Essays

Accountability of NGOs in the Italian Legal Framework of International Adoption

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Abstract

The paper focuses on the accountability of private and public entities with competence in the international adoption of minor children in the Italian legal framework.

The author detects sources of law, models, and operative rules implemented by legislation, court rulings, and practitioners, distinguishing two different levels and relationships.

The first involves the relationship between the Commission for International Adoption and the NGOs, focusing on the nature of the NGOs (Non-governmental organizations) which are private bodies with public functions that implement private rights, acting in the public interest.

The second level involves the contractual relationship between the appointed NGO and the aspiring parents.

The survey offers a critical perspective on some relevant issues, such as:

- the centrality of trust, in both the public and the private law domain, as a fundamental element of the model;

- the nature and the contractual obligations of the NGOs who assist the prospective parents; and

- alternative legal arguments that courts could follow to better protect the rights and values of the parties involved, or to fill gaps in the rationales already adopted.

I. Introduction

International adoption is the adoption of a foreign child in his/her birth country through the authorities and laws that operate there. In Italy, the competencies in matters of intercountry adoptions, provided for by the Hague Convention of 29 May 1993 and *legge* 31 December 1998 no 476, derive from the Commission for Intercountry Adoptions (CAI), which is the Central Authority established at the Presidency of the Council of Ministers.[1] In brief, the requirements for international adoption are the same as those for national adoption and are provided by Art 6[2]

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[1] Art 39-*ter* legge 4 May 1983 no 184, as modified by legge 31 December 1998 no 476, Ratification and execution of the Convention for the protection of minors and cooperation in the field of intercountry adoption, The Hague, 29 May 1993.

[2] Art 6 provides that adoption is allowed 'to spouses who have been married for at least

of *legge* 4 May 1983 no 184, as amended by *legge* 28 March 2001 no 149 (Adoption Act).[3]

Thus, individuals residing in Italy who meet the conditions prescribed by Art 6, and who intend to adopt a foreign minor residing abroad, must submit a declaration of willingness to undertake an international adoption to the *Tribunale per i Minorenni* of the district where they reside, and ask the court to certify their suitability to adopt. In the case of Italian citizens residing in a foreign country, the *Tribunale per i Minorenni* of the district where their last residence is located is competent; failing that, the *Tribunale per i Minorenni* of Rome is competent. The role of social services is to get to know the couple and to evaluate their parenting potential by collecting information on their personal, family, and social history. At the end of the investigation, a report is prepared and sent to the *Tribunale per i Minorenni*. The *Tribunale per i Minorenni* then summons the couple and may request further information, or it may decide to issue either a decree of suitability or a decree certifying that parents do not meet the requirements to adopt.

Therefore, once the couple has a decree of suitability, they must start the international adoption procedure within one year of receiving it by contacting one of the NGOs authorized by the CAI. This step is compulsory.[4] The institution assists the couple by handling the necessary paperwork throughout this complex procedure. It transmits all the documentation referring to the child, together with the certification of the foreign judge or a competent authority, to the CAI. When the adopted child is ready to travel to Italy, the CAI authorizes the child's entry and stay in Italy after certifying that the adoption complies with the provisions of the Hague Convention. After the child has entered Italy and the pre-adoptive fostering period has elapsed, the procedure ends with the order by the *Tribunale per i Minorenni* to enter the adoption in the civil status registers.

In spite of that, before going deep into the analysis, it is useful to consider the relevant data, to better understand the dimension of international adoption, the number of families and children involved, and the costs, both private and public.

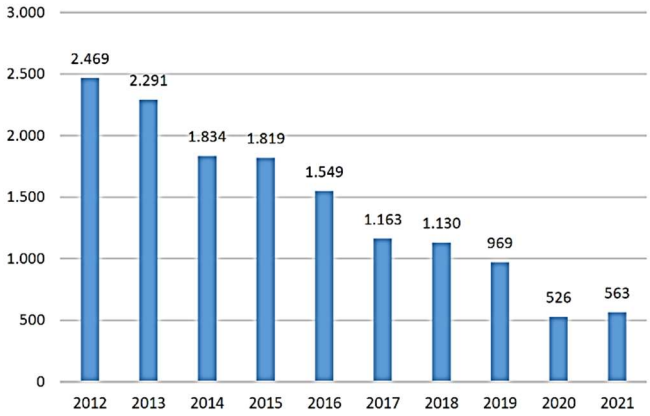
Figure 1 – Couples who requested authorization for foreign minors to enter Italy for adoption purposes, years 2012-2021.[5]

three years, between whom there is no personal separation, not even de facto, and who are suitable for educating, instructing and maintaining the minors they intend to adopt'.

[3] G. Autorino and P. Stanzione, *Le adozioni nella nuova disciplina. Legge 28 marzo 2001 n. 149* (Milano: Giuffrè, 2001); M. Dogliotti, 'Adozione di maggiorenni e minori. Artt. 291-314. L. 4 maggio 1983, n. 184. Diritto del minore a una famiglia' in P. Schlesinger and F. Busnelli eds, *Il codice civile. Commentario* (Milano: Giuffrè, 2002).

[4] The list of authorized entities is online on the Commission's institutional website: www.commissioneadozioni.it.

[5] Source: Presidency of the Council of Ministers, Commission for Intercountry Adoptions, Data and Perspectives in International Adoptions. Summary Report of records from January 1 to December 31, 2021, Istituto degli Innocenti, Florence, available at https://tinyurl.com/bdcsb862 (last visited 20 September 2023).



The progressive decrease, which emerges in the figure, is probably due to: - the scientific and technological development of artificial insemination procedures; - the diffusion of special forms of adoption and foster-care; - the increase of Migrant Non-Accompanied Minors, which enter the adoption national circuit; - the Covid pandemic lockdown in many States and the consequent stop of the intercountry adoption procedures, having regard to 2020 and 2021. In considering these numbers, it should be noted that the median cost for aspiring parents is € 15,000 to € 20,000, in addition to other direct and indirect costs like travel to the country of origin of the child and vaccine expenses.

Moreover, this paper investigates what happens when international adoption goes wrong, who the different actors in this process are, and how their relationships and responsibilities are configured. I examine the sources of law, the models and operative rules implemented by legislation, courts rulings, and practitioners while offering a critical perspective on some relevant issues, such as:

- the centrality of trust, in both the public and the private domain, as a fundamental element of the model;

- the nature and the contractual obligations of the NGOs who assist prospective parents;

- the legal arguments that courts could follow to better protect the rights and the values of the parties involved in the procedure, or to fill gaps in the rationales already adopted.

Thus, I examine two different levels or relationships of trust. The first level involves the relationship between the CAI and the NGOs. Here, I focus on the nature of the NGOs, which are private bodies with public functions that implement private rights, but also in the public interest (paraII). The second level involves the contractual relationship between the appointed NGO and the prospective parents (paraIII). There is also a third level, which implies many connections between foreign country authorities, NGOs in the child's country of origin, and Italian NGOs. While investigating these connections is beyond the scope of this

paper, I intend to address them in a forthcoming article.

Therefore, to provide the international reader (who is not Italian or a civil lawyer) with a better understanding of these issues, I use footnotes in which I discuss the meanings of certain legal concepts, categories, and institutions that cannot be translated directly from Italian into English.[6] When referring to those concepts, I either use the Italian term or a roughly equivalent English term. Moreover, I seek to provide adequate definitions and explanations for each of the categories I am using, and for the functions of the legal concepts cited.[7]

II. The Relationship Between the CAI and the NGOs: Public Trust, Public Control, and Public Interest

The central issue is the legal nature of the entities that carry out the procedure for adopting foreign minors, because it affects the obligations, rights and duties, and the regime of accountability of the NGO in front of the aspiring parents and the legal system.

In this context, Art 39 *ter*, lett d) of the Adoption Act,[8] among other requirements the entities must meet to obtain (and retain) the authorization to carry out intermediation activities in international adoptions, expressly excludes profit-making activities. Thus, the entity cannot and must not engage in the division of profits deriving from this activity.[9] After the CAI has issued its authorization, these entities are assigned powers of a public nature (mainly certification powers). However, the control and the direction of these powers are established by the CAI.

As a matter of fact, the Italian legal system recognizes the category of 'private entities of public interest': *id est*, entities of a private nature, which, due to the public importance of their activities, are subject to a particular legal regime that differs from the regime that generally oversees private entities. Thus, these entities represent a *tertium genus* halfway between public and private entities.[10] There is abundant literature on this point,[11] but for the purpose of my research, it is

[6] S. Sarcevic, *New Approaches to Legal Translation* (The Hague: Kluwer Law International, 1997), 145-160.

[7] V. Jacometti and B. Pozzo, *Traduttologia e Linguaggio Giuridico* (Padova: CEDAM, 2019), 91-117.

[8] Art 39-*ter*, letter d) of the Adoption Act expressly states that the NGOs must 'be non-profit, ensure absolutely transparent accounting management, even on the costs of the procedure, and operate correctly and fairly, with a verifiable method'.

[9] P. Morozzo Della Rocca, *La riforma dell'adozione internazionale. Commento alla Legge 31 dicembre 1998 n. 476* (Torino: UTET, 1999); Id, 'Gli enti autorizzati a curare l'adozione quali associazioni di diritto privato esercenti pubbliche funzioni: regole, poteri e responsabilità' *Diritto di famiglia e delle persone,* II, 516, 514-529 (2002).

[10] V.M. Sessa, *Gli enti privati di interesse generale* (Milano: Giuffrè, 2007).

[11] G. Rossi, *Gli enti pubblici* (Bologna: il Mulino, 1991), 213; Id, 'Gli enti pubblici in forma societaria' *Servizi pubblici e appalti,* 221, (2004). For a different view, see G. Corso, *Manuale di*

reasonable to construct a concise category of private entities of public interest because certain issues concerning these entities often arise:

- whether (substantially) private entities – being subject to a public law regime – are compatible with the constitutional principles that protect freedom of association; and also, guarantee equality and social solidarity are unclear;

- these special regimes confer privileges of various kinds, especially financial and tax privileges, which must be controlled to verify that public resources are not being used for purposes other than those for which they were granted;

- these privileges and prerogatives cannot and must not be exercised in violation of the non-discrimination principle, and they must be exercised in compliance with the principle of reasonableness.

Moreover, the adoption system outlined in the legge no 184/1983 has been reformed several times by Italian legislators, including under the provisions of international agreements. These reforms took place in two stages. The first part was carried out under the legge no 476/1998, which ratified and implemented the 1993 Hague Convention on the protection of minors and cooperation in the field of international adoption; while the second part was implemented under legge no 149/2001, which amended legge no 184/1983 concerning national adoption, together with some provisions of the civil code.[12] Following the 1998 reform, government regulations were issued that contained rules for the constitution, organization, and functioning of the CAI,[13] which plays a pivotal role in the mechanisms built by the Hague Convention. In this sense, the Convention (Art 22, para 1) provides that the functions conferred on the central authority can also be exercised by public authorities or authorized bodies.[14] Italian legislators made

diritto amministrativo (Torino: Giappichelli, 2022), 89; G. Napolitano, *Pubblico e privato nel diritto amministrativo* (Milano: Giuffrè 2003), 171; Id, 'Soggetti privati 'enti pubblici'?' *Diritto amministrativo*, 4, 801 (2003).

[12] R. Pregliasco, 'Come cambia l'adozione in Italia', in I numeri italiani. Infanzia ed adolescenza in cifre. Edizione 2007 - Quaderni del Centro nazionale di documentazione e analisi per l'infanzia e l'adolescenza no 43 (Firenze: Istituto degli Innocenti, 2007), 75-78.

[13] Decreto del Presidente della Repubblica 1 December 1999 no 492, emended by Decreto del Presidente della Repubblica 8 June 2007 no 108.

[14] Art 22 states that '(1) The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.

(2) Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Arts 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who: a) meet the requirements of integrity, professional competence, experience and accountability of that State; and b) are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.

(3) A Contracting State which makes the declaration provided for in para2 shall keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these bodies and persons.

(4) Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with para 1.

use of this option by establishing a central authority (the CAI) and allowing other bodies to exercise relevant public functions, including public or private authorities duly accredited under national law.

In addition, the entire adoption procedure must pass through intermediary bodies. Thus, couples wishing to adopt a foreign minor must contact these authorities. This appears to be consistent with the intention of legislators to avoid overburdening the central administrative authority with very large bureaucratic apparatuses, which certainly would have happened if the CAI had been assigned the task of directly managing the international adoptions that take place in Italy. The obligatory recourse to these bodies was then reinforced by severe criminal sanctions, provided by Art 72-*bis* of the Adoption Act, for intermediation carried out without authorization, and for aspiring parents who seek to adopt through bodies that are not duly authorized. Furthermore, Art 39-*ter* of the Adoption Act provides the requirements that entities must meet to obtain authorization: eg, having a registered office in the national territory; having an adequate organizational structure in at least one Region or Autonomous Province in Italy, and the personnel structures needed to operate in the foreign countries where they intend to act; being directed by and composed of people with adequate training and competence in the field of international adoption, and with suitable moral qualities; making use of the contributions of professionals in the social, legal, and psychological fields registered in the relevant professional register; and participating in activities to promote the rights of the child.

In this context, the tasks of authorizing and supervising the intermediation organizations are assigned to the CAI. Therefore, the Administrative Authority is responsible for receiving the authorization applications and reaching decisions on them after checking the requirements. If an application is rejected or only partially accepted, the bodies concerned may submit a request for re-examination to the Commission, which must be decided within thirty days, or sixty days in total if further information relevant to the investigation is demanded.[15] Therefore, if, following the checks, the CAI detects irregularities, it can (depending on the seriousness of the violation): censor the entity; demand that the entity adapt its operating procedures to the provisions of the Act or regulations; order the limitation of the assumption of offices; or order the modification of the territorial extension of the operations of the authorized body at the national level. In the most serious cases of non-compliance, the Commission has the power to suspend the NGO's authorization for a specific period and to set a deadline by which it must eliminate the irregularities. If, after the deadline has passed, the entity has not complied, the CAI can revoke its authorization. The revocation is also ordered if

(5) Notwithstanding any declaration made under para 2, the reports provided for in Arts 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with para 1'.

[15] Art 17, Decreto Presidente della Repubblica 8 June 2007 no 108.

the conditions under which the authorization was granted cease to exist, or if the activities of the entity do not comply with the principles and provisions established by the Convention, the Adoption Act, and the regulation.[16]

However, the NGOs that have obtained the authorization are registered in a specific record.[17] This record is kept by the Commission, which is required to check it every three years. Moreover, given the proliferation of authorized bodies, according to the above Art 6, letter d), the CAI must act to ensure the homogeneous diffusion of the entities, while encouraging them to coordinate and improve their effectiveness and quality. The purpose of the regulation is to limit the number of organizations operating in a specific foreign country.

Despite that, this legislation has been criticized not only by those involved in the system but also by scholars. In particular, the decision of the Italian legislator to assign responsibility for the adoption procedures exclusively to private entities has strongly complained.[18] It has been pointed that this regulation, which was not imposed by the Convention, makes it impossible for couples to adopt in countries where no authorized body operates. Because the entities are private, they tend to ask for authorization to operate in some countries rather than in others, mainly based on criteria that (above all) consider the preferences of the aspiring adoptive parents, as well as the ease of obtaining children for adoption. Thus, it is argued, there is a well-founded risk that international adoptions are excessively influenced by the preferences of aspiring adopters while neglecting the interests of the abandoned children themselves.[19] However, unless the Commission has the power to limit the authorization of entities to certain countries, it would no longer have the power to impose conditions on entities operating in countries that fail to meet the requirements. It has been suggested that the CAI should be given the power to proceed directly, thereby filling the role that Italian law reserves exclusively to authorized entities. Alternatively, public adoption services operating in countries with few, or any private intermediation organizations could be created.

Subsequently, by choosing a pluralistic model, Italian legislators were rejecting a monopolistic approach, while also seeking to prevent adoption practices outside of institutional channels and to stop the proliferation of so-called independent adoptions. However, this model is not able to fully meet its goals. This is also because we are dealing with the category of private entity of general interest: *id est*, private subjects that pursue public purposes, but through activities that are not obligatory in nature. These activities always remain private, and are therefore not compulsory, even if they are of public relevance. Thus, when speaking of the

[16] Art 16 of the above Decreto Presidente della Repubblica.

[17] Art 6, para 1, letter c) of the above Decreto Presidente della Repubblica.

[18] L. Lenti, 'Introduzione, vicende storiche e modelli di legislazione in materia adottiva', in G. Collura et al eds, *Filiazione*, *Trattato di diritto di famiglia* (Milano: Giuffrè, 2011), II, 767-820.

[19] L. Fadiga, 'Gli enti autorizzati nella convenzione dell'Aja e nella legge 1983/184' *Studi Urbinati, A - Scienze Giuridiche, Politiche Ed Economiche*, II, 55, 259–274 (2014).

private exercise of public functions, it is not enough that the activities are aimed at satisfying a public interest. Instead, the entity must be ordered to achieve the general purposes predetermined by the law. It is only then that the activities can be considered public, and not just of general interest.

As this discussion clearly shows, it is impossible to include these NGOs in the 'private exercise of public functions' category. Instead, it appears that these NGOs should be considered private entities of general interest governed by our legal system.

III. The Contractual Relationship Between the NGO and the Family

The courts have qualified the relationship between the parties, respectively a couple of aspiring patents and the NGOs as a *mandato*, defined by Art 1703 of the Italian Civil Code as the contract in which one party (*mandatario*) undertakes to perform legal acts on behalf of the other (*mandante*).

For no-Italian or no-civil lawyer readers, it could be useful to clarify that quite often the civil law contractual scheme of *mandato* has been equated and compared to the common law's 'agency', even if the two figures are non-exactly homologous because the *mandato* is a contract, that can be *a titolo gratuito* (for free and without valuable consideration, not for value) or *a titolo oneroso,* which means with the remuneration of the *mandatario* (the agent) supported by a good and valuable consideration. While in the common law agency, the agent is always paid for his activities, as the bargain of the mutual obligations by parties (respectively, the principle and the agent) and the be-side consideration ensure the validity of the contract itself. There are also many differences having regard to the powers of the agent and the ones of the *mandatario* and on the effects of the acts and contracts concluded by the agent or the *mandatario* in the name and on the behalf of the principal and the *mandante*.

Whereas a deep distinction between these two legal categories is beyond the scope of this essay,[20] where the two concepts will be considered improperly as

[20] On the agency, from a common lawyer perspective, see O. W. Holmes, 'Agency' 2 *Harvard Law Review*, 5, 1-23 (1891); F.M.B. Reynolds, 'Agency: theory and practice' 94 *Law Quarterly Review*, 224 (1978); R.E. Barnett, 'Squaring Undisclosed Agency Law with Contract Theory' 75 *California Law Review*, 1969 (1987); E. Rasmusen, 'Agency law and contract formation' 62 *American Law and Economics Review,* 369-409 (2004); W. Muller-Freienfels, 'Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty' 13 *American Journal of Comparative Law*, 193 (1964). In the Italian literature, see F. Menozzi ed, *Fiducia, trust, mandato ed agency* (Milano: Giuffrè, 1991); V. De Lorenzi, *La rappresentanza* (Milano: Giuffrè, 2012) 2-40; R. Calvo, 'La rilevanza esterna del mandato' *Rivista trimestrale di diritto e procedura civile*, 793-801 (2009); Id, 'L'estinzione del mandato', in P. Rescigno and E. Gabrielli eds, *I contratti di collaborazione. Trattato dei contratti,* (Torino: UTET, 2011), XVI, 241-278; S. Delle Monache, *La contemplatio domini: contributo alla teoria della rappresentanza* (Milano: Giuffrè, 2001). With a comparative approach R.E. Cerchia, 'Agency e privity', in Id et al eds, *Il contract in Inghilterra: lezioni e materiali* (Torino: Giappichelli, 2012), 101-113; Id, 'Legal mentality and its influence in shaping legal rules: the

homologous. However, having regard to the relationship here involved, some scholars believe that the contract concluded by the aspiring parents with the NGOs represents an atypical form of *mandato*, as there should be a real legal obligation for the entity to accept the assignment. Thus, the authorized entities should not be free to refuse an assignment given to them by the aspiring adoptive parents. It is argued that in practice, given the legal obligation of the aspiring adopters to contact the authorized bodies, there should be a legal obligation to contract on the latter.

Overall, I disagree with this interpretative solution, first, because the *mandato* contract is *intuitu personae*[21] – and is therefore freely renounceable by the agent – *mandatario*[22] – and the obligation to contract must be considered incompatible with the legal nature of the authorized entities; and, second, because the obligation to contract represents a strong limit on private autonomy, which can be expressly allowed by the law only under specific conditions.[23] Legislators, in exercising their discretion, are strictly limited by the constitutional principles that guarantee the autonomy of all private subjects, including associative ones, protected under Art 18 of the Constitution.[24] The case law in this regard has recently held,[25] that 'the deed of assignment' to the entity

> 'in charge of mediating the request for international adoption has the legal nature of a contract: *mandato* with representation. The public relevance of the function that the entity performs does not affect the essential core of the contract, which remains regulated by arts 1703 and subsequent of the civil code'.

Previously, the *Corte di Cassazione*[26] clarified that the main obligation of the body specialized in intercountry adoptions is an '*obbligazione di mezzi*'.[27] This

relationship between principal and agent' *Global Jurist*, 1-19 (2019); M. Graziadei, 'Il conflitto di interessi nei rapporti di agency: alcuni tratti salienti dell'esperienza inglese', in R. Sacchi ed, *Conflitto di interessi e interessi in conflitto in una prospettiva interdisciplinare* (Milano: Giuffrè Francis Lefebvre, 2020), 39, 331-347.

[21] *Intuitu personae* is a Latin expression which applies to a contract signed by one of the parties by virtue of the personality of the other party. Thus, as the contract is based on the personal skills and characteristics (of the parties), it may not be transferred.

[22] Cf Art 1727, para 1, Civil Code.

[23] Some examples could be the need to protect the citizen-consumer before the monopolist (art 2597 of the Civil Code) or before the operator of a public service for the transport of persons or things (art 1679 of the Civil Code).

[24] Under Art 18 of the Italian Constitution 'Citizens have the right to form associations freely, without authorization, for ends that are not forbidden to individuals by criminal law. Secret associations and those associations that, even indirectly, pursue political ends by means of organizations having a military character, are prohibited'.

[25] Tribunale di Ascoli Piceno 9 January 2018, available on www.dejure.it. All the cited parts of courts' decisions in quotation marks are translated by the author.

[26] Cassazione Civile – Sezioni Unite 1 June 2010 no 13332/2010, available on www.dejure.it.

[27] On the distinction between *obbligazioni di mezzi* and *obbligazioni di risultato*, see A.

means that the NGO must offer a service and a standard of performance that comply with the diligence criteria, but is not obliged to ensure the outcome, as its obligations certainly cannot include ensuring that a couple can adopt a foreign minor. Moreover, there is no right to adopt, just as there is more generally no 'right to have a child', which is protected and enforced under Italian law.

However, believing that the entity is not liable for the failure to achieve the 'result' (duly presented in quotation marks) is not the same as arguing that it is exempt from any legal liability, as will be discussed below. Under the civil code, a *mandato* contract can be drawn up free of charge or in exchange for payment. This is usually burdensome, even if the fee to be paid by the principal-*mandante* (the couple) is not fully at the discretion of the agent-*mandatario* (the entity), as it must be within the limits set by the CAI. According to Art 32 of the Hague Convention:

> 'No undue material profit is allowed in relation to services for an international adoption. Only charges and expenses, including fees due to the people who took part in the adoption can be requested and paid. Managers, administrators and employees of the bodies involved in the adoption cannot receive a disproportionate remuneration in relation to the services rendered'.

> The couple, as the principal, can revoke the assignment at any time, without having to explain the reason why. For its part, however, the NGO can, as an agent, refuse the appointment only for 'justified reasons', which can consist of 'subjective factors, such as the behavior of the principal, or objective events that hinder the normal performance of the management activity; in both cases, however, they must be objectively relevant events'.[28]

Based on this, in the absence of a justified cause, the refusal of the assignment could give rise to a breach of contract, with a consequent obligation to compensate the principal for the damages. In the event of a dispute, the existence of a justified reason must be ascertained in court. The entity may insert a specific clause in the contract that provides for the possibility of refusing the assignment in *ad hoc* cases; for example, if the couple refuses the proposed match without a justified reason (subjective), or if international adoptions are blocked in the countries where the institution operates (objective). Regarding the obligations that the

Ciatti Caimi, 'Crepuscolo della distinzione tra le obbligazioni di mezzi e le obbligazioni di risultato' *Giurisprudenza italiana,* 1653-1657 (2008); F. Piraino, ' 'Obbligazioni di risultato' e 'obbligazioni di mezzi' ovvero dell'inadempimento incontrovertibile e dell'inadempimento controvertibile' *Europa e diritto privato,* 83-153 (2008); Id, 'Corsi e ricorsi delle 'obbligazioni di risultato' e delle 'obbligazioni di mezzi': la distinzione e la dogmatica della sua irrilevanza' *I contratti,* 891-913 (2014); G. Sicchiero, 'Dalle obbligazioni di mezzi e di risultato alle obbligazioni governabili e non governabili' *Giurisprudenza Italiana*, 2322-2329 (2015); V. De Lorenzi, 'Obbligazioni di mezzi e obbligazioni di risultato' *Digesto delle discipline privatistiche, Sezione civilistica* (1995), 397; A. Procida Mirabelli and M. Feola, *Diritto delle obbligazioni* (Napoli: Edizioni Scientifiche Italiane, 2020); A. Berlinguer ed, *La professione forense: modelli a confronto* (Milano: Giuffrè, 2008).

[28] Tribunale di Napoli 27 April 2009, available on www.dejure.it.

NGO assumes when it accepts the couple's *mandato*, it can be argued that the entity should not have to accept the assignment if it is already aware that it cannot fulfill it within a reasonable period, as otherwise, the entity may be held accountable for its negligence or bad faith in accepting the *mandato*. Reasonableness must be determined based on objective data, and not simply on the needs or expectations of the couple. As a matter of a fact, in a case decided by the *Tribunale di Ascoli Piceno*,[29] it was ascertained that the NGO did not propose the adoption until four years after the assignment was conferred. The court determined that such a period was not reasonable and was thus a violation of the commitment that occurred.

1. Duty of Information

The responsibilities of the NGO can be determined at the time of the assignment, and thus in the pre-contractual phase, but also during the performance of the *mandato*. In general, the entity may be held liable if it does not operate with due diligence, or if it violates the principle of good faith in its compliance.

Failure to comply with its duties to provide the couple with essential information is a clear example of the violation of this principle. The NGO has the task of collecting all relevant information relating to the age, history, the causes of the child's abandonment (where known), the minor's living conditions, and physical and psychological health situation, and promptly transmitting this information to the couple. If an NGO fails to send this information, or if it sends incorrect information, this could constitute a source of contractual liability, provided it is attributable to NGO's negligence.

The rationale is clear: having timely and correct information will enable future parents to give their informed consent after assessing whether they have the personal and emotional resources to meet the needs of the child. In the Ascoli Piceno decision, the negligence of the NGO in providing the couple with all the necessary technical information not only to conclude the procedure but also to facilitate the relationship between the minor and the couple, is evident. Four years after the assignment, the NGO contacted the couple for possible adoption, which was not successful.

The NGO then proposed a further adoption, but of a minor who was housed in an orphanage structure, which, as the plaintiffs demonstrated, was at the center of an international scandal. Thus, the defendant NGO violated its primary obligation of choosing the local NGO partner and the children carefully and ultimately failed to provide the couple with the potentially useful information, including on the caring institution where the child was living, on the postponement of the hearing that would certify the adoption in the state of origin, and on the contact between the child and the parents at the very moment when the couple was having to decide whether or not to accept the adoption.

[29] Tribunale di Ascoli Piceno 9 January 2018, available on www.dejure.it.

2. The 'Country Situation' and the Non-Accountability of the NGOs

Undoubtably, no liability can be attributed to the NGO if the lack of information is due not to the negligent actions of the entity, but to the foreign authority failing to transmit information or sending misleading information.[30] In a case before the *Corte di Appello di Venezia*,[31] the NGO assumed the obligation to contact the national authorities of the Russian Federation and to undertake complex bureaucratic procedures. In this case, it emerged that the difficulties and uncertainties that arose in managing these relations were due less to linguistic barriers than to the peculiarities of the Russian bureaucratic-administrative organization, the rigidity of the legislation, and the substantial barriers to accessing the jurisdiction given the provisions of the administrative authorities. The conferral of the *mandato* necessarily presupposed that the NGO understood the environmental, legal, and administrative difficulties involved.

In this context, the NGO's limited room for maneuver became clear, as the evaluations were under the full discretion of the officials and civil servants of Russia. Therefore, the NGO had an obligation to establish contact with the authorities of the Russian Federation, and to facilitate the matching of the adopters with a minor, the identification of whom was, however, left to the authorities of that country. Those authorities provided generic information, reserving the right to approve or reject the adopting couple; and to communicate at their discretion the details relating to the history, the private life, and the health condition of the minor, but only to the couple who was proposed for the match. Conversely, the NGO could not guarantee the completeness, the veracity, or even the verisimilitude of the information provided by the foreign authorities, or anything that happened after the match had been made. Thus, the NGO had specified that the couple had agreed to accept a match with a minor who was in a satisfactory state of health, or who had mild and treatable medical problems. This agreement was integrated into a pre-filled standard Russian form and was not even modifiable.

Moreover, detailed information could only be acquired on-site by the couple interested in adopting the child. Therefore, according to the court, there was no non-fulfillment of the *mandato*, since the NGO reported the information in its possession and offered the logistics and administrative support network for the procedure to the adopting couple, the outcome of which would be unknown until it was completed. In addition, the adopters were aware of the 'country situation', having already experienced the conditions in which the association operated because of the potential incompleteness of the information provided by the granting country in response to the couple's requests. The NGO was obliged to offer the couple all possible means to ensure the result, but not to guarantee the result itself.

Likewise, in a case before the *Tribunale di Bologna,*[32] it was ascertained that

[30] Tribunale di Pisa 16 March 2018 no 247, available on www.dejure.it.
[31] Corte di Appello di Venezia 17 September 2019 no 3700, available on www.dejure.it.
[32] Tribunale di Bologna 28 September 2020 no 1314, available on www.dejure.it.

the NGO violated its duty to provide information, but it was not ordered to pay damages, as the non-fulfillment was attributable to the 'country situation'. According to Art 1710 of the Italian civil code:

> 'The agent (*mandatario*) is required to inform the principal (*mandante*) of the unforeseen circumstances that may determine the revocation or modification of the *mandato*'.

In fact, the *mandatario*-agent is required to inform the

> '*mandante*-principal not only of the circumstances that have occurred, but also of any pre-existing circumstances that the agent became aware of after the assignment of the *mandato*, as well as of any circumstances the agent was aware of before or around that time, which may have resulted in the revocation or modification of the *mandato*'.[33]

In this specific case, the *Tribunale* recognized that the NGO's information duties were not executed with the requested standard of diligence and that there was a lack of transparency in the management of the adoption procedure. The court focused on the NGO's disclosure obligations, which also included the burden of proposing other solutions regarding the two states indicated in the form filled in by the aspiring adopters at the time the assignment was granted. However, the judge found it difficult to determine that the violation was of sufficient gravity to justify the revocation of the mandato with the consequent restitution or reduction of the fees due to the non-profit organization, as governed by the contractual clause that states:

> 'If the relationship between the Body and the couple is interrupted, in the face of sums paid, the Body will retain the amount pertaining to it'.

Even more important, is to consider that in this case, the main obligation of the *agent-mandatario* was to perform all of the activities necessary to implement the adoption procedure on behalf of the principals, but the principals could not demand a good outcome, as foreseen in the clause that regulates the object and content of the assignment, because the will of the foreign authorities is considered decisive in this regard. According to the judge, the couple had to be aware that the liability of the non-profit organization was excluded, as agreed upon,

> 'in the case of extension of the foreseen or foreseeable times for the completion of the adoption, or the interruption of the adoptive procedure, caused by political events, revocation of the adoptability provision of the child, regulatory/legislative changes, calamities, wars or other unforeseen and

[33] Corte di Cassazione 24 February 1987 no 1929, available on www.dejure.it.

unforeseeable circumstances'.[34]

However, as was already mentioned, the NGO was held accountable for a lack of transparency and a failure to communicate all these issues, which might have induced the couple to revoke the assignment, or to ask the NGO to file their application in some of the other countries identified as a potential place of birth or origin (of children for adoption) at the time the assignment made. Furthermore, Art 22, para 2, of the Adoptions Act establishes that 'at any time those who intend to adopt must be provided, if requested, with information on the state of the proceedings'. Although this norm is established in the part of the Act that governs pre-adoption foster care, and not the part that directly governs the relationships with the organizations that deal with adoptions, it is evident that during the entity's periodic meetings with the couple, such information could be requested or given.

From my perspective, this rule can be taken into consideration for a systematic interpretation that could lead to different decisions, and that would, in any case, be differently argued. However, the trial judge did not pronounce the termination of the contract and did not order the NGO to compensate the couple for their economic and non-economic losses. Indeed, the judge did not even address the issue of the *culpa in vigilando*[35] of the CAI, since, in the end, the NGO's violation of its information duties was not considered serious enough. Therefore, after the NGO was excluded from contractual liability, the issue of the CAI's failure to supervise was set aside.

By contrast, in the case of Ascoli Piceno, the non-fulfillment of the duty to properly handle the file was considered directly attributable to the NGO and its appointed professionals. In this case, the judge found that the NGO had neglected to update the dossier relating to the minor to include the in-depth study of the condition of the minor, who was, as was previously mentioned, living in a notorious caring structure that was at the center of a criminal case that attracted media attention. It is, therefore, evident that there was a violation of the principle of good faith in the fulfillment of the *mandato*. The Ascoli Piceno NGO failed to provide the levels of transparency and seriousness that must be expected from a professional entity, as it did not provide the couple with a true picture of the institution that housed the child, which they ultimately gleaned from other sources.

[34] In the *Tribunale di Bologna*'s case, such circumstances were: the ratification and execution of the Hague Convention in 2011 by the Senegalese state, the change of the competent Judge at the Court of Dakar, the revocation of the adoptability of the child.

[35] *Culpa in vigilando* can be translated as 'fault in supervising'. A failure to supervise properly or to exercise due diligence. It has sometimes been hypothesized that the basis of state liability under international law for the acts of its officials (or sometimes nationals or persons within its territory) is attributable to the state's failure to observe its duty to control these persons. See https://tinyurl.com/5456ekup (last visited 20 September 2023).

3. The Free-Of-Charge *Mandato* Downgrades the Assessment of the NGO's Responsibility

Moreover, in the *Corte di Appello di Venezia* case, the judges, while ascribing the relationship to the *mandato*, held that, because the assignment was free of charge, the standards of diligence and expertise in the execution of the services to which the NGO is supposed to perform should be assessed more leniently:[36]

> 'the *mandato* is presumed to be onerous; in the event that it is free of charge, the responsibility for the agent-*mandatario*'s fault must be assessed with less rigor'.

The finding in the case is significant, as the NGO

> 'carries out its activity in accordance with its nature: association for charitable purposes, in the spirit of collaboration with those who aspire to be adoptive parents, for the benefit of the people who turn to it to fulfill their family life project'.

From my personal standpoint, these are not sufficient grounds to either exclude profit or determine the downgrading of liability. Here, it should be noted that while the accredited bodies were NGOs, and were thus non-profit associations, this does not necessarily mean that the services were free of charge, as it is established practice that these bodies can pursue indirect profit strategies. For example, they can offer couples a series of paid professional services that are carried out by collaborators external to the institution, but with whom they have friendly relations.[37] I agree with this approach in part, since the contractual responsibility represents a qualified social contact from which the diligence obligations of the specialized operator can be derived, regardless of whether the contract is or is not based on payment, such as in cases in which a surgeon performs a free procedure or a lawyer argues a *pro bono* case. The non-fulfillment of the contract or the seriousness of the incorrect or inadequate fulfillment of the contract must be assessed through a process that has been called 'posthumous prognosis': if another entity was able to perform a similar service in the same country and the same period, this means that the service was executable with ordinary diligence.

In any case, the NGO has the right to argue that the failure of the procedure was due to facts and circumstances related to the couple's behavior, or to the 'country situation'. However, I certainly disapprove of the interpretation that the expertise and the seriousness, and professionalism of an NGO can be lower because it is a non-profit entity. From a systematic point of view, these risks reducing the reliability of the entire model, would have serious repercussions for

[36] Corte di Appello di Venezia 17 September 2019 no 3700 n 31 above.

[37] P. Morozzo della Rocca, 'La condizione giuridica del minore straniero: norme, giurisdizione e prassi amministrative' *Minorigiustizia*, 3, 4, 30, 29-57 (2002).

minors and for couples and would increase the danger of system distortions. As a result, the NGO has specific obligations to the couple: the relationship, qualified as an atypical *mandato* and governed by Arts 1703-1730 of the civil code, has a fiduciary nature, which arises after the assignment by the couple to the institution. In the event of an explicit request from the adopters, the NGO can carry out support activities for the adoptive nucleus,[38] in collaboration with the local authority services. As part of the *mandato* agreement, it is the agent-*mandatario* who must prove that the non-fulfillment is not attributable to them. Therefore, the circumstances and facts that support the non-accountability depending on the 'country situation' and socio-political conditions must be proven by the NGO, not simply pleaded. This also applies if the non-fulfillment is based on the couple's refusal to accept the child with whom they were matched and if these circumstances lead to the incorrect or delayed fulfillment of the assignment.

Furthermore, proof of true fulfillment is, in any case, borne by the provider of the service, even for the services the NGO is obliged to provide, such as 'a contact person, legal advice and activity abroad'.[39] In any case, the NGO must provide proof that it correctly, adequately, and promptly informed a couple of all impeding or delaying circumstances. However, in almost all the cases analyzed, liability was excluded either because the evidence was obtained that the NGO was not responsible for the non-compliance, or because the NGO's breach of its obligations was not deemed serious enough.

4. Nature of the Damages

As specified by case law, pecuniary damages resulting from expenses incurred by the couple for the adoption procedure and paid for various reasons to the institution can be awarded. For example, in the case of Ascoli Piceno, the court ordered the NGO to pay compensation for damages in favor of the plaintiffs due to a breach of contract in the form of both pecuniary and non-pecuniary damages as well as to reimburse the plaintiff's costs of litigation.

However, in all other cases analyzed here, moral (non-pecuniary) damages were denied, since Art 2059 of the Civil Code provides for the compensation of non-economic loss only when a right has been infringed that is expressly recognized by the legislation or is otherwise constitutionally protected.[40] In this

[38] For the qualification of the relations between the NGO and the professionals and on the lucrative nature of the activity, see Corte di Appello di Venezia 16 March 2021 no 13, available on www.dejure.it.

[39] Tribunale di Pisa 16 March 2018 no 247, available on www.dejure.it.

[40] On the compensation for non-economic loss for rights and values that must be enforced by legislation or protected by the Constitution, the debate is huge and various, for all, see M. Barcellona, *Il danno non patrimoniale* (Milano: Giuffrè, 2008); G. Ponzanelli, 'Sezioni Unite: il 'nuovo statuto' del danno non patrimoniale' *Il Foro italiano*, 134-138 (2009); C. Castronovo, 'Danno esistenziale: il lungo addio' *Danno e responsabilità*, 1-6 (2009); E. Navarretta, 'Il danno non patrimoniale contrattuale. Profili sistematici di una nuova disciplina' *I Contratti,* 728-735 (2010); M.

regard, judges have ruled that in the Italian legal system, a couple does not have the right to have a child.[41] Thus, non-pecuniary damages cannot be paid even if the failure of the adoption process is attributable to the entity.[42]

In my opinion, nevertheless, the judges could have decided and argued these cases differently by relying on the right to private and family life, under Arts 8-12-14 of the European Convention on Human Rights, and on Art 2 of the Italian Constitution, which 'recognizes and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed'. In fact, among those social groups, we can mention, of course, the family.

IV. Consequences of the Collapse of Trust Between the ONG and the Family. Conclusions

From the perspective of the couples, the most relevant consequences of these cases were that the procedure failed, the court decree that permitted them to enter an international adoption was revoked, and their chances of adoption – and thus their right to private and family life – were curtailed. The complexity of this phenomenon and the different actors involved must be kept in mind. Therefore, it is also important to consider the failures that are based on the behavior of the couple, and the cases in which the *Tribunale per i Minorenni* revoked the eligibility to adopt of couples who aspired to adopt, but who refused the proposed matches. Thus, it is up to couples to decide whether to accept the proposals for matching with adoptable children that come from foreign authorities. However, it must be stressed that when couples refuse one or more combinations with reasons linked to a preconceived idea or, after having met and known the child, for the desire to 'receive' proposals for 'easier minors', the risk is to completely

Franzoni, *Il danno risarcibile,* II (Milano: Giuffrè, 2010); L. Nivarra, 'La contrattualizzazione del danno non patrimoniale: un'incompiuta' *Europa e diritto privato*, 475 (2012); M.R. Marella, 'Struttura dell'obbligazione e analisi rimediale nei danni non patrimoniali da inadempimento' *Rivista critica del diritto privato*, 35-57 (2013); P. Virgadamo, *Danno non patrimoniale e ingiustizia conformata* (Torino: Giappichelli, 2014); Id, 'La funzione equitativa del risarcimento del danno non patrimoniale e la prova del pregiudizio: un binomio inscindibile' *Archivio giuridico*, 107-151 (2014); C. Castronovo, 'Il danno non patrimoniale nel cuore del diritto civile' *Europa e diritto privato*, 293-333 (2016); R. Pardolesi, 'Danno non patrimoniale, uno e bino, nell'ottica della Cassazione, una e Terza' *Nuova giurisprudenza civile commentata,* 9, 1344-1348 (2018).

[41] The debate whether this right exist or not in the Italian legal system had started having regard to artificial insemination and assisted reproduction cases, but has been extended also in the adoption's field, as is well explained in 'Avere un figlio con procreazione assistita di tipo eterologo: alcuni parallelismi con l'adozione' *Minorigiustizia* (2014) in an essay provided by the editorial board of the review. See also I. Rivera, 'Quando il desiderio di avere un figlio diventa un diritto: il caso della legge n. 40 del 2004 e della sua (recente) incostituzionalità' *BioLaw Journal-Rivista di BioDiritto*, 37 (2014). G. Gambino, 'Desiderare un figlio: linee per una riflessione biogiuridica sul diritto al figlio a partire dalla sentenza della Corte Costituzionale sulla fecondazione eterologa' *Archivio giuridico*, 375-400 (2014).

[42] Corte d'Appello di Venezia, 17 September 2019 no 3700, available on www.dejure.it.

lose the opportunity to adopt.

Moreover, the choice to accept or not the pairing has a different weight according to the moment in which it is made: in particular, if an adoptive couple rejects the pairing after having initially accepted it and after having also tried the harmony with the child abroad, the subsequent 'renunciation' – often done in the hope of finding 'less problematic children' or with 'less provocative behavior'[43] – results, on the one hand, in damage to the child who experiences double neglect and, on the other, in a manifestation of change in the balance of the couple that had led the judges to consider her suitable.

In all the cases presented here in the previous paragraphs, the couples, faced with these tortuous procedures, must have felt that they had not received adequate assistance from their NGO, and ended up revoking the *mandato* to appoint another NGO. Some couples who have come before the courts have tried to (so far unsuccessfully) claim that the CAI was responsible for *culpa in vigilando,* or failed to properly control and supervise the NGO,[44] especially in cases of more serious violations of duties of information and good faith, which should have led to the revocation of the authorization. However, in other cases, the authorized entity became the scapegoat for couples who had difficulties in recognizing the limits of their situation, because the adoption process turned out to be more complex than they had imagined. Quite often it is hard for the judge of the case to evaluate the different situations through the trial evidence because the assessment is about the attitudes of the parties involved (aspiring parents), which shouldn't be part of the logical assumptions in the court's ruling.

[43] M. Cavallo ed, *Viaggio come nascita. Genitori e operatori di fronte all'adozione internazionale* (Milano: Franco Angeli, 1999).

[44] Tribunale di Bologna 28 September 2020 no 1314 n 31 above.