different ethnicity from them.

Almeida Advogados remain at your disposal for any additional information deemed necessary.

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<sup>13</sup> As mentioned above the subject is ruled by the Hague Convention about the International Cooperation regarding International Adoption.

## ATTACHMENT I

### Article 4

Adoptions ruled by this Convention may only occur when competent authorities of the State of origin:

a) have determined that the child is adoptable;

b) have determined, after properly examining all possibilities of domestic adoption, that an international adoption accomplishes with the best interests of the child;

c) have been assured that:

1) people, entities and authorities, whose consent for adoption where required, were properly instructed and informed about the consequences of their consent, particularly with regard to the upholding or extinction of the legal bond between the child and his/her family of origin due to the adoption process;

2) those people, entities and authorities have expressed their consent in a free manner, under the applicable legal terms, and that such consent has been expressed or verified in writing;

3) consents were not obtained in return for payment or compensation of any nature or were revoked, and,

4) mother's consent, when required, has been expressed after the child's birth.

d) have been assured, verified the age and maturity level of the child that:

1) adoptee has been properly instructed and informed about the consequences of his/her consent for adoption, when it is required;

2) the will and opinion of the child have been taken into consideration;

3) the consent of the child for adoption, when required, has been given in a free manner, under the applicable legal terms, and that such consent has been expressed or verified in writing;

4) consent has not been induced in return of payment or compensation of any kind.

### Article 5

Adoptions covered by this Convention may only occur when the competent authorities of the host State:

a) have verified that adoptive parents are skilled and able to adopt;

b) have been assured that the adoptive parents were properly instructed;

c) have verified that the child has been or will be allowed to enter and reside permanently in the host country.

### Article 14

People with regular residence in a Contracting State that desire to adopt a child whose regular residence is in another Contracting State, shall refer to the Central Authority of the State of his/her residence.

### Article 16

1. If the Central Authority of the State of origin considers that the child is adoptable, it shall:

a) prepare a report containing information on the child's identity, his/her adoptability, social environment, family and personal development and his/her personal and family medical records, as well as any particular needs;

b) take into account the child's education,

as well as his/her ethnic, religious and cultural origin;

c) assure that the consents have been obtained in accordance with Article 4; and

d) verify, mainly based on reports related to the child and the adoptive parents, if the adoption meets the child's interest.

2. The Central Authority of the State of origin shall send to the Central Authority of the hosting State a report about the child, evidence regarding the consents required and the reasons which justify the adoption, taking all measures necessary not to reveal the parents' identity, if the disclosure of such information is not allowed in the State of origin.

#### Article 17

Any decision of insertion of a child under the adoptive parents' guard may only be taken in the State of origin if:

a) the Central Authority of the State of origin has assured that the adoptive parents have expressed their agreement;

b) the Central Authority of the hosting

State has approved such decision, when such approval is required according to the hosting State or the Central Authority of the State of origin law;

c) the Central Authorities of both States are in agreement to continue with the adoption, and

d) it has been established, in accordance with Article 5, that the adoptive parents are skilled and able to adopt and that the child is or will be allowed to enter and reside permanently in the host country.

#### Article 19

1. The child's moving to the hosting State will only occur when the requirements of Article 17 have been accomplished.

2. The Central Authorities of both States shall ensure that the moving takes place in complete security, with appropriate conditions and, when possible, in the company of the adoptive parents or future adoptive parents.

3. If the child's moving does not conclude, the reports mentioned in Articles 15 and 16 shall be returned to the authorities that have issued them.