

2009 Intercountry adoption conference

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A. Introduction

„German-Japanese relations are in general good and no special bilateral problems exist.“ This is what the former Japanese Prime Minister Miyazawa Kiichi wrote in a commemorative publication of the Japanese-German Center Berlin in 2005. This common ground is shared by the two States also in many fields, so in the field of child protection. Both countries have committed themselves to the protection of children, which can be seen in both countries ratifying the UN Convention on the rights of the child.

Part of the international system of protecting children is the right of adoption. It is aimed at giving children a chance to stay in their home countries: by means of youth welfare structures which provide the preconditions for a child's remaining with his or her own family; by means of institutions which enable children to grow up outside their family, but taking into consideration their needs and abilities; by means of political cooperation which provides the political conditions – both in domestic policy and foreign policy – for the States to provide children with a chance to grow up in peace and freedom within their own national borders.

For this reason, I appreciate the opportunity to speak to you today, and to share with you our German experiences with regard to the Hague Convention on Intercountry Adoption.

B. Germany and Intercountry Adoption

I. The starting situation in Germany

Intercountry adoptions are an integral part of adoption processes in Germany. But the circumstances have changed. After World War II, Germany was a “sending” country; many children from Germany were adopted e.g. by families in the United States. International Social Service was involved in those adoptions as a licensed adoption agency at that time.

1. Preface

Nowadays Germany is a so-called “receiving” country: In 2007 alone, 1,432 children adopted in that year were of non-German nationality.

Compared to the number of inhabitants of Germany, which are 80 million people, this number is relatively small. Nevertheless, this issue is being much discussed among professionals. Also the general public is always interested in the situation of families who want to adopt, or have adopted, a child from another country.

More and more couples in Germany are childless. The reasons are diverse. Times of economic instability, or maybe many years of study before finally starting a job, are the reasons why many men and women in Germany decide to become mothers or fathers relatively late in life – and end up in remaining childless. This phenomenon very often applies to university graduates.

There are many of those couples, not only in Germany but worldwide, who wish to raise, if not their own biological child, then at least a small infant. In many cases, however, their wish to adopt an infant cannot be met in Germany because the number of infants who can be adopted is limited. In 2007, there were 886 children free for adoption, as against 8,914 adoption applicants – which means that theoretically there are 10 applicants for one child.

2. Figures

The number of adoptions in Germany has been decreasing in the last few years – both the number of completed adoptions and the number of adoption applicants and of children to be adopted.

Adoptive children of German and of foreign nationalities:

| <i>1997</i> | <i>2007</i> |
|--------------|--------------|
| <i>7,173</i> | <i>4,509</i> |

Adoption applicants:

| <i>1997</i> | <i>2007</i> |
|---------------|--------------|
| <i>17,139</i> | <i>8,914</i> |

Children free for adoption in Germany:

| <i>1997</i> | <i>2007</i> |
|--------------|-------------|
| <i>1,276</i> | <i>886</i> |

Now let's have a look at those figures of the year 2007 in more detail:

Out of 4,509 children adopted in 2007, one third of them (1,432 children) did not have German nationality. 709 children came to Germany from abroad. Statistics differentiate between non-relative adoptions, stepchild adoptions, and relative adoptions. Unfortunately the statistics do not give proof of all the inter-country adoptions that have taken place, since adoptions that take part without the involvement of national agencies are not being noted.

Almost half of those 1,432 children were adopted by a step-parent or by relatives. A little more than half of them – i.e. 778 children – were adopted by persons who were strangers to them.

Where do those children originate from?

The majority of all the above-mentioned children came from Europe; the others came from all over the world (even from countries which do not have the legal institution of adoption in their legislation, such as Morocco).

Let me give you some figures on this:

Europe as a whole
(not including Germany): 757

| <u>of which:</u> | | <u>stepchildren</u> |
|---|-----|---------------------|
| Poland | 53 | 28 |
| Romania | 34 | 29 |
| Russian Federation (Non-Member State of the Hague Convention) | 327 | 115 |
| Ukraine | 106 | 37 |
| Africa as a whole: | 167 | |
| Ethiopia (non-Hague) | 30 | |
| America as a whole: | 195 | |
| Columbia | 89 | |
| Asia as a whole: | 306 | |
| Thailand | 73 | 45 |
| India | 32 | |
| Vietnam (non-Hague) | 26 | |
| Philippines | 22 | 11 |

For some countries, I specified the number of stepchild adoptions because it gives an impression of the marriage habits of German men and women.

3. The system of adoption placement

Germany has a federalist structure, in which the competences on legislation are shared between the Federation (National Parliament) and the individual “Länder” (Federal States). The same applies to the executive, which is shared between the Federal Government, the “Länder” governments, and the local governments (communities or municipalities). This equally applies to adoption placement. Already since the time before the Hague Convention on Intercountry Adoption, the issue of adoptions has been handled by the following authorities in Germany:

a) Legislative power:

According to Article 74 of the German Basic Law (Grundgesetz/GG), the Federation has legislative power regarding legislation on adoption. However, the “Bundesrat” (i.e. the representation of all the German Federal States) has to be involved in the legislative procedure. Within the Federal Government, the following departments are competent in the field of adoption legislation: the Federal Ministry for Family, Senior Citizens, Women and Youth, and the Federal Ministry of Justice.

b) the level of the Federal States:

The individual “Länder” (Federal States) each have a central “Land” youth welfare office. It has the following functions:

- adoption agency;
- authorizing local youth welfare offices to handle adoption cases;
- licensing of voluntary adoption agencies;
- counselling for the youth welfare offices.

c) the local level:

At local level, i.e. in the municipalities and communities, adoption cases are handled by the youth welfare offices. They have the following functions:

- to give counselling and guidance for adoption procedures;
- to make suitability reports (home studies) on adoption applicants;
- adoption agency (provided that they have a permission from the “Land” youth welfare Office for the individual adoption case);
- to make post-adoption reports (progress reports).

d) voluntary adoption agencies:

At present, there are as many as 14 voluntary adoption agencies in Germany. Most of them are registered associations or agencies run by the Church. They are licensed by the “Land” youth welfare office to handle intercountry adoptions both with Member States and with Non-Member States of the Hague Convention. Therefore, it is possible for an intercountry adoption agency to have a licence both for Ethiopia, which is a Non-Member State, and for South Africa, which is a Member State of the Hague Convention. The adoption of a child from South Africa must be handled according to the rules of the Hague Convention, whereas the adoption of a child from Ethiopia must be handled according to German law. In the end this does not make too much difference, since the basic rules for adoption apply to both kinds.

4. Aspects concerning law on foreign nationals

For a child to enter Germany after having been adopted or for the purpose of adoption, a visa is required. The visa is issued by the German Embassy in the respective country, after consultation with the local Aliens Office at the adoptive parents’ place of residence.

- Without wanting to go into too much detail about German immigration law, I would just like to mention that the visa procedure takes much more time in case of Non-Member States because in those cases, in-depth evaluations are required, e.g. to verify whether an adoption which has already been pronounced in the other country can be recognized under German law. This fact sometimes results in a lot of embarrassment on the part of the adoptive parents as well as the children.

5. International / European endeavours in the field of adoption legislation

At European level there are endeavours to unify the adoption laws of the European States in the interest of the children and parents concerned. On the one hand, there is the Convention of the Council of Europe on the Adoption of Children, which is aimed at harmonising the legislation of its State Parties. The revised version, which is to bring the Convention into line with current societal and legal standards, has been opened for signature since 2008. As of 16.01.2009, it has been signed by seven States. No State has ratified it until now. So it is not in force yet.

Also the European Union is dealing with questions of adoption in the European area and is aiming at closer cooperation between the Member States of the European Union in the field of adoption. If, and in which way, those considerations will result in a European set of rules, cannot be foreseen yet.

Up to now, the Hague Convention on Intercountry Adoption is the only international instrument to provide rules on cooperation between States in the field of intercountry adoption and supposedly will remain so.

II. The Implementation of the Hague Adoption Convention by Germany

1. Reasons for Germany to sign the Hague Convention

The German Branch of International Social Service as a non-governmental organisation, which has been working in the field of intercountry adoption for a long time, was participating in the elaboration of the Convention. Also Japan was participating in the development of the Convention. Therefore, I would like to be very brief when describing the motives for Germany to sign the Convention.

Germany feels committed to the goals of the UN Convention on the Rights of the Child to protect children to the best of our ability, which also implies Article 21 of the UN Convention. Child trafficking, deceiving the birth mother of a child, and other criminal

actions in connection with intercountry adoptions must be prevented and children must be given the best possible protection.

Time and again, we hear about cases where children have been placed for adoption in another country although they were no orphans. For the children concerned, these are traumatic experiences.

Apart from this, intercountry adoption always implies a break-up of relationship, which affects the emotional development of a child. They are uprooted from their familiar environment, they have to adjust to a strange culture, and they are possibly exposed to the risk of having to live with parents who are unsuitable for their care and upbringing. To prevent this as best we can, by looking for the most suitable parents for a child, is one of the goals of the UN Convention on the Rights of the Child.

Therefore, it has been a matter of course for Germany to ratify the Hague Adoption Convention, and to adapt its legislation to the provisions of the Convention.

2. Substantive law

The substantive preconditions for the adoption of a child are laid down in sections 1741 to 1766 of the German Civil Code, which specify the minimum age of the adoption applicants, the form of consent to be given by parents and children, the effects of adoption, etc. Germany's accession to the Hague Convention has not resulted in any amendment of the German Civil Code.

Pursuant to section 1741 of the German Civil Code, the adoption of a child is permissible if it serves the child's wellbeing, and if it is to be expected that a parent-child relationship will be created between the prospective adoptive parent and the child. The child's wellbeing ("best interest of the child") is a term which can be found very often in German law – especially in German family law – and which is at the centre of many court decisions. The best interest of the child is open to modification and interpretation especially by courts to a certain extent. In the field of adoption, the best interests of the

child are met if the adoption would result in lasting improvement of the child's situation. For example, an adoption would not be in the best interests of the child if the prospective adoptive parents are ill or too old.

3. Procedural law

As mentioned above, German law contained provisions on the adoption of children already before the ratification of the Hague Convention. After ratification of the Convention, however, the relevant legislation had to be adapted to it.

This was done by means of the "Law on the settlement of legal questions in the field of international adoption and for the further development of adoption law". The following laws have been passed or amended:

a) Act on the Implementation of the Hague Convention on Intercountry Adoption (AdÜbAG)

The AdÜbAG applies only to adoptions within the scope of application of the Hague Convention. It is aimed to smoothly adapt the existing institutional framework to the provisions laid down in the Hague Convention. Among others, it regulates the competences of the Central Authority at federal level and the Central Offices of the individual Federal States.

Because of its federal structure, Germany has not just one Central Authority, but the Federal States have created Central Offices as well. Their functions are performed by the "Land" youth welfare offices (see above). Some of the "Land" youth welfare offices have formed so-called "Joint Central Adoption Offices", so that there are not 16 Central Adoption Offices, but just 12 Central Adoption Offices in Germany.

The Central Authority within the meaning of Article 6, sub-section 2, sentence 2 of the Hague Convention is the Federal Central Office for International Adoptions ("Bundeszentralstelle für Auslandsadoptionen" - BZAA). It is located at the Federal Office of Justice in Bonn, and is subordinate to the Federal Ministry of Justice.

The BZAA in Bonn has two functions: official representation to the outside world, and a co-ordinating function within Germany. Within the meaning of Article 6, sub-section 2, sentence 2 of the Hague Convention, the BZAA is the contact agency to which any communications or transmissions from the other country may be addressed.

Within the framework of its coordinating function, the BZAA

- maintains a database to which adoption agencies have to report all the adoption cases they completed,
- evaluates the activity reports of adoption agencies,
- obtains information, if required, about individual adoption cases,
- is heard by the courts in proceedings under the Act on the Effects of Adoption (AdWirkG).

b) Adoption Placement Act (AdVermiG)

The Adoption Placement Act which was in force already has been supplemented with new regulations in the field of intercountry adoption.

aa) Scope of application:

The Adoption Placement Act contains rules on national and international adoption. It is applicable both within and outside the scope of application of the Hague Convention. Previously, adoption agencies were allowed to process international adoptions as well, but now, under the amended law, only accredited (licensed) agencies are allowed to carry out international adoption placements.

This applies, in particular, to the permission of youth welfare offices to process adoption placements across borders – now they need a special accreditation from the “Land” youth welfare office. Since youth welfare offices may have little experience in the field of international adoption, this new rule makes it possible for the “Land” youth welfare office to carry out a sort of quality control for adoption procedures.

bb) Professional qualification:

The qualification requirements for professionals working in the field of adoption have been toughened. Whereas the old version of section 3 of the Adoption Placement Act provided that:

“professionals only may be entrusted with adoption placements, who on account of their training and their professional experience are suitable. The adoption agencies shall have to be staffed with at least one full-time professional”,

the new version reads as follows:

“Professionals only may be entrusted with adoption placements, who on account of *their personality*, their training and their professional experience are suitable... The adoption agencies shall have to be staffed with at least *two full-time professionals or a corresponding number of part-time professionals*; these professionals must not be primarily dealing with tasks other than adoption placements.”

The suitability of a professional has been supplemented with the feature of “personality”, which corresponds to Article 11 lit. b of the Hague Convention, which emphasizes the “ethical standards” of the staff in adoption placement agencies. The term “personality” implies certain requirements such as empathy and communication skills.

The minimum number of staff of an adoption agency has been increased. This was aimed to ensure that at least two staff members are dealing with adoption matters most of the time so that they are always familiar with the practical aspects of adoption placement. Moreover, it was aimed to ensure that the staff have an exchange of information among themselves in order to maintain and improve the quality of their work.

cc) Obligation to retain the files on adoption placements

Another important change took place with regard to the handling of adoption files. In Germany, there is the principle of incognito adoption, which means that the child’s birth parents are not informed about where their child will be placed.

However, not being able to learn about his or her origin can be very distressing and embarrassing for the adoptee. Therefore, according to the ruling of the Federal Constitutional Court, which is the German supreme court, the German Constitution guarantees the possibility to get to know one's origin.

Nevertheless, the right of the family of origin to respect their privacy has to be taken into consideration.

To take into account the interests of both parties, the legislator gives adoptees the right to access the adoption file. Those files have to be stored for 60 years after the child's birth. However, the adoptee's right to access the file is limited to such information as concerns his or her origin and life history. It can be refused if a person concerned has major concerns, such as when the birth mother e.g. would face a danger to life and limb.

c) Act on the Effects of Adoption (AdWirkG)

Before the Act on the Effects of Adoption was passed, there had often been uncertainty in Germany about the recognition of adoptions which had been pronounced in another country. The recognition and legal effects of a foreign adoption are important, especially with regard to the child's nationality as well as maintenance claims and inheritance rights.

Before the passing of the Act on the Effects of Adoption, such uncertainties could be overcome sometimes only by means of a repeated adoption (so-called "re-adoption").

The Act on the Effects of Adoption implements the Articles 23 et.seq. of the Hague Convention, although it applies not only to Contracting States, but to Non-Contracting States as well. The court has to make a binding decision on the existence and legal effects of a parent-child relationship in order to provide legal certainty for the adoptive parents as well as for the child. Legal certainty is derived from the fact that the decision is generally binding.

If recognition is sought for a foreign adoption decree which does not fall within the scope of the Hague Convention, German law is applicable, including the so-called “ordre public” reservation (Public Policy Reservation), which means that apparent violation of major principles of German law results in refusal of recognition. In case the adoption decree may not have been in the best interest of the child, e.g. if no home study was made on the adoptive parents’ suitability, the German court must retroactively obtain an assessment of whether the child’s best interest was met. This regulation has been the subject of debate in many cases until now.

Some youth welfare offices refuse to provide an assessment because the involvement of the youth welfare offices in those cases is not necessarily required by the law. Another question in dispute is the timing of the assessment whether the adoption is in the best interest of the child – for many courts, the assessment, whether a parent-child relationship has actually been created, should be made when the court proceedings are pending already; whereas others argue that this undermines the law because it may retroactively sanction an adoption which would normally not have been approved.

Moreover, the Act on the Effects of Adoption deals with cases where an adoption, which was made under the legislation of another country, does not lead to a complete dissolution of the legal relations between the child and its birth parents or relatives (so-called “simple adoption”). In such cases, it is possible to convert them into a full adoption under German law.

Here, too, the best interests of the child are of primary importance. A simple adoption can be converted into a full adoption only if the conversion claim serves the best interests of the child, and if the declarations of consent required under the law of the State of origin – especially the birth parents’ consent – have been submitted. The courts, within the framework of the court proceedings, have the duty to retroactively obtain an assessment of the best interests of the child.

III. Striking a Balance – 7 Years of the Hague Convention on Intercountry Adoption

The Hague Convention on Intercountry Adoption has been in force in Germany since 1st March 2002. Seven years are enough time to be able to strike a balance.

1. Advantages

The advantages of the Hague Convention can be listed easily:

- Basic standards, which make it more easy to respond to the needs of orphaned children and to find suitable parents for them;
- More Transparency. The requirement of accreditation for adoption placement agencies as well as supervision mechanisms prevent child trafficking;
- The organisational framework facilitates cooperation between the State of origin and the receiving State;
- Questions concerning the child's residence status can be clarified more easily;
- The regulations on recognition and the effects of adoption provide legal certainty;
- The child's entry to Germany is greatly facilitated.

2. Difficulties

Where there is light, there is shadow. And since I have been invited to share with you the German experiences with the Hague Convention on Intercountry Adoption, I don't want to hide the fact that difficulties still exist.

a) So-called self-procurement of children for adoption

So-called self-procurement of children for adoption, i.e. adoption of children without an accredited adoption agency being involved, is one of the major problems. One reason for this self-procurement is that the German adoption placement practice is based on the assumption that the age difference between adoptive parents and the adoptive child should not be more than 40 years – many couples are beyond that limit, or are about to be too old in view of the long duration of the adoption procedure. That is one of the reasons why many couples, including binational couples, decide to try their luck abroad.

According to estimates, about 50% of all intercountry adoptions in Germany are so-called self-procurement adoptions, mostly from Non-Contracting States, but also from Contracting States of the Hague Convention. Precise figures do not exist. The reasons why people wanting to adopt a child decide to take this path, are diverse. The following reasons may be exemplary:

aa) Ignorance – especially within Contracting States – of the obligation that an adoption agency must be involved. This phenomenon occurs most often with applicants with a migration background or in cases of stepchild adoptions.

bb) The applicants are not suitable to adopt a child (e.g. because of their age, or because they have been rejected by the youth welfare office or adoption agency);

cc) Long duration of the procedure, transparency, and the costs:

The aspect of costs probably plays a role especially for adoptions among family members/relatives: the adoptive parents, who think they don't need any help or placement of a child, won't understand why they have to pay e.g. 2000.- EUR for the adoption placement procedure, including a home study report.

dd) Adoption for improper purposes (to acquire German citizenship or a residence permission in Germany): This phenomenon occurs when children are adopted from extended family or acquaintances, by applicants who have a migration background. Usually the adoptees are older children or adolescents. If a "full adoption" decree is made, they immediately acquire German citizenship, without having any knowledge of the German language and without any future prospects for their integration in Germany. With a new law these adoptions have been made more difficult, but this does not hinder people to try with the effect that they have problems to bring children into the country.

ee) With regard to Non-Contracting States, one of the problems is that no adoption agency exists which has been accredited for adoption placements from the country of origin. The Central Adoption Offices of the "Land" youth welfare offices

have the obligation to handle adoptions only from Contracting States of the Hague Convention, whereas the adoption agencies of local youth welfare offices have no obligation at all to handle intercountry adoptions (they can only get an accreditation, which depends on an authorization from the “Land” youth welfare office). Moreover, accredited adoption agencies cover only part of the possible countries of origin.

The risks of self-procurement are obvious. There is no system which proves if children really need to be adopted and if their parents really have agreed to them being adopted or if money has been paid. Children bear the risk to end up in bad conditions – something the Hague Convention wanted to prevent.

b) Lack of infrastructure in Contracting States of the Hague Convention

The example of some states demonstrates that accession to the Hague Convention or its ratification is no guarantee for compliance with the standards laid down in the Convention. There are other examples, too, which show that the youth welfare offices, courts and adoption agencies in the Contracting States need more information and awareness-raising in order to make sure that adoption placements are handled along the lines of the Convention. It is therefore highly appreciated that those states are being supported in their efforts to establish the infrastructure by other states.

c) Criticism from adoption agencies

If you ask voluntary adoption agencies, they will criticize this as well. They criticize, among others, the fact that red tape has become excessive. For example, the duties of notification in the course of the procedure actually consist of more than 90 single steps. Moreover, criticism is lodged against the rivalling competence of the “Land” youth welfare offices who, in spite of their function as supervisory authority over the voluntary agencies, also assume the task of adoption placement directly.

Many voluntary adoption agencies support the idea of basic funding to be provided by the State. This would help to ease the pressure on voluntary agencies, who otherwise

may engage in adoption placements excessively just because of the need to finance themselves (cf. the personnel costs of highly qualified professional staff).

d) Principle of subsidiarity

The UN Convention on the Rights of the Child as well as the Hague Convention are based on the conception that international adoption is the “ultima ratio”. International adoption is considered only if no satisfactory solution can be found for a child in his or her home country. It think that this fundamental principle is not always taken into account. In particular, the States of the so-called “First World” should have the duty to make sure that children don’t have to be given away by their families, or that suitable families are found for them in their country of origin.

C. Conclusion

Nothing is perfect from the beginning on. From my point of view the advantages of the Hague Convention prevail the difficulties. I am sure that it will be possible to overcome the above-mentioned disadvantages step by step. I’m sure you won’t disagree with me if I say that there should be no “1st class” child protection and “2nd class” child protection, but there should be equal standards for every child. For that reason, plans are underway in Germany to make “self-procuring adoption” more difficult, to promote awareness-raising, and to make it more difficult for parents to adopt a child without presenting a suitability assessment report. The success of such efforts will certainly depend, among other things, on getting as many States as possible to ratify the Hague Convention, and to seriously pursue its implementation. So that we will be able, according to the philosophy of ISS Germany, to cross borders - to protect children and to unite families.