



Newsletter, Autumn 2022



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Welcome to the Second Edition of the European Chapter Newsletter

by Alberto Perez Cedillo, Spain & UK

A lot has happened since the first edition of the European Chapter Newsletter last spring, not least the annual conference in Athens in May 2022. A big thanks to everybody who attended the conference and those who participated in making it the success it was. After a couple of difficult years, it was great to see so many of our old friends face-to-face finally in Athens and share our tales of family law in the age of lockdowns, surreal zoom hearings and accidentally hilarious Teams meetings from around the continent as well as self-discoveries in bread-making and online Pilates. But it was also an occasion to be introduced to new fellows who have joined since Palma de Mallorca in September 2019. I am sure Mark Harper's report included in this edition will provide you with a trip down memory lane and for those who weren't able to join us some idea of the fun we had with the jellyfish and ancient Athenian punishments for adultery.

Some of us will be going to the Young Lawyers conference in Ibiza in October and the International meeting in Marrakech. Those of you who are still dithering need to book your places soon. Meanwhile, our next full European Chapter meeting in Venice is fast approaching in early February 2023, a completely magical time to visit this extraordinary city. The educational and social programmes for Venice are now available on the IAFL website and I would like to thank Alice Meier-Bourdeau, Michael Gouriet and Francesca Zanasi for their hard work creating what will be both an informative and intriguing education programme for Venice. I look forward to as many of you as possible attending the Venice conference as we sail the Venetian lagoon on the Galleon boat discover the secrets of hidden Venice and take a trip down the Grand Canal by candlelight for a masked President's dinner in one of Venice's most beautiful ancient palaces?

The chapter has continued to keep busy and connected to the Fellows through our monthly chats which I hope you have enjoyed and which have included passionate and surprising "Forum Beauty Contests" debating the best and worst parts of our respective jurisdictions in managing Family Law. The chats have also included important news and updates from the Public Policy Committee as well as from Rachael Kelsey, Frances Goldsmith and Jennifer Wilkie who are organising the Ibiza educational programme. After a summer break, you will be pleased to know that the monthly

chats have now resumed and we started with a quiz which some found more difficult than others; the worthy winners will get a round of free drinks in Venice to celebrate their victory.

We would like as many of you as possible to come to Venice not only for the education and the social program but also to make sure you have an opportunity to share your ideas and vision for the future of the Chapter. Meanwhile, if there are any specific subjects or issues you would like us to address at the strategy meeting in Ibiza, in the chats or in Venice, please contact me so that we can add them to the agenda.

The Chapter is still working hard to recruit more members from under- and unrepresented jurisdictions. As mentioned in the previous edition of the newsletter a new committee led by Karen O'Leary and Sarah Hoskinson has been set up to focus our efforts in this direction and we continue to look for any suitable candidates you may know from any of the jurisdictions on the list which is appended at the end of this issue.

With the same aim, we have joined our second EU-funded project dealing with 'The interplay of different EU instruments in Family matters and Beyond'. The new project is known as, "How to navigate the labyrinth in EU Family law" ("NAVI"). The objective is to develop training materials and to organise seminars in each jurisdiction represented in the consortium these being, Bulgaria, Croatia, Lithuania, Poland & Spain. Thank you to Alice Meier and Soma Kölcseyi for joining the programme. To this same end, Sandra Verburgt attended the FBE General Congress in Sofia last June.

Meanwhile, the results of our last EU-funded project have now been published as The EU Regulations on Matrimonial Property and Property of Registered Partnerships. This shows how vital it is that professional organisations are in constant dialogue with legislators in our efforts to bring about added legal clarity and consistency in European private international family law. I have asked the authors to give a brief summary of their work for this newsletter.

We are also pleased to announce Yasmin Khan-Gunns, of England, as the winner of the 10th IAFL European Chapter Annual Award for Young Family Lawyers. I would like to thank all the participants this year; the level was really outstanding. A date for the launch of the Young Lawyers' Award 2023 will likely be at the end of October. This time it will be in the form of a case study on some excruciatingly complicated and intractable issue of family law or maybe something deceptively simple; we look forward to seeing our young lawyers rise to the challenge once again.

It is now nine months since the latest invasion of Ukraine began initiating a devastating war and humanitarian crisis which has affected many of our members directly and indirectly. Sandra Verburgt has been leading the IAFL Emergency Relief Committee for Ukraine; we would be grateful for any offers of help and for any suggestions for ways in which we as family lawyers can

assist and support the victims of the war. I hope you will enjoy our latest edition of the newsletter and I look forward to seeing you all in Ibiza.

Alberto Perez Cedillo



Report On Athens Educational Programme

by Mark Harper

1. The Educational Programme was organised by Mark Harper, James Stewart, and Julia Pasche. It was wonderful to all be together with friends and colleagues in person for the first time in over two and a half years. Each session was linked to a Greek God or Goddess.
2. The Programme was intense, and everyone had a thirst for in person education and training – and sharing alcohol too! We started with an Exploration of Love, Marriage, and Divorce in Ancient Greece – a talk by Classics Professor James Davidson, also the husband of our President, Alberto Perez Cedillo.
3. Rather than a more traditional lecture on family law in the host country, there was a panel discussion with two Greek family lawyers on the significant points about Greek family law. The first was the fact that almost no one enters into a marriage contract in Greece, as the default regime is a form of separate property. The second is the significant changes in the law regarding fathers' rights concerning children. Finally, an update was given on the Greek law approach to surrogacy and other parenting issues.
4. There was then a practical session on post-Brexit pitfalls for European family lawyers in cases with a UK dimension. The real impact of Brexit has yet to become clear, as cases work through the system, but the legal complexity is very obvious. There will be more forum disputes given that the first to file a divorce wins rule no longer applies to the UK.
5. On the second day there was a further intense session on the practical implications of the EU Matrimonial Property Regulation and the Succession Regulation looking at habitual residence as a point of connection as defined under recent case law from the CJEU. There was also an overview comparison of the treatment of trusts on divorce.
6. The following session focused on domestic abuse, coercive control, financial and economic abuse which featured the varying approaches in different jurisdictions.

7. On the third day there was a comparative session on the treatment of surrogacy, contrasting the French prohibition with more liberal laws. We were very fortunate to have in attendance in person Oksana Voynarovska, one of our Ukrainian Fellows. After a long and dangerous journey overland out of Ukraine, she was then able to travel to join us in Athens. She gave an insight to the horrors being inflicted by the Russian invasion, and received an emotional standing ovation from everyone present.
8. The final session focused on the future of family practice and procedure, and how the pandemic has changed working lives and practices.

Mark Harper







Asia Pacific Contribution

by Corinne Remedios, Hong Kong

1. Alberto Perez Cedillo's brief to me as outgoing Asia Pacific Chapter President, was to chronicle the splendours, the intrigue and the murders that I have encountered while in office. So here goes...
2. What I had hoped to do in the couple of years was to plan and run a fabulous Meeting in Hong Kong, delivering a cutting-edge education programme, wickedly fun social events, culminating in an impossibly memorable President's Dinner, celebrated in IAFL spirit. But sadly, that was not written in the stars - it was June 2020, deep in the midst of Covid-19. Hong Kong had recently emerged from the 2019 Protests to some of the strictest quarantine measures known. The Chapter was barely 3 years old, we had meagre funds in our coffers, no bank account of our own and were totally dependent on the IAFL Executive Director for Chapter administration. And worse - the first murder had just taken place - the fatal throttling of the AP's first standalone Meeting in Bangkok, 2 weeks before it was due to start. The task ahead seemed daunting.
3. Doing the best to look at this as a half full glass, I penned a song sheet for the venerable rock band that I was privileged to lead:
 1. *Expansion of the Chapter;*
 2. *Education programmes, including online webinars;*
 3. *Keeping in touch through such initiatives and a new newsletter; and*
 4. *Improving finances.¹*
4. Two years later, and despite Covid as a pervading backdrop, the Asia Pacific Chapter has achieved most if not all of the profound objectives. I wish to acknowledge the role of those who have nurtured the Chapter and given it scope to grow.

¹ AP June 2020 AGM Minutes <https://www.iafl.com/media/6095/minutes-of-asia-pacific-chapter-agm-on-2-june-2020-24-june-2020.pdf>

The Asia Pacific Management Committee

5. As Past President, Nigel Nicholls has been a superb sounding board. I came into the 2019 Committee as President Elect and in his generous way, Nigel guided me through those early days, making me feel welcome and involving me in his plans. We worked well together and after he handed over, I continued to seek his wise counsel and friendship.
6. As President Elect, Geoff Wilson has embraced all initiatives, which is a good omen for the continuity of the Chapter. His laid-back approach and dry sense of humour has been sustaining and fun.
7. As Vice-President Poonam Mirchandani accepted the heavy responsibility of taking charge of expansion. Poonam has a wide circle of contacts and has identified many potential Fellows, a vital task in growing the Chapter.
8. As Treasurer, Rita Ku managed our meagre coffers, which have risen to over US\$60,000. Rita and I worked for months, setting up an AP bank account in Hong Kong. I thank Marlene and Tom for their oversight along this journey and their approval when the destination was reached.
9. As Secretary, John has been the glue that has kept us together. Methodical, organised and efficient, he set the Agenda and recorded our meetings in great detail. John has the ability to herd cats and chase defaulters without causing offence. This is a rare talent.
10. As Committee Members Anita Chan QC, Catherine Por, Kai Yun Wong, Jason Walker and more recently Masami Kittaka, have been instrumental in making AP music, whether it be in expansion, welcoming new Fellows, or education or simply brainstorming during our monthly meetings. I think I speak for all in the AP Committee when I say our meetings have been fun – like a gathering of friends, all working towards the same end.

Asia Pacific Chapter Assistant Executive

11. I thank Tom Sasser for his vision in recognising that the Covid-induced lull was an appropriate time to train staff for the AP Chapter. I thank IAFL President at the time, Marlene Moses, for her green light that we could go ahead. With Mothership's blessing, we engaged Daphne da Rosa, from Hong Kong as our first Assistant Executive and were off to a flying start on the Chapter's journey to semi-dependency.

12. I would like to thank Donna Goddard who brought Daphne up to speed with the IAFL ways and Ali Massey for training Daphne on how to run a webinar. Thank you also to the new IAFL Admin team, especially Annie Dunster, for their help in circulating our newsletter, *AsPacEd*, sending out our invitations for *AP Hour*, our monthly zoom meetings, and preparing the applications for Fellowship in the AP Region for review.

The Voice of the Asia Pacific Chapter - “AsPacEd”

13. Faced with an uncertain future for the organisation, it was imperative for the Chapter to be visible and be heard. One of the early projects I worked on with Jason Walker was to set up a newsletter. Karen Lam teamed up with Jason so that a combined melody of Asia and the Pacific would be heard. Karen was the constant, chasing for contributions, finding funny and/or serious news articles. Without Karen, we might have fallen apart. We decided not to be too ambitious, or too formal or set ourselves too impossible an act to follow every month. By the end of September 2022 we will have produced 28 editions, one every month from June 2020 to date and continuing. A recent IAFL survey resulted in 106 Fellows from outside the Asia Pacific Region requesting to be put on our circulation list.

The AP Chapter’s Happy Hour - “AP Hour”

14. Simultaneously, Jason and I brainstormed on how AP Fellows could keep in touch despite not being able to meet because despite the advent of remote IAFL Webinars and the best will in the world, the vast time differences were splitting the Chapters apart. We decided that a regular zoom at our end of the planet was the answer: every mid-month Monday a remote CLE and ‘Appy Hour. We wanted *AP Hour* to be interactive and have been encouraged immensely by our loyal regulars. We start with an informal meet-and-greet. At the light hearted end of the scale, we held a Christmas Quiz in 2020 and again in 2021, coupled with a wine tasting from Geoff’s cellars in Brisbane. Because new Fellows had no opportunity to network, we interposed an introduction to *newbies*, before proceeding with the structured part of the CLE.
15. We brought in Moderators and Speakers from the Region and beyond - many from the European Chapter, including Suzanne Kingston, Mark Harper, James Stewart, Alain Cornec. Our thanks to you all for waking up early and joining us. To reinforce the chosen topic, a summary is posted in that month’s *AsPacEd*. It was always a scramble to get this done on time. By September 2022, we will have held 27 *AP Hours*, one every month since July 2020, more CLE hours than in splendid face-to-face meeting each year.

Asia Pacific Chapter Expansion

16. We are a new Chapter, covering a large geographical area and comprising diverse cultures, religions, ethnicities and jurisprudential bases. Expansion, especially establishing a “*bridgehead*” in unrepresented or under-represented jurisdictions, was a vital objective of the Management Committee from Day One.
17. Since June 2020, we have had about a 25% increase in the Chapter. The Asia Pacific Chapter now has 140 Fellows, spread over 13 jurisdictions. Of the new Fellows, 15 joined in 2022 and there are many still in the pipelines. I am particularly happy that we have welcomed Fellows from 3 new jurisdictions: Taiwan, South Korea and Thailand. I am grateful to Tom Sasser for his acknowledgement of the advances made by the Chapter in expansion – his encouragement has gone a long way.

Conclusion

18. The unexpected splendours over the last 2½ years have made the intriguing challenges worthwhile. The deemed demise of the Bangkok Meeting was but an illusion because thrice postponed, Bangkok will go ahead from Wednesday 31st May 2023 through to Saturday 3rd June 2023, run by Nigel, Geoff and me jointly: having been conceived by my predecessor Nigel and his team, Bangkok was thereafter placed in my foster care, before being formally adopted by Geoff. The three of us are psychological parents of this baby and so will bring her up together.
19. It has been amazing to work alongside the 2020-2022 Asia Pacific Management Committee – a rock band that has made music for the ears of the Chapter and IAFL as a whole. I thank you for taking part in the “*gigs*” and hope that you will continue to support Geoff Wilson who will take over on 22nd September 2022.

Until we meet in Bangkok...

Corinne Remedios
President, Asia Pacific Chapter, IAFL



Hungarian Child Custody Law

by Soma Kölcsényi

Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters applies from 11th January 2015 in all Member States except Denmark.

For the purposes of this regulation, protection measure means any decision, whatever it may be called, imposing obligations on the person causing the risk with a view to protecting another person, when this person's physical or psychological integrity may be at risk. These obligations can be:

a prohibition or regulation on entering the place where the protected person resides, works or regularly visits or stays;

a prohibition or regulation of contact, in any form, with the protected person, including by telephone, electronic or ordinary mail, fax or any other means;

a prohibition or regulation on approaching the protected person closer than a prescribed distance.

This regulation basically sets up a mechanism for the direct recognition of protection measures ordered in one Member State in any other Member State without any special procedure and without any declaration of enforceability being required. As a result, a protection measure ordered in one Member State is treated as if it had been ordered in the Member State where recognition is sought.

A person wishing to have a protection measure recognized in another Member State, must simply obtain a certificate from the Member State of origin which must be produced together with a copy of the protection measure and where necessary a transliteration or translation to the competent authority of the Member State addressed.

The validity of the certificate, i.e the effects of recognition of the protection measure, is limited to a period of 12 months from the date of issue even if the protection measure has a longer duration.

Recognition can be refused on limited grounds, and in particular if recognition is manifestly contrary to the public policy of the Member State addressed or if recognition is irreconcilable with a judgment given or recognised in that Member State.

It seems that the regulation has limited application in the Member States. This is evident in Greece where there is no case law and according to the information obtained from the Athens Court of First instance, no certificate has been issued and no such request has been filed so far. The situation seems similar in other Member States as well. The regulation seems little used.

This limited application may be related to a number of reasons:

In some cases, the protected persons when moving from their country of origin, they actually move away from the person causing the risk. So, they are not really interested in receiving protection in the Member State where they move.

Another reason could be that the regulation applies only to civil protection measures and in some states the distinction between civil, criminal and administrative protection measures might not be that clear.

In addition, the regulation does not interfere with the national systems of the Member States with respect to protection measures. It does not oblige them to modify their national systems so as to introduce civil protection measures. Therefore, and according to the information provided from the website of European Judicial Network in civil and commercial matters in some Member States, such as Sweden, Croatia and Spain there are no protection orders such as those described in the regulation.

Another reason for the limited application of the regulation could be that it does not interfere with the enforcement procedure of protection measures in case of breach. It leaves these matters to the law of the Member State addressed. This could turn out problematic, because not all Member States have the same reaction to violations of a protection order and in some cases additional proceedings may be required.

Finally, as the effects of recognition pursuant to the regulation are limited to a period of 12 months, some people may prefer to require national protection measures which may offer longer protection.

The application of the regulation will be addressed in the European Commission's report which was due by 11 January 2021 but was delayed due to the outbreak of the COVID-19 pandemic in the first half of 2020. According to the information provided by the Commission the assessment and publication of the report is expected within March 2022.

Soma Kölcseyi



Working with Family Law Clients in the Aftermath of the Pandemic

by Michael Saini, PhD²

.....Then along came COVID-19. When the pandemic first affected our courts – in those two head spinning weeks in March 2020 when we went from touching elbows instead of shaking hands, to cancelling large gatherings, to cancelling small gatherings, to practicing social distancing, to barring unnecessary people from courthouses, to conducting court hearings by audio or video conference –we were in survival mode. On the fly, we were trying to figure out how to protect court staff and the public while keeping the courts open and continuing to protect the safety of children and the rights of parents.³

The impact of COVID-19 on children and families involved in family law disputes is far reaching and remains a central focus in family law. While some families have improved their sense of cohesion and intimacy during social isolation and global lockdowns, many others have experienced an increase in family breakdown, instability and deterioration of their mental health and wellbeing.

Family lawyers need to be aware of the impact of these changes on the lives of their clients and its impact on family law disputes. At the same time, family lawyers are not immune to the pandemic-related stresses and they need to be mindful of the impact of the pandemic on their own mental health and wellbeing. Awareness of the implications of these uncertain times, both for their clients and themselves, can help family lawyers be better equipped with the tools and strategies to address ongoing pandemic related stressors.

To increase awareness of the impacts of the global pandemic, this brief note will consider: 1) the impact of COVID-19 on family court stakeholders, including children and their families and the lawyers who serve them; 2) the new concept of ‘return anxiety’ as family lawyers struggle to make decisions about in-person and virtual connections with their clients; 3) the needs for family

² Professor Michael Saini holds the endowed Factor-Inwentash Chair in Law and Social Work and he is the Co-Director of the combined J.D. / M.S.W. program at the University of Toronto. He has over 200 publications, addressing children and families’ wellbeing in systems governed by law. He is a Board Member of the Association of Family and Conciliation Courts (AFCC), Access for Parents and Children of Ontario (APCO), Family Mediation Canada (FMC), the Canadian Coalition of the Rights of the Child (CCRC) and he is also an Associate Fellow of the International Academy of Family Lawyers.

³ Warner, J. R. H. (2020). Judging in a Time of COVID. *Family Court Review*, 58(4), 965-967, p. 965).

lawyers to assess and educate their clients about the impacts of COVID-19; and 4) the considerations of COVID-19 when helping clients make decisions about parenting plans.

Awareness of the impact on COVID-19 and ongoing stressors

The COVID-19 global pandemic dramatically altered our way of relating with others. The movement towards social distancing, self-isolating, and minimizing in person meetings to curb the spread of the virus dramatically shifted services to children and parents involved in family law disputes. The consequences of the pandemic on families have been many, including increased rates of unemployment, reduced work hours; financial strain and insecurities, children learning from home due to school closures, lack of childcare for parents working from home, illness of loved ones, death of loved ones; separation from loved ones due to travel restrictions; increased feelings of social isolation or loneliness⁴. While any one of these consequences can negatively impact coping, the influence of these stressors is further intensified in times of family breakdown.

During the pandemic, we have seen increased rates of family breakdown, conflict, divorces, and intimate partner violence⁵. In Japan, a new term called ‘Corona Divorce’⁶ emerged as divorce rates across Asia-Pacific countries surged during COVID-19 and similar trends have been found in other jurisdictions.

Family breakdown during the pandemic has been uniquely challenging. Parents sharing care of their children from the position of living apart has been challenged by the realities of social distancing, closures and restrictions. These coparents had to adjust parenting plans to accommodate ever-changing family disruptions, including changes in scheduling, reduction of out-of-home programming, the complexity of implementing social distancing among multi-household families, and differences in COVID-19 protocols between households⁷

Efforts to protect against the spread of the virus have required families to adjust to new social distancing measures as part of the normal rhythms of everyday life. But safety measures have had their associated costs. Physical distancing measures have contributed to increased feelings of isolation, stress, and anxiety, mood disorders, sleep issues, PTSD, and emotional burnout. Although the research about the impact of COVID-19 remains in the early stages, the preliminary

⁴ Brooks, S.K., Webster, R.K., Smith, L.E., Woodland, L., Wessely, S., Greenberg, N., & Rubin, G.J. (2020). The psychological impact of quarantine and how to reduce it: Rapid review of the evidence. *The Lancet*, 395(10227), P912-920.

⁵ Peterman, A., Potts, A., O'Donnell, M., Thompson, K., Shah, N., Oertelt-Prigione, S., van Gelder, N. (2020). Pandemics and violence against women and children. Center for Global Development working paper, 528. <https://www.cgdev.org/sites/default/files/pandemics-and-vawg-april2.pdf>. Prasso, S. (2020). China's divorce spike is a warning to the rest of locked-down world. Retrieved from <https://www.bloomberg.com/news/articles/2020-03-31/divorces-spike-in-china-after-coronavirus-quarantines>. Rajkumar, R. P. (2020). COVID-19 and mental health: A review of the existing literature. *Asian Journal of Psychiatry*, 52, 102066.

⁶ Lee W.Y. (2020) ‘The Musings of a Family Therapist in Asia When COVID-19 Struck’, *Family Process* 59(3): 1018–23.

⁷ Lebow, J.L. (2020). The challenges of COVID-19 for divorcing and post-divorce families. *Family Process*, 59 (3), 967-973.

findings are consistent with the impact of various types of disasters that have occurred around the world.⁸

The impact has been particularly difficult for children due to moving to online learning, school closures, a stoppage of recreational activities and social events, thus transforming them into less active children. Most children's eating and sleeping habits have changed, as well as the time spent on electronic devices. The lack of extracurricular activities and outdoor activities away from the family has contributed to higher rates of anger and aggression, the occurrence of sibling rivalry and increased violent outbursts.⁹

The impact of COVID-19 on family lawyers

While research is only now beginning to emerge about the impact of COVID-19 on the legal profession, preliminary data are documenting the increased stress and anxiety of family lawyers due to the ongoing personal and professional adjustments in these uncertain times¹⁰. Not all family lawyers will experience the long COVID-19 psychological impacts that have been documented in the literature but those who do, may experience mental health problems including anxiety, depression, higher levels of PTSD, poor job satisfaction, and overall psychological problems. Left unaddressed, these psychological challenges can impact the work with clients and can impact overall job satisfaction. While some stress of returning to in-person contact with clients may be unavoidable, it is important for family law lawyers to seek help when the stress interferes with the ability to provide support to their clients.

Awareness of return anxiety

As the COVID-19 curve continues to flatten and many jurisdictions begin to re-open services, family courts are slowly returning to a 'new normal'. Many family lawyers are leaving their home offices and returning to court for in-person activities. While returning to in-person services is a welcome return for some, many will experience some level of 'return anxiety'¹¹. The new concept of return anxiety stresses the importance of acknowledging the fears and worries about the heightened risk of infection, new social expectations, and the adjustment of routines to new work realities.

⁸ For a review of the impact of COVID-19 on families, see Pruett MK, Alschech J, & Saini M. (2021). The impact of coparenting on mothers' COVID-19-related stressors. *Social Sciences*. 10(8):311. <https://doi.org/10.3390/socsci10080311>. Parkinson, D., Zara, C. (2013). The hidden disaster: Domestic violence in the aftermath of natural disaster. *Australian Journal of Emergency Management*, 28, 28–35. <http://www.austlii.edu.au/au/journals/AUJEmMgmt/2013/24.pdf>. Gunther-Bel, C., Vilaregut, A., Carratala, E., Torras-Garat, S., & Perez-Testor, C. (2020). A mixed-methods study of individual, couple, and parental functioning during the state-regulated COVID-19 lockdown in Spain. *Family Process*, 59(3), 1060-1079.

⁹ Al-Balushi B, Essa MM. The Impact of COVID-19 on Children – Parent's Perspective. *Int J Nutr Pharmacol Neurol Dis* 2020;10:164-5

¹⁰ Rostron, A. (2021). COVID-19's Impact on Families, Lawyers, and Courts: An Annotated Bibliography. *J. Am. Acad. Matrimonial Law.*, 34, 593.

¹¹ Trigg, D. (2021). Atmospheres of anxiety: The case of Covid-19. In *Atmospheres and Shared Emotions* (pp. 77-95). Routledge.

Returning to the workplace after working remotely during the COVID-19 pandemic may impact people differently. For some people, the return to routines and seeing colleagues can be very healing. For others, returning to social situations can both be exhausting and concerning due to the ongoing concerns around infection. It is important to allow space for people to have mixed and complex feelings about returning to social situations, including the clients, colleagues and family court professionals. It is expected that the awkward greeting dance (e.g., should I elbow bump, shake hands, hug, bow, smile, etc.) will continue for the foreseeable future and will be influenced by both the cultural and geographical context.

In-person or virtual meetings

Although online communication technology has grown exponentially with each successive generation as a central fixture within our society, the current climate has dramatically accelerated the need for online platforms to continue working with families despite restrictions of face-to-face contact. Remote methods to connect with clients is a vital method for improving access to justice for children and families involved in family courts. This need remote access existed long before the global shutdown due to the economic, socioeconomic, geographical, or logistical reasons that prevented many litigants from accessing services. Family lawyers now have a new tool in their toolbox for engaging with clients and they will now need to make decisions about the optimal situations for meeting in-person and when it would be preferred to meet remotely. Decisions should be based on considerations of accessibility, convenience, and the best interest of the clients and should be on a case-by-case basis.

Importance of educating clients

The speed of changes during this global pandemic has created an essential role for family law lawyers to articulate the needs of their clients and to educate them about the challenges of developing and adjusting parenting plans in the post pandemic era. As children and families strive to adapt to living in this pandemic environment, family lawyers should be equipped with the latest resources and information to educate their clients about the new realities and the adjustments needed for parenting plans to be responsive to the new realities in the aftermath of the pandemic.

Family lawyers need to educate their clients about the legal context of the pandemic, including the expectations of the courts, the types of issues being considered by the court in relation to the pandemic, and how the courts are generally deciding similar decisions in the context of COVID-19 so their clients are better able to make decisions that are in the best interest of their children.

Lawyers also need to be aware of the literature on the impact of COVID-19 so they are better able to educate their clients about the stressors and consequences related to the pandemic and how best to mitigate the negative feelings and emotions. Client may be unaware, uninformed or

misinformed about the impact of COVID-19 on their own mental health and the overall wellbeing of their children and how these concerns may be impacting their legal matters.

Screening and promoting safety

Family lawyers contact with their clients typically occurs when clients are experiencing significant changes in their lives and feeling heightened levels of distress. Given the known increase in intimate partner violence, family conflict and psychological harm within families during COVID-19, family lawyers have a unique opportunity to identify emotionally-charged clients and to help them navigate this stressful time in their lives. Family lawyers should screen their clients for domestic violence / intimate partner violence using specialized screening tools designed for lawyers¹².

Promoting children's voices

*The irony is public health measures aimed at preventing one disease can exclude and undo preventive efforts to intervene proactively in the lives of many vulnerable children and young people globally. The indirect impacts and unintended consequences of pandemic responses are potentially most damaging. These include delayed acute presentations, foregone treatment for chronic health conditions and increased burden of mental health conditions.*¹³

COVID-19 emergency measures, leading to the closure of schools, recreation centres, and organized activities, have resulted in widespread disruption to all aspects of the lives and routines of children and adolescents, including 1) Families home together for long periods of time, without access to the usual external resources; 2) Parents and children using more screen time; 3) Economic uncertainties putting extra strain on families; and 4) Family conflicts due to different expectations.

There has been an increased risk of mental health issues among children, due to the lack of attention to socio-emotional development during pandemic, anxiety upon return to school, and the social isolation due to pandemic protocols. These impacts have been compounded in cases where the children's parents have been stuck in family conflict and unable to make child-focused decision-making in their children's best interest. Family lawyers should take steps to ensure that children's views and perspectives are ascertained in a sensitive fashion, and that these are shared

¹² Sowter, D. (2020). Coercive control: What should a good lawyer do?. Slaw: Canada's Online Legal Magazine. <http://www.slaw.ca/2019/12/27/coercive-control-what-should-a-good-lawyer-do>.

¹³ Raman, S., Harries, M., Nathawad, R., Kyeremateng, R., Seth, R., & Lonne, B. (2020). Where do we go from here? A child rights-based response to COVID-19. *BMJ paediatrics open*, 4(1).

with their clients in a matter that promotes the children's best interests. Further, family lawyers should educate their clients on understanding their children's needs.

Seeking mental health assistance for clients

Family lawyers should speak to their clients about how they are coping with the COVID-19 and refer them to mental health services as needed. Connecting with local mental health agencies and service providers can provide direct lines for emotional support to clients when mental health issues are identified. While it is not the role of family lawyers to complete a psychosocial assessment of their clients' mental health, being aware of these impacts can both help to differentiate legal issues from other stressors and to know when a referral for mental health services may be needed. For those clients who do not know a mental health professional, lawyers can make the following referrals: (1) seek recommendations through their family physician; (2) have a roster of recommended professionals; or (3) have a roster of recommended programs that address their particular concerns.

In some cases, it may be helpful for clients to receive guidance by mental health professional to address parenting plans disputes that have arisen due to the pandemic (e.g., disputes about vaccination, issues, dealing with the increased stress of their children due to the pandemic, mental health issues impacting parenting).

Conclusion

Family lawyers play a critical role in the lives of their clients and they have a significant impact on the outcome of the family disputes. In these uncertain times, family lawyers play a critical role in providing their clients with information and education about the role and impact of the pandemic on family disputes. During these uncertain times, clients need not just the legal information and assistance with decision making in the family courts, but to also identify and respond to the mental health and psychological concerns that may be impacting their family law disputes.

Michael Saini, PhD



How family law responds to the war

by Oksana Voynarovska

Emergency settings, such as warfare, often reveal practical drawbacks of the legislation, surplus bureaucracy regarding documents, or complete inability to obtain particular services. Yet they shed light on modern and digital solutions that will last even after the cessation of hostilities. Thus, amidst the initial collapse and current challenges, family law adjusts to respond to the war and effectively regulate family relations.

Around 2 million Ukrainian children stay abroad after they fled the aggressive war in Ukraine seeking safety from shelling. This wouldn't be possible unless the government temporarily lifted the obligation to notify and obtain the notarial consent of the second parent or authorization of the court. Though such consent is an efficacious mechanism for protecting the rights of custody and preventing child abduction in peaceful times, it is an unnecessary obstacle endangering the lives of both a child and parents during warfare. Besides if parents are unable to travel, a child may cross the border when accompanied by one of the relatives (grandparents, adult siblings) provided they have proof of family relationships. Any other individual wishing to accompany a child needs the written consent of one parent certified by the tutorship and guardianship agency.

The growing number of orphans during the war is inevitable. As the Russian missiles land on the houses of civilians, children lose their parents and desperately need care. At the same time accelerated or simplified adoption procedure may violate children's rights. It is possible though to ease some formalities and digitalize the process. Now, the citizens of Ukrainian who wish to adopt or take care of an orphan can apply either in person or online via a national web portal in order to obtain the status of adopting parents and schedule online consultations. The platform will automatically upload documents from various databases, thus saving the applicant's time and efforts. Moreover, the government reduced the timing for verification of an application, examining of living conditions, as well as for completion of basic courses in caring for this category of children.

On the contrary, the procedure of international adoption was suspended due to a bunch of problems: many children were either internally displaced or evacuated abroad, some orphans have indefinite status as their parents or relatives still may be alive, it is problematic to organise a meeting of children and the foreigners as well as verify the documents of the latter, and some national authorities do not work in full capacity because of constant shelling and can't issue their consents to the adoption. Hence, this sphere of family law currently remains in ambiguity.

In the first half of 2022, approximately 100.000 marriages were concluded. The importance of a marriage during the war is crucial since it allows to regulate the status of common property as well as guarantee certainty in case of inheritance or social security. Within a pilot project "Marriage in One Day", couples may register their wedlock almost in every registry office of their choice within one day. Though launched in 2016, this project acquired new meaning after the recent events. Likewise, during martial law, if one of the future spouses is a conscript, he or she may apply to the commander in order to marry in absentia. Such an application certified by the commander is then transmitted to a registry office and recognized as consent to the wedlock. If possible, the conscript may take part in the ceremony via video link.

Thus, in warfare settings, family law gains new features such as paperless format, digitalisation, and speedy procedures in order to overcome challenges and protect the interests of people. But at what cost does this come?

Oksana Voynarovska

IAFL Fellow (Ukraine)

Young Lawyers' Award Winner and Runners-Up

We congratulate Yasmin Khann-Gunns for winning the Young Lawyers' Award 2022 as well as the two runners up Emma Jamison and Jessica Ryan, whose articles we include in this edition.



'Intercountry adoption is in decline - discuss. What is your view about this statement?'

by Yasmin Khann-Gunns

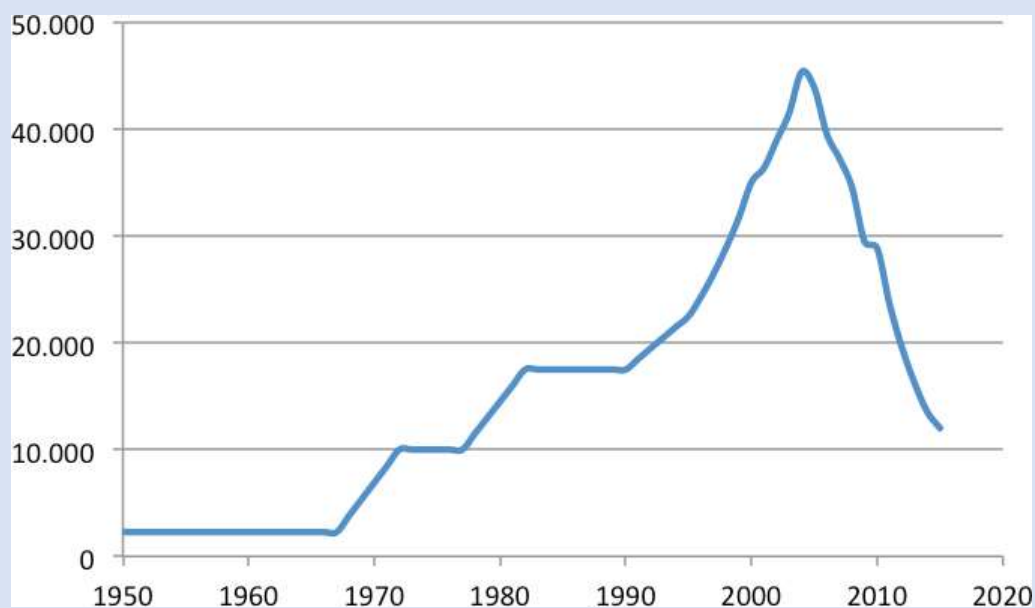
Introduction

Inter-country adoption (ICA) is the process by which a child, habitually resident in one country, is adopted by an individual(s) habitually resident in another country.¹ The country of origin is often referred to as the 'sending country', while the country of destination is often referred to as the 'receiving country'. The statistics are clear; ICA is in steep decline. The question is, why? The writer will address this question by drawing on the experiences of ICA lawyers from around the world, prominent academics in the field and Dr Peter Selman, a Specialist Advisor of Statistics to The Hague Conference on Private International Law (HCCH).

The statistics

In his 2012 report, Selman found that *'in 1998, there were just under 32,000 adoptions; by 2004 this number had risen to over 45,000; by 2009, the world total had fallen to under 30,000 ... and the decline continued in 2010'*² (see Figure 1).

Figure 1³



¹ 'Intercountry Adoption and the 1993 Hague Convention', (*HM Courts & Tribunal Service*, 2016),

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717285/a21-eng.pdf> accessed 8 March 2022.

² Peter Selman, 'Global Trends in Intercountry Adoption: 2001-2010' (2012) 44 *Adoption Advocate*, PL 1.

³ Jean-François Mignot, 'Will international adoption be replaced by surrogacy?', *Niussp*, Fertility and Reproduction, 2017,

<<https://www.niussp.org/fertility-and-reproduction/will-international-adoption-be-replaced-by-surrogacyla-gestation-pour-autrui-va-t-elle-remplacer-ladoption-internationale/>> accessed 1 March 2022.

Selman's most recent report for the HCCH is dated February 2022. It provides comprehensive ICStatistics based on data from 24-28 receiving countries.

Selman's first table illustrates the steep decline of ICA amongst *a//*receiving countries (see Figure 2).

Figure 2⁴

Table 1: RECEIVING STATES 2004-20 - Ranked by total adoptions in period

8-2-2022	25 Receiving States 2004-2020																	
COUNTRY	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2004-2020
USA	22.988	22.735	20.671	19.605	17.467	12.753	12.149	9.320	8.668	7.094	6.441	5.648	5.372	4.714	4.059	2.970	1.622	184.276
Italy	3.402	2.874	3.188	3.420	3.977	3.964	4.130	4.022	3.106	2.825	2.206	2.216	1.872	1.439	1.394	1.205	669	45.909
Spain	5.541	5.423	4.472	3.648	3.156	3.006	2.891	2.573	1.669	1.191	827	801	574	542	456	375	195	37.340
France	4.079	4.136	3.977	3.162	3.270	3.017	3.508	2.003	1.569	1.343	1.069	815	956	685	615	421	244	34.869
Canada	1.949	1.858	1.568	1.715	1.614	1.695	1.660	1.516	1.162	1.243	905	895	790	621	658	576	416	20.841
TOP FIVE	37.959	37.026	33.876	31.550	29.484	24.435	24.338	19.434	16.174	13.696	11.448	10.375	9.564	8.001	7.182	5.547	3.146	323.235
Sweden	1.109	1.083	879	800	793	912	728	630	542	450	408	400	342	297	262	170	92	9.897
Netherlands	1.307	1.185	816	782	767	682	705	528	488	401	354	304	214	210	156	145	70	9.114
Germany	744	720	661	783	716	606	513	624	452	288	227	200	196	96	91	85	81	7.083
Norway	706	582	448	426	304	344	343	304	239	144	152	132	126	125	95	89	40	4.599
Denmark	528	586	450	426	395	496	419	338	219	176	124	97	84	79	64	46	23	4.550
TOP TEN	42.353	41.182	37.130	34.767	32.459	27.475	27.046	21.858	18.114	15.155	12.713	11.508	10.526	8.808	7.850	6.082	3.452	358.478
Belgium	470	471	383	358	364	439	388	351	260	178	156	137	121	124	104	75	52	4.431
Switzerland	567	389	410	394	259	288	293	238	194	159	92	92	73	75	52	62	35	3.672
Australia	370	434	421	405	270	269	222	217	157	138	114	83	82	69	65	57	37	3.410
Ireland	398	366	313	392	422	307	201	188	117	72	34	82	54	53	41	33	29	3.102
UK	333	369	363	356	225	200	173	153	120	124	68	58	64	60	71	52	53	2.842
Finland	289	308	218	176	157	187	160	163	175	141	142	93	58	70	54	67	27	2.485
Israel	226	191	176	218	150	120	114	115	88	69	42	37	22	17	17	11	6	1.619
NZealand	339	30	20	49	39	16	13	19	25	42	22	12	22	23	18	13	12	714
Malta	46	39	60	64	53	34	42	50	57	19	11	18	6	45	53	31	n/a	628
Luxembourg	56	41	45	23	28	36	32	25	32	17	13	18	19	16	12	18	5	436
Iceland	29	41	19	18	13	17	18	19	17	8	11	20	5	6	5	5	5	256
Slovenia		3	15	3	6	14	21	18	35	15	14	15	11	14	14	15	5	218
Cyprus	3	3	0	19	16	12	4	12	1	2	2	4	0	0	0	0	n/a	78
Andorra	3	1	4	6	5	7	9	2	1	4	2	0	2	2	0	3	0	51
Monaco	n/a	0	0	1	3	4	1	2	1	4	1	3	0	1	1	0	3	22
TOTAL	45.482	43.868	39.577	37.248	34.466	29.421	28.736	23.428	19.393	16.143	13.436	12.177	11.065	9.382	8.356	6.524	3.718	382.420
No. of states	23	24	23	25	25	25	25	25	25	25	24	23	24	23	23	22	22-25	
% To USA	50,5%	51,8%	52,2%	52,6%	50,7%	43,3%	42,3%	39,8%	44,7%	43,9%	47,9%	46,4%	48,5%	50,2%	48,6%	45,5%	43,6%	48,2%

⁴ Peter Selman, 'Statistics based on data provided by 24-28 receiving States' (*Hague Conference on Private International Law*, February 2022)

<<https://assets.hcch.net/docs/a8fe9f19-23e6-40c2-855e-388e112b1f5.pdf>> accessed 21 February 2022.

Selman's second table illustrates the steep decline of ICA amongst *nearly all* sending countries(see Figure 3).

Figure 3⁵

Table 2: TOP 20 STATES OF ORIGIN 2004-20 - Ranked by number adopted to 27 States

1-2-2022	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2004-2020
China (Mainland)	13.412	14.484	10.765	8.749	5.879	5.004	5.427	4.371	4.136	3.405	2.943	3.059	2.678	2.211	1.798	1.065	250	89.636
Russia	9.450	7.569	6.837	4.926	4.169	4.061	3.424	3.420	2.674	1.838	1.058	766	486	355	284	228	45	51.590
Ethiopia	1.534	1.799	2.184	3.041	3.917	4.564	4.385	3.446	2.734	1.997	1.056	676	330	485	245	22	13	32.428
Guatemala	3.425	3.870	4.230	4.851	4.172	784	58	36	11	27	32	13	7	4	1	5	0	21.526
Colombia	1.749	1.500	1.681	1.643	1.613	1.404	1.815	1.591	931	570	536	522	485	552	565	607	387	18.151
TOP 5	29.570	29.222	25.697	23.210	19.750	15.817	15.109	12.864	10.486	7.837	5.625	5.036	3.986	3.607	2.893	1.927	695	213.331
Ukraine	2.119	2.035	1.077	1.623	1.601	1.500	1.097	1.068	722	640	608	381	399	277	328	365	277	16.117
South Korea	2.239	2.118	1.813	1.225	1.366	1.395	1.127	950	815	219	506	433	376	401	321	259	266	15.829
Viet Nam	492	1.199	1.363	1.691	1.719	1.500	1.265	700	214	296	407	428	405	380	307	240	108	12.714
Haiti	1.169	949	1.108	822	1.313	1.215	2.496	229	374	552	556	276	396	389	389	252	209	12.704
India	1.067	864	831	987	751	714	608	614	399	387	359	345	491	580	646	545	262	10.450
TOP 10	36.656	36.387	31.889	29.558	26.500	22.141	21.702	16.425	13.010	9.931	8.061	6.899	6.053	5.644	4.884	3.588	1.817	281.145
Philippines	410	509	483	568	581	545	494	491	411	538	454	391	363	332	248	222	111	7.151
Kazakhstan	899	849	735	817	768	682	516	218	5	28	63	34	20	17	9	10	3	5.673
Thailand	535	491	423	467	398	359	298	280	282	308	264	261	289	224	249	233	114	5.475
Brazil	487	488	529	490	490	458	375	347	328	238	129	137	120	117	67	64	55	4.919
Poland	407	406	393	371	399	393	315	292	244	303	303	296	328	153	53	14	7	4.677
TOP 15	39.394	39.130	34.452	32.271	29.136	24.578	23.700	18.053	14.280	11.346	9.274	8.018	7.173	6.487	5.510	4.131	2.107	309.040
Bulgaria	395	149	112	100	140	228	237	311	357	413	414	426	374	302	303	273	173	4.707
China (Taiwan)	186	242	269	273	373	397	416	326	299	199	188	180	170	156	121	154	122	4.071
South Africa	241	268	263	255	272	307	220	202	170	221	219	217	147	162	131	141	59	3.495
Congo RD	15	45	61	69	62	153	190	353	521	599	241	384	635	54	47	32	3	3.464
Nigeria	100	102	105	82	221	184	268	246	266	243	183	196	161	216	213	148	118	3.052
TOP 20 >	40.331	39.936	35.262	33.050	30.204	25.847	25.031	19.491	15.893	13.021	10.519	9.421	8.660	7.377	6.325	4.879	2.582	327.829
USA	132	168	176	181	261	257	177	250	232	171	172	174	175	109	159	82	89	2.965
Hungary	70	67	100	142	118	131	139	157	151	112	135	163	174	235	244	241	158	2.537
Nepal	269	227	452	261	413	22	170	157	3	0	4	2	5	1	1	1	3	1.991
Peru	117	173	189	171	153	139	175	135	111	109	97	81	100	66	58	67	32	1.973
Uganda	17	22	16	59	61	74	80	225	249	296	211	237	208	60	29	35	26	1.905
TOP 25 >	40.936	40.593	36.195	33.864	31.210	26.470	25.772	20.415	16.639	13.709	11.138	10.078	9.322	7.848	6.816	5.305	2.890	339.200
All States	45.482	43.868	39.577	37.244	34.486	29.412	28.732	23.428	19.393	16.143	13.436	12.177	11.065	9.382	8.356	6.525	3.718	382.424

The statistics are clear; ICA is in steep decline.

Why is ICA in steep decline?

The writer has identified the following reasons for the decline (and in no particular order):

1. Strengthening of domestic policy and legislation;
2. Shift in focus towards domestic adoptions;
3. The greater ability to have a genetically related child;
4. Ratification of the Convention;⁶
5. Scandals, bad press and politics; and
6. Miscellaneous.

The writer will explore each of these reasons below.

⁵ *ibid*.

⁶ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993 (The Hague Convention).

Strengthening of domestic policy and legislation

The strengthening of domestic policy and legislation has made ICA harder. It is becoming increasingly difficult for prospective foreign adopters to find a child, and the available children tend to have 'special needs'.

Many countries have placed moratoriums on their ICA programs, which has caused numbers to plummet. In some cases moratoriums are voluntary, and in others, they are forced, largely due to concerns of child trafficking, transfer of custody without approval, questionable practices by adoption service providers and fraud.⁷ Moratoriums on ICA from Cambodia were established by several countries, including the USA in 2001.⁸ In Guatemala, a moratorium was introduced in 2008 due to concerns over the sale of children, illegal payments to birth mothers and abduction.⁹ ICA fell from 4,172 in 2008 to 0 in 2020 (Figure 3). In Romania, a moratorium was imposed in 2001, and then again in 2004, '*making international adoption virtually impossible*'.¹⁰ In 2007, Nepal introduced a moratorium whilst it made changes to its processes, intending to resolve serious issues of malpractice.¹¹ Today, ICA in Nepal has virtually stopped; 261 children were sent in 2007, whilst only 3 were sent in 2020 (Figure 3). In 2011, Ethiopia announced that it would drastically reduce ICA and in 2017, the country introduced a moratorium; 1,534 children were sent in 2004, while only 13 were sent in 2020 (Figure 3).

Countries have increasingly imposed stringent eligibility requirements on prospective foreign adopters, making it harder for them to adopt. China requires prospective adopters to sign statements that they are not gay or lesbian, and China does not allow single people to adopt, or those who are obese, taking psychotropic drugs, over the age of 50, or who are poor.¹² The writer interviewed Roll Chunnhakasikarn who explained that in Thailand, only married heterosexual couples may apply for ICA, along with single women who can only adopt special needs children. In addition, the adopter must be at least 25, and if they wish to adopt a special needs child they must be healthy, have no criminal record or psychological problems.¹³

A change in political ideology can increase ICA, or cause numbers to dramatically fall. O'Halloran explains that the one-child policy in China introduced in 1980, coupled with the preference for male children, led to many unwanted female children being absorbed through the ICA process.¹⁴ In 2004, China ranked as the highest country of origin sending 13,412 children, but in 2020, it sent just 250 (Figure 3). This decline is partly due to the two-child policy introduced in 2015 and the three-child policy introduced in 2021. In Romania, abortion was outlawed in 1966 for women under 40 with less than four children, resulting in many children being abandoned in orphanages. The ban was removed in 1989 and by 1991, Romania was a major sending country for ICA. In 2015, Romania changed its adoption laws and now, ICA is only possible for Romanian citizens living outside of Romania and for foreign citizens who are residents in Romania.¹⁵

⁷ Kelly Weisberg, *Modern Family Law: Cases and Materials* (Wolters Kluwer 2020) 848.

⁸ Simon Springer, *Violent Neoliberalism, Development, Discourse, and Dispossession in Cambodia* (Palgrave Macmillan 2015) 50.

⁹ Karen Rotabi and Nicole Bromfield, 'The Decline in Intercountry Adoptions and New Practices of Global Surrogacy: Global Exploitation and Human Rights Concerns' (2012) 27(2) *Journal of Women and Social Work* 129.

¹⁰ Kerry O'Halloran, *The Politics of Adoption, International Perspectives on Law, Policy and Practice* (4th edn, Springer 2021) 661.

¹¹ 'Adoptions: restricted list' (*Department for Education*, March 2021)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965905/Restricted_List_2021.pdf> accessed 24 March 2022.

¹² O'Halloran (n 10) 169.

¹³ Interview with Roll Chunhakasikarn, Partner and Family Lawyer, Chun & Chun Law in Thailand, Fellow of the International Academy of Family Lawyers (email, 14 March 2022).

¹⁴ O'Halloran (n 10) 168.

¹⁵ O'Halloran (n 10) 661.

The elimination or restriction of private adoption intermediaries has also impacted ICA numbers. Bartholet argues that this has been the '*death knell*' for ICA in many countries, particularly in South and Central America.¹⁶

It is not just sending countries that have strengthened their domestic policy and legislation making ICA harder, but also receiving countries. In February 2021, ICA was suspended in the Netherlands. The writer interviewed Selman¹⁷ who explained that '*The Dutch government failed to observe its duty of care for many years by looking the other way and failing to take action in cases of malpractice and abuse*'.¹⁸ A similar enquiry has been called in Sweden, while Norway and Denmark are also questioning their ICA programs.

Domestic adoptions

O'Halloran points out that many present-day adopters are interested in babies, preferably healthy and voluntarily relinquished, rather than children simply in need of a home. This has presented countries with difficulties:

*It removes the most adoptable children from their own country, culture and kin, it pre-empts any possibility of meeting the needs of their own adopters and it leaves behind those children who are statistically less likely to be adopted and who will therefore probably be consigned to institutional care.*¹⁹

For these reasons and those set out below, there has been a noticeable shift from ICA to domestic adoption.

Countries have introduced legislation or policy requiring them to prioritise domestic adoptions. In South Korea, the Special Adoption Act came into effect in 2012 prioritising domestic adoptions and endeavouring to reduce the number of South Korean children adopted abroad. In 2004, 2,239 children were sent and in 2012, 815 were sent; this dropped sharply in 2013 to 219 (Figure 3). In the UK, O'Halloran notes that domestic adoptions have remained amongst the highest in Europe, '*probably due to local authority policy of looking first to family members in accordance with the Children Act 1989*'.²⁰ Domestic adoptions have also steadily grown in Canada, largely due to '*more assertive policies to increase adoptions from care*'.²¹

¹⁶ Elizabeth Bartholet 'International Adoption: The Human Rights Position' (2010) vol 1 Global Policy 91, 93.

¹⁷ Interview with Dr Peter Selman, Specialist Advisor of statistics to The Hague Conference on Private International Law and Independent Research Professional (Microsoft Teams, 7 March 2022).

¹⁸ 'Minister Dekker suspends intercountry adoption with immediate effect' (*Government of the Netherlands*, 8 February 2021)

<<https://www.government.nl/latest/news/2021/02/08/minister-dekker-suspends-intercountry-adoption-with-immediate-effect>> accessed 23 March 2022.

¹⁹ O'Halloran (n 10) 164.

²⁰ O'Halloran (n 10) 227.

²¹ O'Halloran (n 10) 409.

It is arguable that as a country becomes more prosperous, ICA declines; countries want to hold onto their children, particularly the ‘healthy’ ones. The writer interviewed Stephen Page who explained that *‘the side effect of countries becoming more prosperous is that children are not being exported for ICA anymore. Instead, people within those countries who cannot have children have become more inclined to adopt domestically.’*²² Page gave the example of India, a country with one of the fastest-growing economies in the world; ICA fell from 1,067 in 2004 to 262 in 2020 (Figure 3). Similarly, Page explained that *‘China is hanging on to the children who are fit’*; China tends to send disabled children to Australia aged 2-5. China is not alone in this regard, with several countries almost exclusively sending children with *‘special needs’*, or older children, including Brazil, Latvia, Lithuania and Poland.²³ Selman explains that these children are *‘expensive’* to look after domestically.²⁴ That said, prosperous countries such as South Korea are still sending children for ICA. Selman believes that this is due to the concept of diaspora; South Korea favours the idea of sending children around the world to *‘spread the message of the goodness of Korea’*.²⁵

Linked to prosperity is national pride. Bartholet argues that national pride has led to calls to stop selling, or giving away, *‘our most precious resource [children]’*, and for countries to *‘take care of our own’*.²⁶ This concept is particularly prevalent in Asian countries, where domestic adoptions by relatives are seen as a *‘means of strengthening bloodlines’*; in China, this is called *‘qinqi’*.²⁷

Genetically related child

The desire to have a genetically related child, and the greater ability to achieve this through assisted reproduction, has led to a decline in prospective adopters and therefore contributed to the decline of ICA. Indeed, O’Halloran suggests that where prospective adopters have a choice between having a genetically related child versus adopting a child in need of a family, they are likely to choose the former.²⁸

In 2004, when ICA began its steep decline, surrogacy began to take off. Gestational surrogacy rates stood at 738 in 2004; by 2013, the number of children born by surrogacy was higher than the number of ICAs.²⁹ O’Halloran describes how as ICA becomes a much slower, more complicated and uncertain process, which tends to deliver older children or those with physical or mental health issues, many would-be parents are instead considering commercial surrogacy.³⁰ O’Halloran puts it bluntly, stating *‘where choice rather than altruism is in play, some prospective adopters may simply decide that surrogacy offers better value’*.³¹

²² Interview with Stephen Page, Family Lawyer and Director at Page Provan, Fellow of the International Academy of Family Lawyers and a Fellow of the Academy of Adoption and Assisted Reproduction Attorneys (Microsoft Teams, 3 March 2022).

²³ Peter Selman, ‘The Global Decline of Intercountry Adoption: What Lies Ahead?’ (2012) vol 11 Social Policy and Society 381, 386.

²⁴ Interview with Dr Peter Selman (n 17).²⁵
Interview with Dr Peter Selman (n 17).²⁶
Bartholet (n 16) 92.

²⁷ O'Halloran (n 10) 821.

²⁸ O'Halloran (n 10) 997.

²⁹ Kim Armour, 'An Overview of Surrogacy Around the World' (*Growing Families*, 2012) <<https://www.growingfamilies.org/wp-content/uploads/2015/12/Overview-of-Surrogacy-Around-The-World.pdf>> accessed 10 March 2022.

³⁰ O'Halloran (n 10) 997.

³¹ O'Halloran (n 10) 358.

Surrogacy has become increasingly popular with the LGBT+ community, due to prospective parents facing '*numerous attitudinal and institutional obstacles in the adoption process*'.³² Whilst the Convention neither prohibits nor requires nations to place children for adoption with LGBT+ individual(s), it leaves the matter open for each country to decide. This has led to many sending countries prohibiting LGBT+ individuals from adopting, including countries that recognise same-sex marriage.

The writer interviewed Janaína Albuquerque.³³ Albuquerque considers that '*It is not possible to talk about ICA without talking about surrogacy. ICA has definitely gone down. Surrogacy is going up*'. When asked why, Albuquerque explained that surrogacy is viewed as a quicker and sometimes cheaper process, with adoptions potentially taking 3 to 4 years. In addition, people want to have a baby of their own; '*a baby comes without baggage and offers a clean slate, unlike adoption*'.³⁴ Chunhakasikarn explained '*The development and success rate of IVF and surrogacy processes have increased, while the cost has decreased*', and this has had a direct impact on the trajectory of ICA.³⁵

In summary, and as O'Halloran points out, the '*correlation between falling rates of domestic adoption and ICA and rising rates of surrogacy tourism and successful IVF is unmistakable*'.³⁶

The Hague Convention

The Convention came into force in 1995. By 2022, 104 states had contracted to the Convention.³⁷ Whilst the objects of the Convention include establishing safeguards to ensure that ICA takes place in the best interests of the child, and to prevent the abduction, sale of or traffic in children,³⁸ arguably, the Convention is '*actually depressing intercountry adoption due to resulting increased bureaucracy, delays, and costs*'.³⁹

Article 4 of the Convention requires Members to give '*due consideration*' to placing the child within the country of origin; this is the principle of subsidiarity.⁴⁰ O'Halloran states that the '*requirements to give first preference to domestic adoption and to confirm orphan status before releasing children*' led to the radical decline of ICA in China.⁴¹ Albuquerque worked with the team responsible for the Convention. She explained that when discussing the Convention, the experts considered that '*the more the child stays within their cultural context or routes, the better it would be for them*'.⁴²

³² Gretchen Wrobel, Emily Helder and Elisha Marr (eds), *The Routledge Handbook of Adoption* (Routledge 2020) 167.

³³ Interview with Janaína Albuquerque, international Family Lawyer registered in the Brazilian and Portuguese Bar Associations (Microsoft Teams, 1 March 2022).

³⁴ *ibid.*

³⁵ Interview with Roll Chunhakasikarn (n 13).

³⁶ O'Halloran (n 10) 213.

³⁷ 'HCCH MEMBERS' (*Hague Conference on Private International Law*), <https://www.hcch.net/en/states/hcch-members>> accessed 21 February 2022.

³⁸ The Hague Convention (n 6), Article 1.

³⁹ Robert Ballard and others, *The intercountry adoption debate: Dialogues across disciplines* (Cambridge Scholars Publishing 2015) 200.

⁴⁰ The Hague Convention (n 6), Article 4

⁴¹ O'Halloran (n 10) 826.

⁴² Interview with Janaina Albuquerque (n 33).

The costs and delays from ratification of the Convention have further contributed to the decline of ICA. The safeguards put in place by the Convention can be '*crippling*' to a sending country that will bear the cost of implementing them.⁴³ The writer interviewed Victoria Nabas.⁴⁴ Referring to the Convention, Nabas explained '*it is so complicated to adopt that individuals or couples who would like to adopt have no choice but to give up*'. Nabas spoke of adoption costs as high as £50,000. Indeed, a recent study by the European Commission on Adoption found that '*the cost of adoption is an important issue and sometimes forces the prospective adoptive parents to give up the procedure*'.⁴⁵

After joining the Convention, some countries have seen a sharp decrease in ICA, whilst others have seen a sharp increase. Selman points out that amongst others, Italy, Belgium, the U.S and Ireland (receiving countries) all experienced a decrease after joining, as did Sri Lanka, Brazil, Madagascar, China and Chile (sending countries).⁴⁶ That said, Selman believes that ICA '*has not declined in Hague countries particularly faster than non-Hague countries*'.⁴⁷ He points out that '*Theten years after the Convention came into force saw the largest rise in ICA in the 70 years since WW2*'. For example, Spain, Sweden and Switzerland (receiving countries) saw an increase after joining, as did Romania, South Africa, Mali and Guatemala (sending countries). Instead, Selman argues that the Convention has '*exposed more and more where ICA has gone wrong*'.⁴⁸

Scandals, bad press and politics

ICA scandals, bad press and politics have helped contribute to the decline of ICA and as discussed above, the shift in focus towards domestic adoptions.

There have been many high-profile cases involving children being hurt or killed by their foreign adoptive parents. Albuquerque informed the writer that '*one of the biggest problems with adoption is that parents give the child back. It happens a lot*'.⁴⁹ This is what happened to Artyom Savelyev, who was rejected by his American mother and sent back to Russia alone. On 1 January 2013, Vladimir Putin banned the adoption of Russian children by U.S. citizens; perhaps he was embarrassed, or perhaps this was retaliation for the Magnitsky Act⁵⁰ that sanctioned Russian officials and nationals for human rights abuses.⁵¹ In Romania, it was deemed politically expedient to cease ICA in 2005, as a result of ongoing allegations of malpractice that threatened to compromise accession to EU treaties.⁵²

As Bartholet puts it,

⁴³ Ballard (n 39) 221.

⁴⁴ Interview with Victoria Nabas, Partner and Head of Immigration, qualified in Brazil, Portugal and England & Wales, Gunnercooke, (MicrosoftTeams, 24 February 2022).

⁴⁵ Ballard (n 39) 289.

⁴⁶ Interview with Dr Peter Selman (n 17).

⁴⁷ *ibid*

⁴⁸ *Ibid.*

⁴⁹ Interview with Janaína Albuquerque (n 33).

⁵⁰ Global Magnitsky Human Rights Accountability Act 2012.

⁵¹ Weisberg (n 7) 848.

⁵² O'Halloran (n 10) 994.

The media reflect and exacerbate the hostility to international adoption, featuring stories of baby buying and kid-napping, fueling the idea that ICA is an inherent violation of human rights, depriving children of their heritage birthright.⁵³

Celebrity adoptions have not helped this hostility; 67 organizations filed amicus briefs in court opposing Madonna's first adoption of a child from Malawi, with The Human Rights Consultative Committee, representing 85 such organisations, opposing the second adoption.⁵⁴

An interesting case study is that of Australia. As a result of historic failings, Australia is sometimes described as 'anti-adoption'. Page explained that Australia's height of adoption was in the 1960s, when forced adoptions by churches and adoption agencies were widespread and when thousands of Aboriginal Australians were forcibly separated from their families.⁵⁵ This ultimately led to a formal apology from the Government. Page explained that *'as a result of this guilt, the adoption authorities in Australia are very rigid'*.⁵⁶ Other countries with similar tainted histories may feel the same way. Selman considers that the British "Home Children" migrant program *'may explain why ICA is so low in the UK'*.⁵⁷

Miscellaneous

Perhaps parenting has become more feasible in sending countries? Perhaps this has led to fewer children being given up for adoption, thereby contributing to the decline of ICA. War and natural disasters are also factors to be considered.

We cannot ignore the worldwide decline in mortality rates, rising standard of living, wider availability of effective birth control, the emergence of family planning centres, weakening of stigma around abortions and increased support for single parents. Pösö and Skivenes argue that one reason for the decline of ICA is *'fewer unwanted pregnancies'* and *'social measures supporting parents'*.⁵⁸ The writer interviewed Doreen Brown; Doreen explained that *'Parents are allowing their daughters to be on the pill much younger than in the past. Abortions have become easier ... life, in general, is evolving and we see many single-parent families today'*.⁵⁹ In Selman's view, these factors may also explain the decline in domestic adoptions. Selman points to the impact of The Abortion Act 1967⁶⁰ in the UK which legalized abortions on certain grounds, along with increased support for single parents in the 1990s.⁶¹

O'Halloran states that war and natural disasters have *'impacted upon established flow patterns'* of ICA.⁶² For example, by 2008 and following several tropical storms and hurricanes, Haiti had

⁵³ Bartholet (n 16) 92.

⁵⁴ Bartholet (n 16) 92.

⁵⁵ 'Forced Adoption Practices' (*Australian Government Department of Social Services*, 8 October 2021) <<https://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/forced-adoption-practices>> accessed 9 March 2022.

⁵⁶ Interview with Stephen Page (n 22).

⁵⁷ Interview with Dr Peter Selman (n 17).

⁵⁸ Tarja Pösö and Marit Skivenes, *Adoption from care: international perspectives on children's rights, family preservation and state intervention* (Policy Press 2021) 4.

⁵⁹ Interview with Doreen Brown, Family Attorney, Green Glazer in Canada, Member of Academy of Adoption and Assisted Reproduction Attorneys, (email, 10 March 2022).

⁶⁰ Abortion Act 1967.

⁶¹ Interview with Dr Peter Selman (n 17).

⁶² O'Halloran (n 10) 412.

become a major source of children for France, Canada, the Netherlands and the USA. This peaked in 2010 after the earthquake.⁶³ ICA also increased after WW2, the war in Korea and the war in Vietnam. The impact of the armed conflict in Ukraine is yet to be seen. On 16 March 2022, The Permanent Bureau published an Information Note in light of the Ukraine conflict, stating:

*The conflict should not be used as a justification for expediting intercountry adoptions, or for circumventing or disregarding international standards and essential safeguards for safe adoption ... Adoption procedures should be prohibited from taking place.*⁶⁴

Conclusion

Once a rapid growth phenomenon, ICA is now in steep decline. There is no single cause for this, but rather an amalgamation of legal, social, political, cultural, economic and scientific changes. It is arguable that over the years, ICA has become somewhat lost, that it can no longer be seen solely in terms of an altruistic child rescue response but is more often a consequence of the ‘demand-led pressure to satisfy the parenting needs of infertile couples in modern western societies’.⁶⁵ Those that agree with this statement hope that as the world recovers from Covid-19, ‘reformation of the ICA system will increase its focus on the best interest of the child’ and continue to look towards the preservation of natural families or domestic adoptions.⁶⁶ Whilst this is likely to further accelerate the decline of ICA, it will ‘shift the transactional focus to a humanitarian effort to assist children more at risk’.⁶⁷ However, where the preservation or domestic adoption is unavailable, the decline of ICA may mean that too many of these children will never realise their intrinsic right to a family.⁶⁸

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⁶³ Karen Rotabi, *Intercountry Adoption: Policies, Practices, and Outcomes* (Taylor & Francis 2016) 74.

⁶⁴ 'Children deprived of their family environment due to the armed conflict in Ukraine: Cross-border protection and intercountry adoption' (HCCH, 16 March 2022) <<https://assets.hcch.net/docs/0f9c08e9-75d0-4497-8ca0-12c595aa6845.pdf>> accessed 30 March 2022.

⁶⁵ O'Halloran (n 10) 157.

⁶⁶ Ambrosia Wilkerson, 'The Fate of intercountry Adoptions following COVID-19' (2021) vol 54 no. 3 *The International lawyer* 457, 482.

⁶⁷ *ibid.*

⁶⁸ Ballard (n 39) 301.



‘Intercountry adoption is in decline - discuss. What is your view about this statement?’

by Emma Jamison

Intercountry adoption (‘ICA’) is the adoption of a child, which entails a change in the child’s habitual country of residence,¹⁴ creating a permanent parent-child relationship between an adopting individual or couple and an adopted person.¹⁵ This article will posit that ICA is in decline, first defining and considering the scope of ICA and its relevant legal framework. Secondly, it will interrogate data provided by 25 ICA receiving states between 2004 and 2020, setting out the empirical position that ICA is in decline. Thirdly, it will consider why ICA is in decline by (1) reference to states signatories to The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (‘HCIA’) and suspensions of ICAs in countries due to corruption and abuse, (2) political, legal and societal shifts (including advances in reproductive medicine) and (3) the Covid-19 pandemic. It is argued that the cumulative effect of these factors impacted both the ‘supply’ of adoptable children and ‘demand’ of adults wishing to intercountry adopt, but the overall decline has been a positive development. The HCIA has been unable to fully accomplish its safeguards and principles and there remain challenges, but it is a noble instrument of the Hague Convention on Private International law (‘HCCH’) with the best interests of children at its core.

What is ICA?

At face value, ICA may be seen as a humanitarian endeavour that gives orphaned or neglected children in developing countries that were, inter alia, ravaged by wars, safe

¹⁴ Germany Federal Office of Justice, ‘Frequently Asked Questions: Questions about international adoption’ <https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/BZAA/Fragen/FAQ_node.html#faq4153320> accessed 22 March 2022

¹⁵ HM Courts and Tribunals Service, ‘Guidance: Intercountry Adoption and the 1993 Hague Convention’ (HM Courts and Tribunals Service, 1 November 2016)

homes, families and an improved quality of life. It can also give adoptive parents, who may have gone through a long and traumatic journey of not being able to have their own biological children, a child. Yet for others, under the guise of white saviorism or financial corruption, ICA has resulted in children being taken wrongfully or coercively from their birth parents with tragic, life-long consequences. This trauma can eradicate the socio-cultural identities of the domestic family units, whilst also binding the adoptive families into a system of perpetuating harm they had no intention of engaging in.¹⁶ ICAs and the surrounding legal framework grapple with the paradox of potentially helping the global societies' most vulnerable, whilst simultaneously risking harm to the child, family of origin and the adoptive family.

However, there are ICAs that potentially pose less risk of harm to those involved. An ICA can occur when an adult living in another jurisdiction for many years wishes to adopt from that jurisdiction and then return to their place of origin. Another ICA is when a person adopts the child of their spouse or partner from a different country. Similarly, an ICA may be when an adoptive parent wishes to adopt a child from their ethnic background in a different country or an extended family member may want to adopt within their family who live in a different jurisdiction.¹⁷

The UN Convention of the Rights of the Child ('CRC') is the foundation of the HCIA which opened for signature in 1993.¹⁸ At present, 104 countries are contracting parties to the HCIA.¹⁹ The HCIA gives effect to Article 21 of the CRC by adding substantive safeguards and procedures to the broad principles in the CRC.²⁰ It

¹⁶ The Netherlands Committee Investigating Intercountry Adoption, February 2021, *Summary:*

Consideration, Analysis, Conclusions,

Recommendations and Summary (Ministry of Justice and Security, 2021) pg 3

¹⁷ Federal Office of Justice, 'International Adoption'

<https://www.bj.admin.ch/bj/en/home/gesellschaft/adoption.html#medienmitteilungen_content_bj_en_home_gesellschaft_adoption_jcr_content_par_tabs> accessed 22 March 2022 Federal Office, Switzerland, https://www.bj.admin.ch/bj/en/home/gesellschaft/adoption.html#medienmitteilungen_content_bj_en_home_gesellschaft_adoption_jcr_content_par_tabs

¹⁸ Hague Conference on Private International Law, Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, 33, available at: <https://www.refworld.org/docid/3ddcb1794.html>

¹⁹ Hague Conference on Private International Law, 'Status Table'

<<https://www.hcch.net/en/instruments/conventions/status-table/?cid=69>> accessed on 22 March 2022

²⁰ Ann Smith, 'We Have the Right Tools: An Examination and Defense of Spending in International Adoption' [2017] Harvard International Law Journal, Vol 58, No.2 pg 492

includes that ICA in a signatory state must not give rise to improper financial gain.²¹ It also provides for the mutual recognition between contracting party states of adoption, provided certain procedures are followed. The HCIA recognises that growing up in a family of one's origin state is of primary importance,²² but also that ICA can offer the advantage of a family unit environment when no such opportunity exists in one's country of origin. Although the UN Declaration on the Protection and Welfare of Children, CRC or HCIA does not offer an explicit definition of subsidiarity, all encourage the use of preferential ordering for the placement of children.^{23 24 25} Thus, the principle of subsidiarity is most commonly understood to mean that it is in the best interests of the child to be adopted by their extended family wherever possible and, otherwise, by families in the child's country of birth, with ICA being used only as a final recourse. Therefore, the state's first obligation is to assist the family²⁶ and if a child is illegally deprived of some or all of their identity, the state will provide assistance, with a view to re-establishing their identity.²⁷

The impact arising from ICA is critical in understanding the importance of the HCIA's principle of subsidiarity and Article 7 of the CRC to register the child's birth, for the child's right to acquire a nationality and the right to know and be cared for by his or her parents.²⁸ This is because adoptees confront existential questions about the how and the why of their adoption, plus have questions about their dual origins, identity

²¹ Jean-François Mignot, 'Why is intercountry adoption declining worldwide?' (2015) *Populations and Societies*, Vol 519, Issu 2 <https://www.cairn-int.info/article-E_POPSOC_519_0001--why-is-intercountry-adoption-declining.htm> accessed 18 March 2022

²² US Department of State, 'The Hague Convention on Intercountry Adoption: A Guide for Prospective Adoptive Parents' (United States Department of State Bureau of Consular Affairs, October 2006)

²³ UN General Assembly, Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement Nationally and Internationally, 3 December 1986, A/RES/41/85, available at: <https://www.refworld.org/docid/3ae6b370c.html>, Article 21(b) 'If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family.'

²⁴ *Ibid*, Art 17 states:

²⁵ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption pmbl., adopted May 29, 1993, 1870 U.N.T.S. 167, 42 U.S.C. 14901

²⁶ Article 8(1) CRC

²⁷ Article 8(2) CRC

²⁸ Article 7 CRC

and sense of belonging.²⁹ Many individuals who were adopted through ICA as children experience a sense of loss or grief, feel compelled to find connection with their biological and/or cultural backgrounds, and struggle with anger, pain and sadness when they cannot.³⁰

ICA in decline: statistical analysis

Large-scale ICA started in the 1960s as many were concerned about children in developing countries suffering wars and natural disasters.³¹ The number of ICAs increased from approximately 2,500 per year in the 1950s and 1960s to more than 40,000 per year in the mid-2000s.³² During this time, ICA was seen as a humanitarian solution.³³ American rhetoric regarding ICA post the Korean War evoked a normative tone of 'saving' orphans from the impoverished third world.³⁴ Around this time, ICA and religion began to intertwine,³⁵ and there have been movements including Evangelical Christians believing that ICA could save children in the developing world from poverty, consequently bringing them into a Christian family.³⁶ When the HCIA was introduced in 1993, ICA's increased until 2004, with the rise largely due to ICA from China and Russia.³⁷ In 2004 it changed and since then numbers have decreased steadily.

²⁹ Supra note 3 pg 13

³⁰ Sarah-Vaughan Brakman, 'The Principle of Subsidiarity in the Hague Convention on Inter-country Adoption: A Philosophical Analysis' [2019] *Ethics & International Affairs*, 33(2), 207-230. doi:10.1017/S0892679419000170

³¹ Supra note 3

³² Peter Selman, 'Global trends in intercountry adoption:2001-2010' [2013] *Adoption Advocate*, no. 57, pp.1-17

³³ Peter Selman, 'Global Trends in Intercountry Adoption: 2003-2013' in Robert L. Ballard et al (eds) *The Intercountry Adoption Debate Dialogues Across Disciplines 1* (Cambridge Scholars Publishing 2015)

³⁴ Shani King, 'Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption', [2009] 30 *Mich. J. Int'l L.* 413, 422-23

³⁵ Kathleen Ja Sook Bergquist, 'International Asian Adoption: In the Best Interest of the Child?' [2004] 10 *Tex. Wesleyan L. Rev.* 343, 344

³⁶ David M. Smolin, 'Moving from Fad to Fundamentals: The Future of the Evangelical

Christian Adoption and Orphan Care Movement' in Robert L. Ballard (eds) *The Intercountry Adoption Debate Dialogues Across Disciplines* (Cambridge Scholars Publishing 2015). Available at:

https://works.bepress.com/david_smolin/17/

³⁷ Dr Emily Helder, 'Peter Selman: Adoption in the context of natural disaster' (30 November 2020) <https://www.youtube.com/watch?v=WDC_pjR7QRw> accessed on 29 March 2022

ICA decline is illustrated in Table 1 and Table 2 below which show statistics of ICA between 2004 and 2020 which were collated from the Central Authorities of 25 receiving states.³⁸ These tables were produced by Peter Selman, an expert in ICA, who is responsible for the official global figures on ICA published annually by the HCCH and which indicate the minimum number of ICAs during that period.

Table 1: RECEIVING STATES 2004-20 - Ranked by total adoptions in period

8-2-2022	25 Receiving States 2004-2020																	
COUNTRY	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2004-2020
USA	22.988	22.735	20.671	19.605	17.467	12.753	12.149	9.320	8.668	7.094	6.441	5.648	5.372	4.714	4.059	2.970	1.622	184.276
Italy	3.402	2.874	3.188	3.420	3.977	3.964	4.130	4.022	3.106	2.825	2.206	2.216	1.872	1.439	1.394	1.205	669	45.909
Spain	5.541	5.423	4.472	3.648	3.156	3.006	2.891	2.573	1.669	1.191	827	801	574	542	456	375	195	37.340
France	4.079	4.136	3.977	3.162	3.270	3.017	3.508	2.003	1.569	1.343	1.069	815	956	685	615	421	244	34.869
Canada	1.949	1.858	1.568	1.715	1.614	1.695	1.660	1.516	1.162	1.243	905	895	790	621	658	576	416	20.841
TOP FIVE	37.959	37.026	33.876	31.550	29.484	24.435	24.338	19.434	16.174	13.696	11.448	10.375	9.564	8.001	7.182	5.547	3.146	323.235
Sweden	1.109	1.083	879	800	793	912	728	630	542	450	408	400	342	297	262	170	92	9.897
Netherlands	1.307	1.185	816	782	767	682	705	528	488	401	354	304	214	210	156	145	70	9.114
Germany	744	720	661	783	716	606	513	624	452	288	227	200	196	96	91	85	81	7.083
Norway	706	582	448	426	304	344	343	304	239	144	152	132	126	125	95	89	40	4.599
Denmark	528	586	450	426	395	496	419	338	219	176	124	97	84	79	64	46	23	4.550
TOP TEN	42.353	41.182	37.130	34.767	32.459	27.475	27.046	21.858	18.114	15.155	12.713	11.508	10.526	8.808	7.850	6.082	3.452	358.478
Belgium	470	471	383	358	364	439	388	351	260	178	156	137	121	124	104	75	52	4.431
Switzerland	567	389	410	394	259	288	293	238	194	159	92	92	73	75	52	62	35	3.672
Australia	370	434	421	405	270	269	222	217	157	138	114	83	82	69	65	57	37	3.410
Ireland	398	366	313	392	422	307	201	188	117	72	34	82	54	53	41	33	29	3.102
UK	333	369	363	356	225	200	173	153	120	124	68	58	64	60	71	52	53	2.842
Finland	289	308	218	176	157	187	160	163	175	141	142	93	58	70	54	67	27	2.485
Israel	226	191	176	218	150	120	114	115	88	69	42	37	22	17	17	11	6	1.619
N.Zealand	339	30	20	49	39	16	13	19	25	42	22	12	22	23	18	13	12	714
Malta	46	39	60	64	53	34	42	50	57	19	11	18	6	45	53	31	n/a	628
Luxembourg	56	41	45	23	28	36	32	25	32	17	13	18	19	16	12	18	5	436
Iceland	29	41	19	18	13	17	18	19	17	8	11	20	5	6	5	5	5	256
Slovenia		3	15	3	6	14	21	18	35	15	14	15	11	14	14	15	5	218
Cyprus	3	3	0	19	16	12	4	12	1	2	2	4	0	0	0	0	n/a	78
Andorra	3	1	4	6	5	7	9	2	1	4	2	0	2	2	0	3	0	51
Monaco	n/a	0	0	1	3	4	1	2	1	4	1	3	0	1	1	0	3	22
TOTAL	45.482	43.868	39.577	37.248	34.466	29.421	28.736	23.428	19.393	16.143	13.436	12.177	11.065	9.382	8.356	6.524	3.718	382.420
No. of states	23	24	23	25	25	25	25	25	25	25	25	24	23	24	23	23	22	22-25
%. To USA	50,5%	51,8%	52,2%	52,6%	50,7%	43,3%	42,3%	39,8%	44,7%	43,9%	47,9%	46,4%	48,5%	50,2%	48,6%	45,5%	43,6%	48,2%

³⁸ Peter Selman, 'Global Statistics for Intercountry Adoption: Receiving States and States of origin 2004-2020' (Hague Conference on Private International Law, February 2022) <<https://assets.hcch.net/docs/a8fe9f19-23e6-40c2-855e-388e112bf1f5.pdf>> accessed 22 March 2022 Selman, P. (2022) Global Statistics for Intercountry Adoption: Receiving States and States of origin 2004-2020. These tables are available on the HCCH website at <https://assets.hcch.net/docs/a8fe9f19-23e6-40c2-855e-388e112bf1f5.pdf>

Table 2: TOP 20 STATES OF ORIGIN 2004-20 - Ranked by number adopted to 27 States

1-2-2022	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2004-2020
China (Mainland)	13.412	14.484	10.765	8.749	5.879	5.004	5.427	4.371	4.136	3.405	2.943	3.059	2.678	2.211	1.798	1.065	250	89.636
Russia	9.450	7.569	6.837	4.926	4.169	4.061	3.424	3.420	2.674	1.838	1.058	766	486	355	284	228	45	51.590
Ethiopia	1.534	1.799	2.184	3.041	3.917	4.564	4.385	3.446	2.734	1.997	1.056	676	330	485	245	22	13	32.428
Guatemala	3.425	3.870	4.230	4.851	4.172	784	58	36	11	27	32	13	7	4	1	5	0	21.526
Colombia	1.749	1.500	1.681	1.643	1.613	1.404	1.815	1.591	931	570	536	522	485	552	565	607	387	18.151
TOP 5	29.570	29.222	25.697	23.210	19.750	15.817	15.109	12.864	10.486	7.837	5.625	5.036	3.986	3.607	2.893	1.927	695	213.331
Ukraine	2.119	2.035	1.077	1.623	1.601	1.500	1.097	1.068	722	640	608	381	399	277	328	365	277	16.117
South Korea	2.239	2.118	1.813	1.225	1.366	1.395	1.127	950	815	219	506	433	376	401	321	259	266	15.829
Viet Nam	492	1.199	1.363	1.691	1.719	1.500	1.265	700	214	296	407	428	405	380	307	240	108	12.714
Haiti	1.169	949	1.108	822	1.313	1.215	2.496	229	374	552	556	276	396	399	389	252	209	12.704
India	1.067	864	831	987	751	714	608	614	399	387	359	345	491	580	646	545	262	10.450
TOP 10	36.656	36.387	31.889	29.558	26.500	22.141	21.702	16.425	13.010	9.931	8.061	6.899	6.053	5.644	4.884	3.588	1.817	281.145
Philippines	410	509	483	568	581	545	494	491	411	538	454	391	363	332	248	222	111	7.151
Kazakhstan	899	849	735	817	768	682	516	218	5	28	63	34	20	17	9	10	3	5.673
Thailand	535	491	423	467	398	359	298	280	282	308	264	261	289	224	249	233	114	5.475
Brazil	487	488	529	490	490	458	375	347	328	238	129	137	120	117	67	64	55	4.919
Poland	407	406	393	371	399	393	315	292	244	303	303	296	328	153	53	14	7	4.677
TOP 15	39.394	39.130	34.452	32.271	29.136	24.578	23.700	18.053	14.280	11.346	9.274	8.018	7.173	6.487	5.510	4.131	2.107	309.040
Bulgaria	395	149	112	100	140	228	237	311	357	413	414	426	374	302	303	273	173	4.707
China (Taiwan)	186	242	269	273	373	397	416	326	299	199	188	180	170	166	121	154	122	4.071
South Africa	241	268	263	255	272	307	220	202	170	221	219	217	147	162	131	141	59	3.495
Congo RD	15	45	61	69	62	153	190	353	521	599	241	384	635	54	47	32	3	3.464
Nigeria	100	102	105	82	221	184	268	246	266	243	183	196	161	216	213	148	118	3.052
TOP 20 >	40.331	39.936	35.262	33.050	30.204	25.847	25.031	19.491	15.893	13.021	10.519	9.421	8.660	7.377	6.325	4.879	2.582	327.829
USA	132	168	176	181	261	257	177	250	232	171	172	174	175	109	159	82	89	2.965
Hungary	70	67	100	142	118	131	139	157	151	112	135	163	174	235	244	241	158	2.537
Nepal	269	227	452	261	413	22	170	157	3	0	4	2	5	1	1	1	3	1.991
Peru	117	173	189	171	153	139	175	135	111	109	97	81	100	66	58	67	32	1.973
Uganda	17	22	16	59	61	74	80	225	249	296	211	237	208	60	29	35	26	1.905
TOP 25 >	40.936	40.593	36.195	33.864	31.210	26.470	25.772	20.415	16.639	13.709	11.138	10.078	9.322	7.848	6.816	5.305	2.890	339.200
All States	45.482	43.868	39.577	37.244	34.486	29.412	28.732	23.428	19.393	16.143	13.436	12.177	11.065	9.382	8.356	6.525	3.718	382.424

Although some countries have increased ICAs during this period, for example, Italy increased its ICAs between 2004 and 2011. The tables show that the 'total' number of ICAs declined steadily annually between 2004 and 2020.³⁹ In 2020, there were 3,718 ICAs per annum compared to 45,482 in 2004, (a 91.83% decrease). Although the aggregate number of ICAs decreased steadily, this trend has coincided with a growth in the number of adoptions of children with special needs⁴⁰ (meaning they are older, are in a sibling group, or have a disability).⁴¹

Why is ICA in decline?

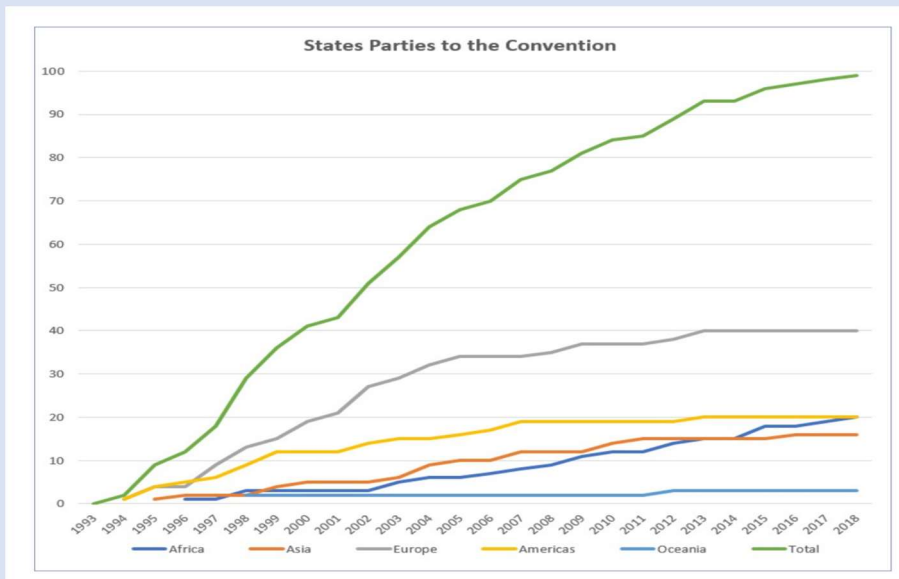
HCIA and suspension of ICAs

³⁹ *Ibid*

⁴⁰ Peter Selman, 'International Forum on Intercountry Adoption and Global Surrogacy: Intercountry Adoption Agencies and the HCIA', [2012] AFIN no.79

⁴¹ European Parliamentary Research Service, Adoption of children in the European Union (European Parliamentary Research Service, June 2016) Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583860/EPRS_BRI\(2016\)583860_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583860/EPRS_BRI(2016)583860_EN.pdf)

The below graph shows the increase between 1993 and 2018 of the state parties to the HCIA.⁴²



One sees a broad correlation between the gradient in total state parties to the HCIA and the decline in total ICAs, i.e. as the total number of state parties to the HCIA increase, the numbers of ICA decline.

However, it is simplistic to conclude that ICA is in decline as a result of states becoming parties to the HCIA. Notably, the HCIA was introduced in 1993 and ICA increased until 2004 before the numbers started to decline. Furthermore, some countries increased ICA after becoming a signatory of the HCIA, such as Italy, which became a signatory in 2000⁴³ and whose ICAs increased until 2010.⁴⁴

The HCIA was developed to respond to complex human and legal problems in the absence of an international instrument that could respond to this situation. Consequently, the HCIA may therefore have enabled some countries to continue ICA as it served as a mechanism to prevent abuses occurring in the absence of a suitable

⁴² Hague Conference on Private International Law, '1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: 25 Years of Protecting Children in Intercountry Adoption 1993 - 2018' (The Hague Conference on Private International Law Permanent Bureau, 29 May 2018) <<https://assets.hcch.net/docs/ccbf557d-d5d2-436d-88d6-90cddbe78262.pdf>>

⁴³ Centre for Adoption Policy, 'Overview of Italian Adoption Law' (Centre for Adoption Policy 9 February 2005) <<http://www.adoptionpolicy.org/pdf/eu-italy.pdf>> accessed on 22 March 2022

⁴⁴ *Ibid*

legal framework. Nevertheless, the correlation can be noted but should be viewed in the context of serious abuses (discussed below).

Countries signing the HCIA indicate an intention to abide by its stipulations regarding regulations on child placement, the role of money, terms of citizenship, and the use of intermediaries.⁴⁵ It means signing an international treaty about ICA to (1) further the best interests of the child/children, and (2) make sure ICAs are happening ethically, which includes preventing child trafficking and child abduction. Under the HCIA, countries must implement a 'central authority' to act as a hub that matches children with families.

When some countries, such as Cambodia and Nepal, signed the HCIA, they were unable to implement the HCIA standards and so placed a moratorium on ICA.^{46 47} Lauren Koch of the National Council for Adoptions, has (somewhat simplistically) argued that countries subscribing to the HCIA or closed as a result of trying to become more compliant with it, resulted in children being unavailable to be adopted and added barriers to adoptive families.⁴⁸

Barriers that adoptive parents face include the costs. The HCIA laid down principles to prevent abuses, such as recognising that reasonable fees and costs are acceptable, but that charges cannot be disproportionate and that the central authorities must ensure that the consents required for adoption are not paid for.⁴⁹ Notwithstanding, ICA costs can vary considerably, depending on the country of origin (for instance how many trips are required to go to the country of origin or

⁴⁵ *Supra* no.15

⁴⁶ International Adoption Guide, 'Criteria for adopting from Nepal' (*International Adoption Guide*, January 2017) <<https://internationaladoptionguide.co.uk/from-which-countries-is-it-possible-to-adopt-from/nepal-adoption-criteria.html>>

⁴⁷ US Department of State, 'Government of Cambodia Announcement on Intercountry Adoptions' (*US Department of State*, 16 February 2021) <<https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/government-of-cambodia-announcement-on-intercountry-adoptions-.html>> accessed on 20 March 2022

⁴⁸ Wall Street Journal, 'Foreign Adoptions Drop to Lowest Levels in Decades' (*Wall Street Journal*, 4 January 2015) <<https://www.wsj.com/video/foreign-adoptions-drop-to-lowest-levels-in-decades/33A16A5F-D8FD-43FC-930D-018AE5C9A37E.html>> accessed on 30 March 2022

⁴⁹ Hague Conference on Private International Law, Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, 33, available at: <https://www.refworld.org/docid/3ddcb1794.html>, Art 31(1)

length of time in the country of origin, and adoption agencies fees). There are also expenses for administration, medical and legal fees, translation services and adoption tax credit.⁵⁰ In the US, families expect to pay between \$20,000 and \$50,000⁵¹ to adopt internationally, which may deter or inhibit families from being able to intercountry adopt at all.

In contrast are academics who believe that ICA is too problematic to continue. Professor David Smolin, an Evangelical Christian who himself adopted two daughters from India who he subsequently discovered had been stolen from their birth family, has written extensively on this subject. He has called for a moratoria on ICAs on the basis that the combined efforts of the standards of the CRC, HCIA and United Nations have under-achieved since the 1950s to date. He argues that ICAs must be shut down to provide a better system including effective remedies should a breach or abuse of process occur.⁵²

Even if one does not agree that a moratorium on ICA is a practical solution (Smolin himself acknowledges a global moratoria on ICA is not a legal possibility as there is no international actor with the authority to put such a ban in place⁵³), his concerns in respect of the harms that can befall ICA must be given credence. In reality, HCIA never fully achieved its goals, in particular fulfilling the principle of subsidiarity and the child/children's best interests. Countries including Guatemala and Ethiopia have closed their ICA adoption programs due to concerns about child trafficking as well as concerns about exploitative practices by adoption services providers.^{54 55} Recently, a report from the Netherlands stated, '*throughout the entire period of ICA and in all*

⁵⁰ Federal Office for Building and Logistics BBL, 'Adoption in Switzerland' (Federal Office for Buildings and Logistics FOBL, August 2018) <<https://www.bj.admin.ch/dam/bj/en/data/gesellschaft/adoption/bro-adoption-e.pdf.download.pdf/bro-adoption-e.pdf>> accessed on 22 March 2022

⁵¹ Susannah Snider, 'What Adoption Costs – and Strategies to Pay for It' (*US News & World Report*, 11 June 2020) <<https://money.usnews.com/money/personal-finance/family-finance/articles/what-adoption-costs-and-strategies-to-pay-for-it>> accessed on 30 March 2022

⁵² David M. Smolin, 'The Case for Moratoria on Intercountry Adoption' (2021) *Southern California Interdisciplinary Law Journal*, Vol. 30, No. 2 (Forthcoming).

⁵³ *Supra* no.39

⁵⁴ US Citizenship and Immigration Services, 'Adoption Information: Guatemala' (*US Citizenship and Immigration Services*, 28 January 2020) <<https://www.uscis.gov/adoption/uscis-country-specific-processing/adoption-information-guatemala>> accessed on 22 March 2022

⁵⁵ Shelley A. Steenrod, 'The Legacy of Exploitation in Intercountry Adoptions from Ethiopia: "We Are All One Family Now"' [2021] *Adoption Quarterly*, pp1-30

countries, there were serious structural abuses. Similarly, ICAs were characterised by large-scale, systematic abuses including missing archives to child trafficking. It found that the abuses occurred before and after the HCIA came into force in the Netherlands in 1998.⁵⁶ As a result, the Netherlands suspended ICAs.⁵⁷

Adopters may read the publicity surrounding the abuse, and be deterred from ICA by not wanting to become involved in criminal activity or lose confidence that ICA is a legitimate child protection measure.⁵⁸

The suspensions in countries of origin have therefore reduced the ‘supply’ of children available for ICAs but in the context of ‘*systematic abuses*’ of children the reduction should be seen as a positive action towards protecting vulnerable children and families.

Decline in ICA due to a combination of societal, political and legal factors

There have been shifts in social, economic and political policies of some of the largest sending ICA countries which has led to a decline in ICA. For instance, Russia closed ICA to the US in 2013, following the Dima Yakovlev Law or ‘anti-Magnitsky law’ which was informally named after a Russian orphan who died in the care of his US adoptive family.⁵⁹ The suspension of ICA to the US was described as a retaliation to the US Congress’ passage of the Magnitsky Act, which placed sanctions on Russian officials who were involved in a tax scandal.

A further example is China, which between 2004 and 2020, was the state sending the highest numbers of children for ICA but where the number of children adopted reduced from 13,421 in 2004 to 250 in 2000 (98.1% reduction). China’s 3-child policy

⁵⁶ *Ibid* no.11, pg 42

⁵⁷ Nach Welt, ‘Netherlands halts intercountry adoption after damning report’ (*Nach Welt*, 2 August 2021) <<https://www.nach-welt.com/die-niederlande-stoppen-die-internationale-adoption-nach-einem-verdamnten-bericht/>> accessed on 22 March 2022

⁵⁸ The Guardian, ‘I just needed to find my family’: the scandal of Chile’s stolen children, (The Guardian, January 2021), available at <<https://www.theguardian.com/news/2021/jan/26/chile-stolen-children-international-adoption-sweden>> accessed on 30 March 2022

⁵⁹ The Moscow Times, ‘Russia to Expand Anti-Magnitsky Sanctions Worldwide, Keep U.S. Adoption Ban (The Moscow Times, 3 June 2021) available at <<https://www.themoscowtimes.com/2021/06/03/russia-to-expand-anti-magnitsky-sanctions-worldwide-keep-us-adoption-ban-a74091>> accessed on 30 March 2022

has resulted in less healthy 'adoptable' children available for adoption.⁶⁰ Peter Selman argues that the root cause of the decline in China seems to be simply that there are now very few healthy infants in Chinese orphanages, and that there are many Chinese wanting to adopt these.⁶¹

As ICA is a subsidiary child protection measure, offering a home to children who have hitherto lacked adequate family support, the relative rise in living standards in developing (i.e. the majority of sender) countries on a macro-economic level enabled governments to bolster their own child welfare programmes and implement social and family policies to support orphaned or abandoned children.⁶²

Furthermore, many former and current sending countries have begun to see ICA not as a solution to child welfare and a means to aid national child welfare programs, but instead as a stain on the sending countries' national reputation and not wishing to see themselves or have the world see them as 'unable to care for their own,' For example, South Korea stopped restrictions as a result of national pride.⁶³

It is worth noting that due to political or social changes or natural disasters in the state of origin, a moratorium on adoption proceedings may be imposed from one day to the next. This has been seen recently with the crisis in Ukraine, where there is a moratorium on all ICAs.⁶⁴ This uncertainty could make adoptees more reluctant to choose ICA.

⁶⁰ David Stanway and Tony Munroe, 'Three-child policy: China lifts cap on births in major policy shift' (Reuters, 2021) available on <<https://www.reuters.com/world/china/china-says-each-couple-can-have-three-children-change-policy-2021-05-31/>> accessed on 30 March 2022

⁶¹ Peter Selman, 'Intercountry adoption of children from Asia in the twenty-first century, Children's Geographies' [2015] Children's Geographies Vol 13, Iss 3.DOI: 10.1080/14733285.2015.972657

⁶² Nigel Cantwell, The Best Interests of the Child in Intercountry Adoption (UNICEF Office of Research, 2014)

⁶³ Mark Montgomery and Irene Powell, Saving International Adoption (Vanderbilt University Press 2017) For Russia's ban, see p. 44; for implementation difficulties as likely reasons for the decrease in ICA from Cambodia and Vietnam after entry into force of the HCIA, see pp. 157–58; for South Korea restrictions on ICA as a result of national pride, see p. 41.

⁶⁴ International Adoption Net, 'Updated - Information for U.S. Citizens in the Process of Adopting Children from Ukraine' (International Adoption Net, 25 March 2022) <<https://www.internationaladoptionnet.org/blog/2022/03/updated-information-for-u-s-citizens-in-the-process-of-adopting-children-from-ukraine/#:~:text=On%20March%2013%2C%202022%2C%20the,in%20Ukraine%20at%20this%20time>> accessed on 29 March 2022

There have also been medical advances in reproductive medicine and IVF has come to occupy a central place in this field.⁶⁵ Those who may previously have turned to ICA as a route to parenthood are now able to conceive. IVF was previously fraught with difficulties, technically and socially, (although hard to comprehend the disdain the introduction of IVF was initially greeted with) to be an IVF parent was considered shameful and an IVF child was considered a 'freak'.⁶⁶ In a similar vein, the first known surrogate child was born in 1984, but since then IVF has been becoming widely recognised as a pathway to parenthood. Based on statistics from the UK, surrogacy has been on the rise, including data from the English family court showing 350% growth in the UK and internationally surrogacy over the 12 years.⁶⁷

In recent years, it has become more socially acceptable or commonplace to use fertility treatments, including workplaces offering IVF as a 'fertility benefit'.⁶⁸ This suggests that it has become socially acceptable, if not encouraged, to undergo fertility treatments. IVF and surrogacy, as compared to ICA, also offer what some may consider a benefit to having a child with the same genetics as the parent.

Covid-19

The Covid-19 pandemic created unprecedented economic, health and social upheaval across the world. ICA was not immune to this disruption, and was essentially halved in 2020 when compared to 2019.⁶⁹ Many countries hardest hit by Covid-19, such as the US, China, South Korea, Italy and Spain were key actors in ICA, as they were either countries of origin or countries of destination.⁷⁰ The US Department of States' view was that the decline was largely attributed to the impact

⁶⁵ Aris Papageorgiou, 'Themed Issue: Advances in Reproductive Medicine:2020 and Beyond' An International Journal of Obstetrics and Gynaecology [January 2019] pages i-iv, 133-299

⁶⁶ Peter Braude and Martin Johnson, 'Reflections on 40 years of IVF' [2018] British Journal of Obstetrics and Gynaecology, Vol 126, Iss 2, pp 135 - 137

⁶⁷ Brilliant Beginnings, 'New data from English family court shows 350% growth in UK and international surrogacy over the last 12 years' (Brilliant Beginnings, 7 September 2021) <<https://brilliantbeginnings.co.uk/new-data-family-court-350-percent-growth-surrogacy/>> accessed on 31 March 2022

⁶⁸ The Financial Times, 'Law firms Cooley and Clifford Chance offer UK staff fertility benefits for the first time' (The Financial Times, 14 June 2021) available on <<https://www.ft.com/content/d0efae1-8848-4971-894e-e5db44881c9c>> accessed on 30 March 2022

⁶⁹ Peter Selman 'Global trends in intercountry adoption:2001-2010' [2012] Adoption Advocate, 44, pp.1-17

⁷⁰ Patricia Fronek and Karen Smith Rotabi, 'The impact of the COVID-19 pandemic on intercountry adoption and international commercial surrogacy' [2020] International Social Work Vol 63, Iss5, pgs 675-670

of the global pandemic on the operations in countries of origin worldwide, travel restrictions and the US's unprecedented Level 4 'Do Not Travel' global travel advisory.⁷¹

While the world slowly returns to 'normal', the pandemic's long term impact on ICA is yet to be determined, but it is clear that the pandemic contributed to a decline in ICA.

Conclusion

It is clear that for the myriad reasons listed above, ICA is in decline. It can be argued that HCIA is over-regulated in certain aspects resulting in adopters with good intentions finding the process too difficult, time-consuming and expensive. As a result, leaving children, particularly those with special needs, without a family. However, it is plain that more weight should be given to children (and their families of origin) having their rights respected than be given to the sheer volume of ICA writ large. The state of affairs prior to the HCIA afforded too much leeway for the unscrupulous and corrupt, and thus while ICA has dropped in quantity, the quality of ICA, as measured by respecting the rights of the child and their families of origin, has improved.

⁷¹ US Department of State, Annual Report on Intercountry Adoption, (US Department of State, July 2021) pp.6



‘Intercountry adoption is in decline - discuss. What is your view about this statement?’

by Jessica Ryan

“When somebody takes a child from their native culture, that is in itself an act of aggression” says Lemn Sissay, British author and broadcaster. Sissay was born to an Ethiopian mother shortly after she moved to England, and subsequently taken into care. His poem ‘Gold from the stone’ begins:

“Gold from the stone

Oil from the Earth

I yearned for my home

From the time of my birth”

When considering where and by whom it is in a child’s best interest to be raised, however, native culture is just one (albeit a very important one) in a melting pot of factors to be taken into account. No two people will have identical views about what factors – be it financial security, emotional support, education or cultural identity – are most important when it comes to a child’s welfare. The question of whether a child’s needs would be better met in a country other than their birth country, is therefore a difficult one.

The rates of intercountry adoption have been in steady decline since 2004. In order to understand whether this is a good thing, it must be considered how and why these rates have been affected by changes in:

- the law;
- approaches of the top countries sending children for intercountry adoption;
- demand; and
- our understanding of what is in a child’s best interests.

Changes in the law

The noble sentiment behind the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption (the 'Convention') is to prevent child trafficking, the sale of children and child abduction, as well as to ensure that adoption is in the child's best interests.

The convention calls upon contracting states to designate a central adoption authority. That authority has a number of roles and responsibilities to eliminate obstacles to the application of the Convention, including:

- Taking measures to prevent improper financial or other gains in connection with an adoption;
- Collecting and exchanging information regarding the child and prospective adoptive parents; and
- Ensuring smooth transfer of a child once an adoption has been authorised.

The Adoption Convention gives effect to Articles 3 and 21 of the United Nations Convention on the Rights of the Child (UNCRC), which provide that the best interests of the child should be the paramount consideration in adoption. An outline of the convention states the following about the principle of subsidiarity:

"'Subsidiarity' means that Parties recognise that a child should be raised by their birth family or extended family whenever possible. If that is not possible, other forms of permanent family care in the State of origin should be considered. Only after due consideration has been given to suitable national solutions should intercountry adoption be considered, and then only if it is in the child's best interests. Institutional care should generally be considered a last resort for a child in need of a family."

It is, however, not an easy task for countries to comply with the increased administrative steps, the need for more qualified staff and in turn, the increased costs for adoption agencies that the Convention brings. The governments of countries that sign up to the Convention also have to incorporate its terms into their laws, and ensure a central authority is set up to oversee intercountry adoption proceedings.

Whilst the Convention, and the increased cost and paperwork that it brings, has been a contributing factor to the decrease in intercountry adoption, it could also be argued that it is a vital attempt to reduce the prevalence of abuse of the adoption process, including child trafficking issues.

Unfortunately, there are a number of examples of a corrupted international adoption process placing children into much more, rather than less, vulnerable and dangerous circumstances. Children have been kidnapped, or their parents tricked into relinquishing them, with disreputable adoption agencies then arranging international adoptions and charging high fees to the adoptive parents.

Best-selling novel *'Before We Were Yours'* by Lisa Wingate is based on a real-life scandal in which the director of a Memphis-based adoption organisation, Georgia Tann, kidnapped and sold poor children to wealthy families. Tann believed in class distinctions, and that children should be taken from poor families and placed with what she referred to as *"people of the higher type"*. Whilst the question of what is in the 'best interests' of a child is a nuanced one, the interpretation that wealthiest equals best remains untrue. It is thought that Tann stole over 5,000 children until the closure of her organisation in 1950. It is estimated that Ms Tann received around \$1 million USD in profits from the 'sale' of children.

In 2012, the Health and Safety Executive raised concerns that up to 1,000 babies may have been illegally adopted to the United States. In what is known as the 'Tuam babies scandal', Irish authorities were called on to examine whether the historic deaths of infants at institutions such as the Tuam Mother and Baby home may have been falsified in order to facilitate their adoption by American couples. A more widespread investigation of 18 Irish institutions was carried out, and it was found that around 15% of all the children who lived in the homes died due to the incredibly poor conditions. Sinn Féin leader, Mary McDonald recently said the illegal adoptions were a *"massive failure and abuse"* by the State in its treatment of women and children, and that when *"children had their identities erased through the falsifications their birth certificates, their most basic right was stolen, the right to know who you are, to know where you came from"*.

Changes in the approaches of the top countries sending children for inter-country adoption

Whilst the countries sending most children for inter-country adoption continue to change over time, according to data from Newcastle University, from 2004-2020 the top three countries sending children for intercountry adoption were China, Russia and Ethiopia. Let us consider the landscape of adoption in each of these countries more closely, and how it has evolved.

China

China has historically been a popular choice for those looking to adopt internationally. They have signed and ratified the Convention, meaning that if, for example, a child is adopted from China to the UK under the terms of the Convention, it must be certified by the issuing of an Article 23 certificate, and is then recognised in UK law, as well as by all signatories to the Convention. The number of adoptions from China has, however, been in steady decline since 2005.

This may in part, be due to a tightening of requirements of foreign prospective adoptive parents. In 2007, China revised its adoption guidelines, requiring prospective adopters to meet a number of stringent criteria, including:

- The adopters must be married (a man and a woman)
- Couples adopting special needs child must be between 30 and 55.
- The total value of family assets must be at least \$80,000

Some also believe that a push for domestic (as opposed to international) adoption came from China following increased national pride in the lead up to the 2008 Beijing Olympics, and a sense that they did not need western 'help'.

Zhao Yong, deputy chair of the welfare department at the Ministry of Civil Affairs, said that the number of orphans has decreased by 66% from 2012 to 2019. This is, in part, because of the 2016 abandonment of China's one-child policy, which led a number of families to abandon newborn girls, given the great importance placed on having a son.

It may be that the need for inter-country adoption from China is reduced if they are more able to support their own. According to the state council's poverty reduction office, China has experienced a large decrease in its poorest population. World Bank figures show that in 1990 about two thirds of the Chinese population were living below the international poverty line, some 750 million people. By 2016, this had fallen to 7.2

million people (0.5% of the population). Welfare reforms since the late 1990s have included the bettering of medical insurance and universal healthcare, which affect the ability for those in lower socioeconomic groups to care for dependants (including children) with health difficulties. We know that a high proportion of adoptees have mental and/or physical health issues.

The rates of inter-country adoption from China plummeted when, due to the Covid-19 pandemic, China suspended its foreign adoption programme. This put around 400 families' adoptions of children from China on hold. In the period between March and December 2020, 2,808 complaints were reported to 'Stop Asian American Pacific Islander Hate' and some blame this climate of hate on former President Donald Trump, who referred to Covid-19 as the "China virus". It is a tragic reality that racist behaviour still exists, and may impact a child's welfare.

Ethiopia

Whilst adoptions from Africa were, at one time, a rarity, celebrity adoptions (for example, Madonna adopted from Malawi, Angelina Jolie adopted from Ethiopia) helped change that.

Ethiopia is not a party to the Hague convention, so does not have to follow its regulations in respect of intercountry adoption. In 2003, however, a Pre-Adoption Immigration Review ('PAIR') programme was implemented to assess a child's immigration eligibility before a case is filed with the court, and identify any irregularities. Unfortunately, despite this programme, tragically in 2011, Hana Williams, who had been adopted to the US from Ethiopia in 2008 (aged 10 at the time) with her brother, was found dead outside her family's home in Washington. Investigations showed she had hypothermia as well as signs of physical abuse and starvation. Ethiopia became wary of the international adoption community, and vice versa. The Danish Minister for Social affairs visited a number of adoption facilities in Ethiopia in 2016, and found that despite the PAIR system, information was lacking or incorrect. Denmark made these findings public and tightened controls on adoption from Ethiopia, as did other Scandinavian countries.

Ethiopia banned the adoption of children by foreigners in 2018, amid continuing concerns that they face abuse and neglect abroad. There is an increasing encouragement, through organisations such as 'Bethany' for Ethiopian families to foster and adopt, in lieu of those overseas. This has, in part, involved building

partnerships with local churches, with a significant response coming from the Christian community following a religious case being made to protect all children. The United Nations Department of Economic and Social Affairs shows that in 2003-2004 93% of adoptions in Ethiopia were intercountry, and just 7% (62 adoptions) were domestic. It will therefore take time for domestic adoptions to be normalised. The 'National Child Policy' stated that every Ethiopian child should have the right to grow up in Ethiopia, instilling a sense of national pride in 'looking after our own'.

According to the World Bank, Ethiopia has seen consistent economic growth in the decade from 2010 to 2020. As with China, this helps put the country in a position to improve social welfare. However, a 2019 UNICEF study showed that 88% or 36.2 million children are multidimensionally poor, meaning they are "*deprived of fulfilment of at least three rights or needs for basic goods and services*", such as water and sanitation. If the international community wish to support those children, the solution will have to be far greater and more complex than increasing international adoption rates.

Russia

In the early 2000s Russia was a popular country to choose for adoption. In 2011-13, however, stories of unfavourable adoption scenarios emerged. It is noted that Russia is not a Convention country. In 2013, Russia issued Federal Law No 272-FZ, forbidding US citizens from adopting Russian children out of concern for their welfare. Adoptions that were fairly advanced in their progress were never completed. Russia ended US adoptions very shortly after the US imposed sanctions on some allegedly corrupt Russian officials via the 2012 Magnitsky Act. Senator John McCain stated "*To punish innocent babies and children over a political disagreement between our governments is a new low, even for Putin's Russia.*" Putin defended his actions, saying "*the country will not be humiliated*". In the year prior to this law change, nearly 1,000 children were adopted from Russia to the US.

Sadly, the reason for the fall in adoption rates from Russia to the US does not appear to have been because that is what is in the children's best interest, rather the result of a political 'tit for tat'. If politics is a driving force behind the ability (or not, as the case may be) to adopt from Russia, given the current war, it seems unlikely that adoption from Russia will become any more accessible.

Changes in demand

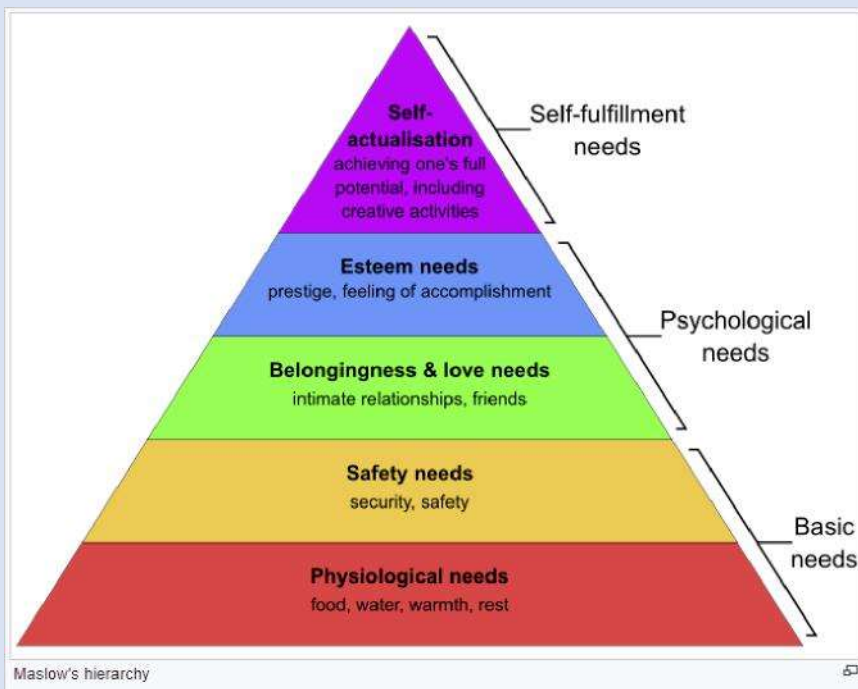
Individuals or couples may choose to adopt for myriad personal reasons. They may be a single parent wanting to start a family, a same-sex couple wanting to become parents, want to give a child a loving home, they may want to incorporate multiple cultures or races into their family, or a couple may be facing infertility issues.

In respect of the last of these, there are an increasing number of ways, outside adoption, for couples or individuals to have a family in spite of infertility issues. As well as improved medical treatments and assisted contraception (such as IVF), surrogacy uptake has increased. According to data from the English family court, there has been a 350% increase in surrogacy rates over the past 12 years – this may increase further following the upcoming reforms to surrogacy law in England and Wales.

With that being said, there are many other reasons, as mentioned above, why people choose adoption, and in the UK the number of families approved to adopt has in fact increased by 23% from 1,930 in September 2020 to 2,370 in September 2021. It does not therefore appear, in the UK at least, that the reason for a decline in intercountry adoption is reduced numbers of prospective adoptive parents. Similarly, there are millions of children worldwide who require greater care, be it through adoption or alternative channels.

Changes in understanding what is in a child's best interests

Maswell's hierarchy of needs suggested that needs could be put into levels, in order of importance, as set out in the diagram below.



Wikipedia

The reality is that for many adoptees, their basic needs are not being met. UNICEF's Global Outlook report on prospects for children in 2022 states that the losses for children, as a result of the Covid-19 pandemic, continue to accumulate, and there has been a record rise in child poverty. Climate change leaves communities the world over vulnerable to natural disasters, fuel instability and the possibility of displacement. UNICEF state there will need to be a strengthening of healthcare systems, and a cooperative approach between countries to strengthen the response to the many emerging challenges which will affect the ability for children's basic needs to be met.

Looking beyond basic needs to a child's psychological and self-fulfillment needs, greater understanding of child development psychology can inform what really is in their best interests. John Bowlby's attachment theory explained the importance of early childhood development, and the need a child has for a protective attachment figure, without which a child can face later psychological difficulties. It is challenging for adoptive parents to build the optimal 'secure' attachment style (as opposed to, for example, avoidant attachment, typical of infants whose needs are not being met) with a child who has likely faced neglect or trauma having experienced separation from their biological parent(s) through, for example, death or financial burden.

Attachment styles develop within the first 18 months of a child's life, and whilst there are ways that adoptive parents can manage this, time is of the essence when it comes to ensuring a child can establish a healthy attachment figure, be it an adoptive parent or, with the right support, a biological parent, as early in their life as possible.

This has been recognised in the UK, where a new 'National Adoption Strategy' has been launched. £160 million of government investment has been put towards ensuring delays are reduced for children in care, to ensure they can be matched with the right family quickly, as well as offering post-adoption support.

Conclusion

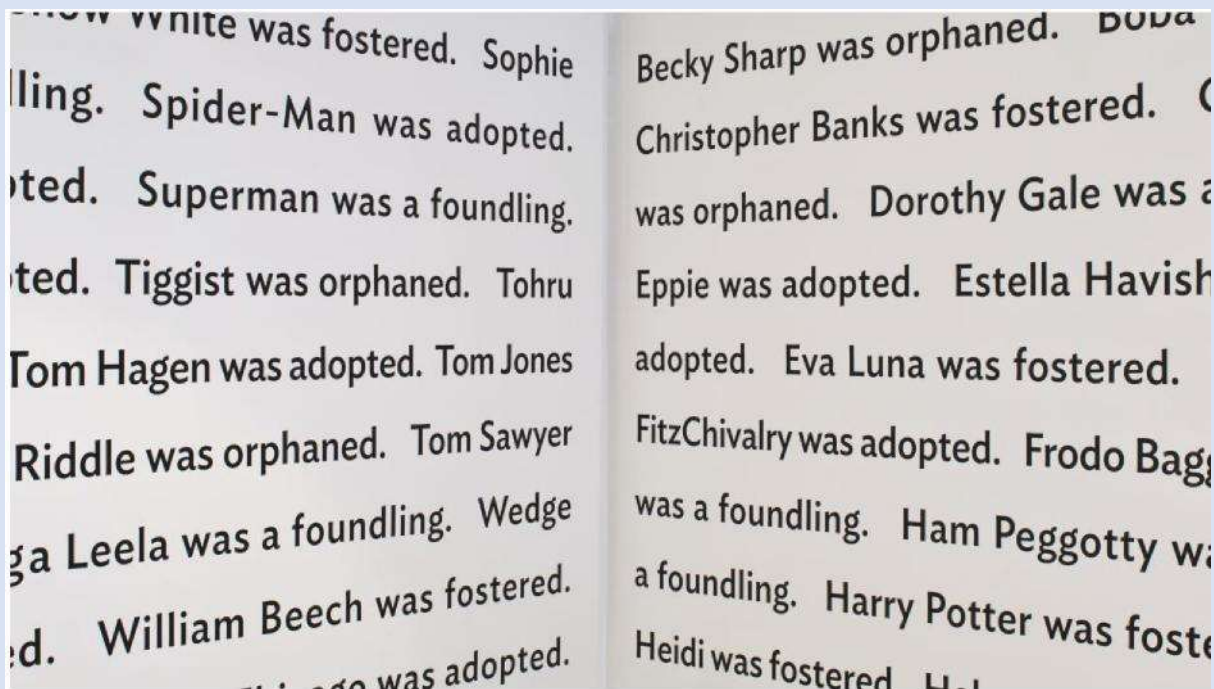
The downward trajectory in countries' openness to inter-country adoption is, in part, due to changes in public policy or laws, encouragement towards domestic adoption, the development of their own welfare programmes and political pressures.

It is acknowledged that the Convention has downsides given the administrative burden it brings, and may discourage international adoption, but the risks of the adoption process being corrupted are too great for those further checks and balances not to be in place.

A greater understanding of children's needs, at all levels, can help to inform adoptive parents, biological parents, foster parents and care workers alike, to give children the best chance of a settled and securely attached childhood.

There is no shortage of individuals or parents open to adopting a child into their lives, nor is there a shortage of children who are left wanting when it comes to even their most basic needs. The impact of removing a child from their native country cannot be denied, but in circumstances where all other channels have been explored, with proper post-adoption support and understanding, inter-country adoption offers an opportunity for a safe and loving new family unit to emerge.

As the aforementioned Lemn Sissay put across in his poem and art installation '*Superman was a Foundling*' (see below), orphaned, fostered and adopted children have a powerful role in our culture. It is society's duty to ensure they have childhood's filled with hope, love and security, however that is come by. Inter-country adoption, when done right, should remain one such way.



Superman was a Foundling – Lemn Sissay

Foundlingmuseum.org.uk

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European Parliament New Brussels II Regulation Conference summary

by Arnaud Gillard



What's new in EU family law? High-level conference on the Brussels IIb Regulation

Thursday, 8 September 2022

On Thursday 8 September 2022, a conference was held at the heart of the European Parliament on the Brussels IIb Regulation, which enters into application on 1st August 2022.

This conference aimed to draw attention to the novelties and important changes introduced by the Brussels IIb Regulation.

This conference aimed also to provide a forum for an exchange of views with legal practitioners on cross-border family disputes involving children in the European Union.

The conference provided participants with an opportunity to hear from experts in EU family law on the key changes to the Regulation and to engage in a moderated discussion on the topic through a Q & A session.

The experts present at the conference were therefore able to share their opinions, praising the strengths and warning about certain points.

Mrs. Ewa Kopacz – Vice President and European Parliament Coordinator on Children's Rights – and by **Mr. Didier Reynders** – Commissioner for Justice – presented the key elements of the speeches and welcomed the entry into application of the Brussels IIb Regulation

After this introduction, **Dr. Miloš Hat'apka** – Justice and Home Affairs Counsellor, Permanent Representation of the Slovak Republic to the EU – started the conference by presenting "*The road to Brussels IIb and the key changes introduced by the Regulation*".

Dr. Boriana Musseva – Associate professor of Private International Law at Sofia University and Attorney-at-law at Musseva and Ivanov Attorney Partnership – then presented the "*Practical Guide for the application of the Brussels IIb Regulation*" which is available in English on [European e-Justice Portal - EJN's publications \(europa.eu\)](https://european-courts.eu/e-justice-portal/) and will help practitioners to implement the Regulation in the best possible way.

Ms. Martina Erb-Klünemann then gave "*a view from the bench – perspective on the Brussels IIb Regulation*", as a – practicing family Judge in Germany and liaison Judge in European Judges Network and International Hague Network of Judges.

"*Mediation in the spotlight -the role of mediation in cross-border disputes under the Brussels IIb Recast Regulation*" was then presented by **Ms. Ishtar Khalaf-Newsome**

– Mediator and trainer, International Mediation Centre for Family Conflict & Child Abduction (MiKK).

IAFL fellow Arnaud Gillard as a member of the Family Law Committee of the Council of Bars & Law Societies of Europe Law Societies of Europe – then moderated the question-and-answer session, allowing experts and practitioners to discuss on the Regulation and to exchange their views.

Finally, **Mr. Markus Brückner** – Secretary General of the European Judicial Training Network (EJTN) –took charge of the closing remarks.

This day was a very interesting first approach of the Regulation, also by the very persons who were involved in its drafting.

Author: Arnaud GILLARD, IAFL Fellow and Amélie VANDERMEERSCH, Associate



A Quick Summary On Key Changes In European Family Law (Brussels II B)

by Soma Kölcsényi

From 1 August this year, what is probably the most important new source of EU law for us family lawyers, will apply. The new Regulation (EU) 1111/2019, - hereinafter Brussels II B - although less of a revolution than the previous legislation in force, is an evolution in the law, yet it brings a number of innovations for practitioners and lawseekers. The following list is subjective and is focuses on wrongful removal/retention.

Increasing importance of ALR and mediation

The old regulation did mention mediation only once and as a possible task of central authorities in facilitating agreements between holders of parental responsibility and cross-border cooperation. The Brussels II B regulation elevates the significance of mediation “*As early as possible and at any stage of the proceedings*, the court either directly or where appropriate with the assistance of the Central Authorities, shall invite the parties”, and its limited by only the best interests of the child. Mediation as the best way towards agreements is the gate to the *possibility to give jurisdiction by choice of the parties* to the court in the Member State of removal to decide on parental responsibility under certain circumstances (Art. 10), “make it possible for them to agree” (Recital 43).

Clarifying deadlines, concentration of jurisdiction

The old regulation in compliance with the 1980 Hague Convention on the Civil Aspects of International Child Abduction mentioned a six weeks deadline for the court to issue its judgment no later than six weeks after the application is lodged (Art. 10), whereas the Brussels II B Regulation is making a much more precise roadmap for deadlines in child abduction cases thereby providing significantly more

guidance to left behind parents. Within five working days from the date of receipt, the Central Authority of the requested member state must not only acknowledge receipt, but shall without undue delay inform the Central Authority of the requesting Member State OR the applicant as appropriate, what initial steps have been or will be taken to deal with the application (Art. 23). No change though in the courts dealing with child abduction cases having to act expeditiously and give a decision no later than six weeks upon being seized. Good news is the six weeks deadline apply to higher instances, respectively (Art. 24). The duration of both the Central Authority work and court procedures is capped, which greatly assists lawseekers, but the transition period between the Central Authority and court instance phases too remain a major source of unpredictability. Nevertheless, uncertainty has been largely reduced compared to the old regime.

In order to improve efficacy of court work, Member States should in coherence with their national court structure, consider *concentrating jurisdiction* for those proceedings; child abduction cases could be concentrated in *one single court* for the whole country or in a limited number of courts and *limiting the number of appeals* possible. (Recitals 41-42)

Voice of the child is key – no recognition without

It cannot be stressed enough that, as a basic principle children who are capable of forming her/his own views must be provided with a *genuine and effective opportunity* to express her/his views and when assessing the best interests of the child, due weight must be given to those views. (Recital 39, 71, Art 21, This requirement applies to not only child abduction but parental responsibility decisions either. Failing to comply *may* result in refusal of recognition in other Member States. (Recital 57, 62, 63, 71, Art. 39)

Suspension of enforcement

The grounds of suspension of enforcement (1 mandatory and 4 discretionary) have been harmonised. The new Regulation introduces uniform grounds for suspension of enforcement proceedings, where one of the grounds may even amount to refusal of enforcement. The suspension of the enforcement proceedings is applicable to all types of decisions, including the privileged ones (Art. 42) and to authentic instruments or agreements. Art. 57 of Brussels II B Regulation permits suspension of the enforcement on grounds envisaged under the law of the Member State of enforcement as far as they are not incompatible with the application of Art. 41

(parental responsibility), Art. 50 (irreconcilable decisions) and Art 56. These grounds may also be used for the suspension of enforcement of authentic instruments and agreements. The national law of the Member State of enforcement determines who decides on the suspension of the enforcement. (Practice Guide for the application of the Brussels IIB regulation)

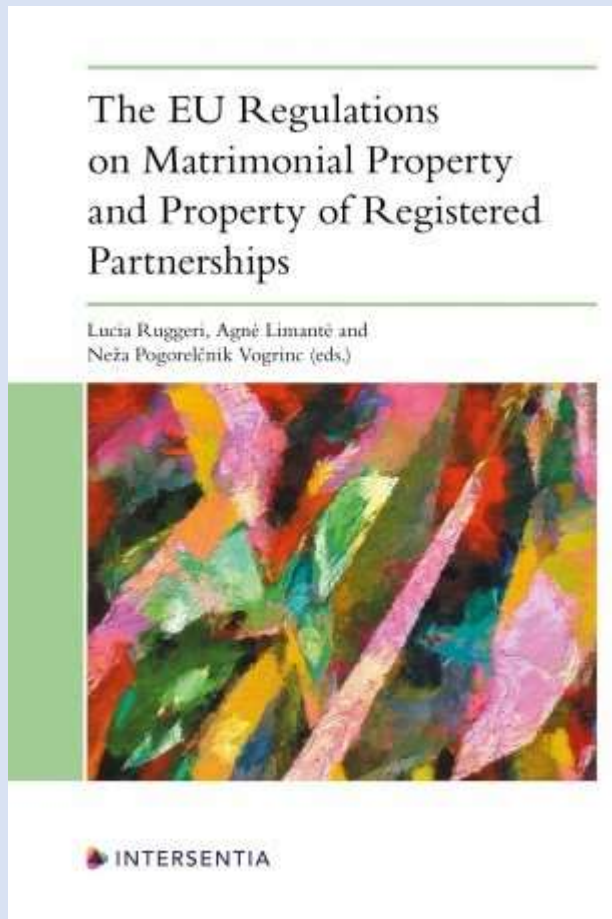
No exequatur

Exequatur abolished for all decisions, but decisions on contact and access and decisions on rights of custody entailing the return of the child (overriding mechanism) remain privileged.

Soma Kölcseyi

The EU Regulations on Matrimonial Property and Property of Registered Partnerships

The following are extracts of the IAFL's first book collaboration.



It should also be noted that this volume was written implementing the EU co-funded project 'E-training on the EU Family Property regimes' (EU-FamPro). This project and, as a result, this volume, unites researchers from the University of Camerino (Italy), the University of Rijeka (Croatia), the University of Ljubljana (Slovenia), the University of Almeria (Spain) and the Law Institute of the Lithuanian Centre for Social Sciences (Lithuania). The EU-FamPro project builds on the well-known European motto 'united in diversity, with its purpose to recognise and implement common solutions at the European level whilst taking into account domestic specifics and legal realities. The main focus of the project is the continuous research

of the Twin Regulations and increased knowledge of practitioners from all over Europe on these two important legal documents. One of the key deliverables of the EU-FamPro project is this scientific monograph, which - we sincerely hope - will become a significant contribution to the literature on private international family law in general and on EU property regimes of cross-border couples in particular.

Property regimes and land registers for cross-border couples *by Prof Luigi Ruggeri and Dr Manuela Giobbi, Italy*

Articles 21 of the Twin Regulations provide that the law applicable to the matrimonial property regime and to the property consequences of registered partnerships shall apply to all the assets falling under that regime, regardless of their location. The aim is to avoid the fragmentation of the matrimonial property regime.

Challenges, however arise when a country involved in a dispute has no register of immovable or movable assets or a proper disclosure system.

Having this in mind, this chapter examines the disclosure of the immovable property and different land register systems used in the Member States from the perspective of the principles of predictability and legal certainty.

At the moment, not all Member States have registers of a right of movable or immovable property or an adequate disclosure system. Different disclosure systems can be identified in each Member States of the European Union. The Twin Regulations determine that the requirements for the recording in a register of a right in immovable or movable property should be excluded from the scope of these Regulations. Such provisions significantly reduce the level of the legal certainty. Therefore, the authors analyse these problems and how they can be overcome through the principle of unity of the applicable law.

Choosing Law and Jurisdictions for Matrimonial Property and Property

Consequences of Registered Partnerships: Associated Risks *by Francesco Giacomo Viterbo and Roberto Garetto*

Abstract: Adopting the Twin Regulations, the European Union has strengthened the choice-of-law and/or choice-of-court options for spouses and partners with regard to the property consequences of marriage and registered partnership. This possibility, however, is not without risks as to how the agreement is concluded. On the one hand, certain risks are associated with the timing of the choice. This timing determines the range of laws (and courts) admissible for the choice and thus the additional formal requirements for the validity of the agreement, if applicable. Some uncertainties concerning the conclusion of the agreement may arise from the

question of whether the designation of the applicable law has to be explicit or may also be implicit. This could occur when the parties enter into an agreement whereby they organise their property regime after the marriage or registered partnership without an explicit choice of law. On the other hand, the decision-making process regarding the choice of law and jurisdiction within the family has characteristics that differentiate it from other areas of law, in particular commercial law. It is conditioned by emotional factors related to the choice to share one's future life with another person on the assumption of a sentimental bond. Aspects related to property regimes can have significant repercussions in the event of divorce or the death of one of the spouses. The role of legal professionals thus becomes fundamental. They are required specific professional skills, not easily found. The lack of this specific expertise can lead professionals to recommend the law and jurisdiction with which they are most familiar, even to the detriment of clients. The effective protection of the weaker party in the relationship also needs attention, since the concept of vulnerability in the context of the family cannot be limited to the element of economic stability.

Key words: Party autonomy; choice-of-law agreement; associated risks; timing of the choice; explicit/implicit choice; decision-making process; informed choice; professional skills; legal advice; vulnerability; family context.

The system of EU private international family law instruments by Agne LIMANTE, PhD, Law Institute of the Lithuanian Centre for Social Sciences

During the last two decades, the EU adopted a number of private international law instruments that are designed to address the issues arising out of cross-border movements of families. The main ones are the Brussels IIa Regulation defining jurisdiction in matrimonial and parental responsibility matters; the Rome III Regulation setting out the rules for the choice of law applicable to divorce; the Maintenance Regulation; the Matrimonial Property Regulation and the Regulation on property consequences of a registered partnership. In addition, the 1996 Hague Convention and the 2007 Hague Protocol on law applicable to maintenance obligations adopted by the Hague Conference on Private International Law are directly applicable in the EU. These instruments – together often referred to as the European private international family law – form a legal framework that is activated once a mixed family or a family living in another country than that of their nationality considers breaking up.

This chapter analyses the system of EU private international family law seeking to draw a map of the applicable instruments and to clarify the links between them. The chapter discusses the legal basis for EU action in the area, defines the scope of each instrument and its place in the interconnected net. This analysis serves as a basis for a better understanding of the location of the Matrimonial Property Regulation and the Regulation on Property Consequences of a Registered Partnership in the overall system of the European private international family law and the connection between these regulations and other instruments.

Miscellaneous Thoughts on Europe, its People and Migration *by Professor Nenad Hlača, University of Rijeka, Croatia*

For the last decades, the political agenda in the European Union is considerably shaped by intra-EU and extra-EU migration and its effects on the states and on the persons who are moving across borders. The keywords of the recent trends in EU migration and the key reasons for it are poverty and property. The hope for a better life has led hundreds of thousands to migrate from the less prosperous East to the “rich” West of the European Union. At the same time, a similar fluctuation of the richer Europeans towards the sunny South can be noticed.

In this chapter, the author examines statistical and demographic data of the EU migration as well as the legal consequences of such migration to the national and European legal context. The author reveals how this shaped the EU policies and argues why new pluralism of family forms with international effects needs special attention from policy makers and institutions.

The Twin Regulations: development and adoption *by (Dr. Eglė Kavoliunaitė-Ragauskienė, Law Institute of the Lithuanian Centre for Social Sciences)*

The property effects of marriages and registered partnerships for a long time were excluded from the EU legislation (i.e. Brussels I Regulation, Rome I, Rome II and Rome III Regulations). However, the need for such regulation was emphasized in a number of programs and framework documents and revealed by statistical trends of increasing numbers of cross-border couples and movements. In this chapter, the

author presents the arguments for the need of this new regulation and discusses the way towards adoption of the Twin Regulations.

The author presents the history of attempts to provide harmonized regulation for at least of some aspects of matrimonial property regimes. To this end, a brief analysis of conventions and other documents is presented, including 1978 Hague Convention on the law applicable to matrimonial property regimes, 1998 Vienna Action Plan and its priority – the adaptation of rules on matrimonial property regimes in the need to address problems derived from the co-existence of different laws and jurisdictions, 2004 Hague Programme and in particular – the Green Paper on conflict of laws rules on matrimonial property regimes (2006). The chapter discusses the role of the 2009 Stockholm Programme, where action plan included a concrete intention to draft a Proposal on jurisdiction, applicable law, and recognition and enforcement of decisions on matrimonial property regime, and “EU Citizenship Report 2010: Dismantling the obstacles to EU citizens’ rights” which further stressed the need for regulation.

Finally, this chapter overviews the procedure of drafting and adoption of the Twin Regulations which were expected to join a growing number of EU private international law instruments in international family law field concerning divorce and legal separation, parental responsibilities, maintenance, and successions and wills. The specific feature of the Twin Regulations – their adoption via enhanced cooperation procedure – is also being discussed.

Jurisdictional Provisions in the Twin Regulations *by Ivana KUNDA, Prof. University of Rijeka, Croatia and Agne LIMANTE, PhD, Law Institute of the Lithuanian Centre for Social Sciences, Lithuania*

The chapter on jurisdiction rules in the Twin Regulations is one of the central chapters in the book. It in parallel provides a detailed comment on the jurisdictional rules of the Twin Regulations (as they are essentially the same in both instruments), and points out few differences that exist between the two Regulations. The analysis starts with the hierarchically highest provisions on jurisdiction by attraction of the succession or matrimonial proceedings – providing for a brief overview of the rules in the Succession Regulation and the Brussels II bis (and II ter) Regulation. The authors then turn to the jurisdiction in “other cases” as the Regulations call them, namely, jurisdiction by

prorogation, and, in the absence of choice, jurisdiction based on four for matrimonial or five for registered partnership property criteria. The remaining sections focus on prorogatio tacita, alternative jurisdiction, subsidiary jurisdiction, forum necessitatis, jurisdiction for counterclaims and preliminary measures. Attention is also paid to coordination of the parallel proceedings pending in different Member States by means of provisions on lis pendence and related actions. Finally, the chapter addresses the procedural issues related to the seised court's examination of own jurisdiction and admissibility where issues of service of documents are of relevance. In the appropriate places, the issues of interpretation are raised and discussed by reference to the existing legal scholarship and case law, offering arguments where the authors offer their opinions.

Authentic instruments and court settlements under the Twin Regulations (prof. Ivana Kunda, Croatia, Martina Tičić, Croatia)

The chapter on authentic instruments and court settlements in the Twin Regulations takes into account the different systems for dealing with matters of matrimonial and registered partnership property regimes in the Member States. Thus, the Twin Regulations guarantee the acceptance and enforceability in all Member States of authentic instruments in these matters. The chapter deals with the evidentiary effects in another Member State of authentic instruments depending on the law of the Member State of origin. The chapter further focuses on the autonomous notion of "authenticity" of an authentic instrument covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up as well as the factual elements recorded in it. The jurisdiction, procedures and effects of challenging the authenticity are also discussed to the extent they are dealt with in the Twin Regulations. The chapter also analyses the notion "the legal acts or legal relationships recorded in an authentic instrument" and the jurisdiction when such question is raised incidenter. The situation of two incompatible authentic instruments and priority between them is also one of the points addressed. Finally, the chapter will make necessary references to the enforcement of the court settlements in the matters covered by the Twin Regulations without repeating what is already be discussed in the chapter on recognition and enforcement of judgments, but stressing their particular features.

Material, Territorial, And Temporal Scope Of The Twin Regulations by Prof. María José Cazorla González and Prof. Mercedes Soto Moya, Spain⁷²

This paper analyses and develops the territorial, temporal and personal scope of the Regulations (EU) 2016/1103 and 1104, which are located within the framework of international cooperation regarding civil matters with cross-border implications, and constitutes an important step towards the unification of private international family law. The topics studied in this work are varied and range from the reason for the need to resort to enhanced cooperation, the concept of marriage and registered partnerships to the singularities of the Spanish multi-unit state.

It is true that the harmonisation of family law in Europe advances with the publication of Twin Regulations (as they are popularly known), and represents a step forward for cross-border families, with new private international, procedural and civil instruments that contribute to providing solutions to the issues derived from the mobility of people within Europe of different nationalities. But it is also true that the application of both Regulations has become a real challenge for the competent authorities, and one of the aims of this paper is to clarify some of the more complex issues. For example, the Regulation (UE) 2016/1104, does not include an autonomous definition of a registered partnership, leaving this task to the internal classification of each State, with the complexity that this entails. The absence of a determination on the country of registration, the nature of the registration, or an express mention of same-sex couples, makes it difficult to achieve the intended "clear legal framework" and the free movement of these couples throughout the EU. This disparity of regulations would have required, in our opinion, the creation of minimum European standards before drafting a regulation of these characteristics.

For its part, the singularities of the Spanish system, with the heterogeneous (regional) regulation of registered partnerships, further complicate its application in Spain. Each Autonomous Community regulates the matter differently: in some, registration is constitutive and, in others, merely declaratory. In some, registration is compulsory, in others it is not. In all of them, however, the registers are administrative and so do not alter the civil status of the cohabitants, nor do they give attestation or

⁷² M. JOSÉ CAZORLA GONZÁLEZ, Full Professor of Civil Law of the University of Almería (Spain). MERCEDES SOTO MOYA, Full Professor of International Private Law of the University of Granada (Spain).

publicity before third parties. And although, in our opinion, all extramarital unions arising from regional legislation in which registration is mandatory may be included in the Regulation's scope of application, no doctrinal unanimity exists in this regard.

Property relations of cross-border *de facto* couples *by Assistant Professor Dr. Sandra Winkler, Croatia*

Among the many couples circulating in the European Union, a significant number are *de facto* couples.

Different national legal systems regulate the personal and property legal consequences of the *de facto* couples in very different ways. The purpose of this paper is to investigate the differences in regulations from a comparative perspective as well as to think about the legal solutions to be found for cross-border *de facto* couples.

Given that *de facto* couples are excluded from the scope of the Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, the difficulties of legal interpretation and application are many.

Finally, another purpose of this paper is to compare the legal position of the cross-border *de facto* couples with the legal position of cross-border couples whose property relations are ruled by "Twin" Regulations 1103 and 1104 of 2016.

Recognition, Enforceability and Enforcement of Decisions under the Twin Regulations *by Jerca Kramberger Škerl*

Chapter 6 of the monograph deals with the cross-border effects of the decisions in patrimonial matters. In the introductory section, it sets the broader context of the topic and examines which decisions can circulate under the Twin Regulations, regarding their substance, the issuing authority, and the time and place of their issuance. The author then tackles the notion of the recognition of decisions and the meaning of the '*ipso iure*' cross-border effects of decisions. In the third part, the declaration of enforceability (*exequatur*) is dealt with from the procedural point of view: which requirements must be met by the creditor, which legal remedies are

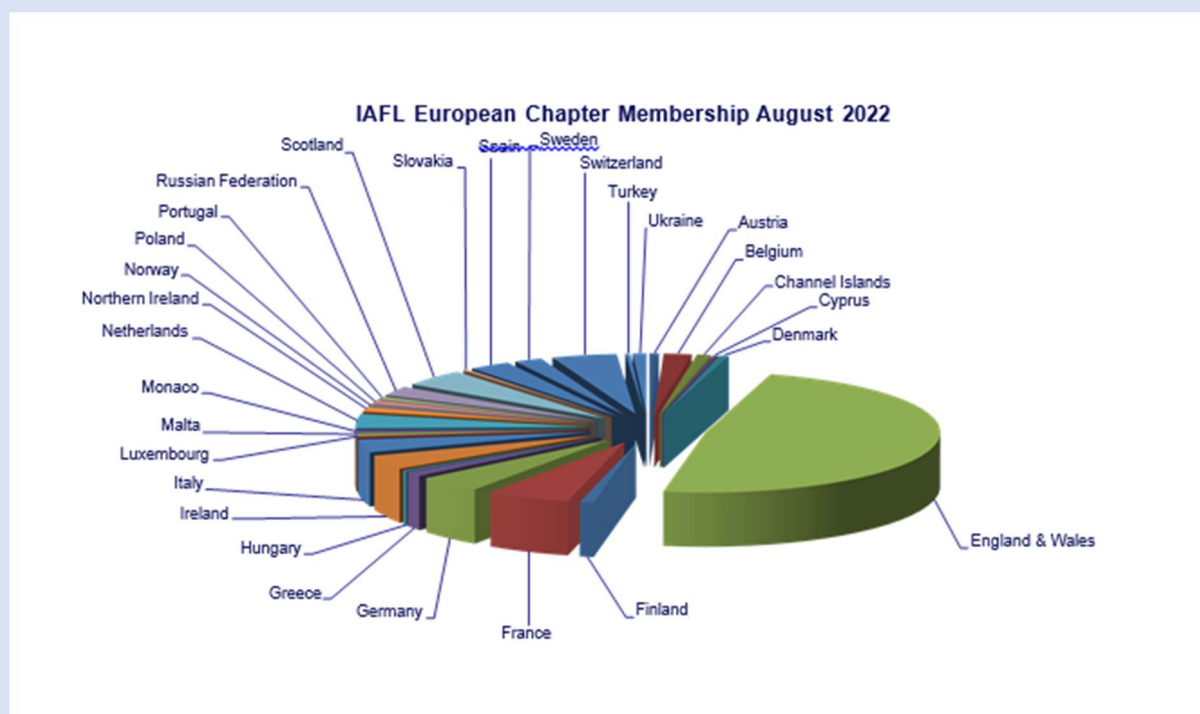
available to the parties, what are the costs of such proceedings and who is to bear them, and which provisional and protective measures are available during such proceedings. The final part of the Chapter is devoted to the analysis of the individual grounds for refusal of recognition and of the *exequatur*. In Closing Remarks, the author resumes the main findings in the Chapter and reveals some of her thoughts regarding the future of the Twin Regulations.

European Chapter Membership Report

We are aiming to increase the membership of the IAFL European Chapter by recruiting new members. Please see attached an updated breakdown of our membership as of today. The IAFL encourage applications from high calibre lawyers from underrepresented jurisdictions as well as those justifications that already have representation. Let us know of any potential members you may like us to encourage to apply.

Current Membership by Chapter						
Chapter	Country/ State	Fellows	Non-Prac Fellows	Judicial Fellows	Associate Fellows	Total Fellows
Europe	Austria	2	0	0	0	2
Europe	Belgium	6	0	0	0	6
Europe	Channel Islands	2	0	1	0	3
Europe	Cyprus	1	0	0	0	1
Europe	Denmark	2	0	0	0	2
Europe	England & Wales	138	7	4	2	151
Europe	Finland	3	0	0	0	3
Europe	France	17	0	1	0	18
Europe	Germany	14	0	0	0	14
Europe	Greece	4	0	0	0	4
Europe	Hungary	1	0	0	0	1
Europe	Ireland	10	1	0	1	12
Europe	Italy	11	0	0	0	11
Europe	Luxembourg	1	0	0	0	1
Europe	Malta	2	0	0	0	2
Europe	Monaco	2	0	0	0	2
Europe	Netherlands	11	0	0	1	12
Europe	Northern Ireland	4	0	0	0	4
Europe	Norway	1	0	0	0	1
Europe	Poland	3	0	0	1	4
Europe	Portugal	2	0	0	0	2
Europe	Russian Federation	6	1	0	1	8
Europe	Scotland	10	2	2	0	14
Europe	Slovakia	1	0	0	0	1
Europe	Spain	9	0	0	0	9
Europe	Sweden	5	0	0	1	6
Europe	Switzerland	14	0	0	0	14
Europe	Turkey	1	0	0	0	1
Europe	Ukraine	3	0	0	0	3
		286	11	8	7	312

IAFL European Chapter Membership Report



IAFL European Chapter Conference

Venice 2023



The romantic city of Venice, a masterpiece of beauty and historic architecture, will be the background of our European Chapter conference 2023. A fantastic Education Programme has been put together by Alice Meier-Bourdeau, Michael Gouriet and Francesca Zanasi, an amazing program of social events including sailing across the lagoon on a Venetian galleon and our very own private carnival in the stunning Pisani Moretta Palace are waiting for you. Register Now!

<https://www.iafl.com/events/forthcoming-events/venice-february-2023/>

SPONSORSHIP OPPORTUNITIES

In light of the strong sponsorship support for past IAFL meetings, the IAFL is delighted to offer sponsorship opportunities for the IAFL European Chapter Annual Meeting 2023 that will be held in Venice, Italy. These opportunities have been crafted to provide maximum visibility to sponsors at key points throughout the event.

The sponsorship opportunities for the meeting are:

- **Exclusive principal** sponsorship of the meeting \$ 5,000

Education program (exclusive per day)

- Thursday sessions **TAKEN**
- Friday sessions **TAKEN**
- Saturday morning \$ 1,500

Vendor display table

- Display table in pre-function area of meeting (Thursday – Saturday) \$ 3,000

Refreshment breaks

- Lunch on Thursday \$ 1,500
- Lunch on Friday \$ 1,500
- Coffee breaks on Thursday and Friday \$ 2,000

Social program

Wednesday

- Welcome Reception on Wednesday \$ 3,000
- Entertainment at the Welcome Reception \$ 1,500
- Welcome Dinner on Wednesday \$ 5,000

Thursday

- Happy Hour at Hotel Monaco & Grand Canal \$ 1,500
- Dinner at Restaurant Post Vecie (First Timers) \$ 1,500

Friday

- Happy hour at Café Florian \$ 1,000
- Dinner at Restaurant Vecia Cavana (for all) \$ 1,000
- Dinner at Osteria Santa Marina (for all) \$ 1,000
- Dinner at Taverna La Fenice (for all) \$ 1,000

Saturday

- President's Dinner at Pisani Moretta Palace \$ 5,000

Tours and Excursions

- Guided Tour La Fenice Theatre (for accompanying guests) \$ 500
- Guided Tour Velvet Atelier & Frari Church (for accompanying guests) \$ 500
- Lunch & Afternoon Tour by Venetian Galleon (for all) \$1,500
- Cooking Class at Antica Besseta Restaurant (for accompanying guests) \$ 500
- Guided Tour Venice Jewish Ghetto (for accompanying guests) \$ 500
- Unknown Venice – Lunch and Guided Tour (for all) \$1,500

Ancillary opportunities

- | | |
|--------------------|----------|
| • Pocket programme | \$ 750 |
| • Speakers' gifts | \$ 1,000 |
| • Fellow bag | \$ 1,800 |

The sponsorship opportunities are flexible. Proposals for sponsorship, at different rates or in other forms, or in any combination – or in concert with other fellows – are welcome. All sponsors will be given appropriate recognition in the conference materials and during the course of the meeting. If, for any reason, you are not able to join us in Venice, you will still see benefit in your firm being recognised and having a presence through one of the sponsorship opportunities.

Please contact Annie Dunster (annie.dunster@iafl.com) if you are interested in sponsoring the meeting.

Any support that you and your firms are able to provide would be very much appreciated.

SPONSORSHIP BENEFITS

All sponsors will be entitled to receive:

- Logo and listing on the IAFL conference website with a link to the Sponsor's website
- Logo to appear on the pocket program

Additional benefits for each sponsor will be provided as detailed below.

Principal Sponsor

The exclusive principal sponsor will be entitled to receive:

- Recognition on on-site signage and in all pre-conference marketing communications
- One complimentary registration¹
- Acknowledgement at the start of the conference, including on holding slide
- Opportunity to provide delegates with a sponsor branded gift
- Opportunity to include collateral² in the Fellow bag
- Display table in pre-function area close to the meeting room for 3 days
- Exclusive recognition in a minimum of two pre-conference social media posts
- Acknowledgement in IAFL social media posts pre and during the conference
- Opportunity to address delegates (maximum 5 minutes) at the opening session of the program
- Opportunity to purchase social program tickets at cost for a maximum of three non-lawyer guests³

Education Program sponsors will be entitled to receive:

- Recognition on on-site signage and in pre-conference marketing communications
- Acknowledgement at the start of the working sessions, including on holding slide
- Opportunity to place collateral⁴ in the meeting room on the sponsored day **OR** in the delegate bag
- Logo on the pocket program distributed to all Fellows
- Acknowledgement in IAFL social media post pre and during the program

Refreshment sponsors will be entitled to receive:

- Recognition on on-site signage
- Logo placement on signage at buffet station
- Acknowledgement in social media post during the conference

¹ *Excludes social functions*

² *Collateral to be agreed with IAFL European Chapter*

³ *Tickets not transferrable*

⁴ *Collateral to be agreed with IAFL European Chapter*

Social program sponsors will be entitled to receive:

- Recognition on on-site signage
- One complimentary ticket to the sponsored social function
- Opportunity to address attendees (maximum 5 minutes) at beginning of function⁵
- Opportunity to provide branded napkins for sponsored function
- Logo placement on signage at function
- Acknowledgement at the start of function
- Acknowledgement in social media post during the conference

Tours and Excursion sponsors will be entitled to receive:

- Recognition on on-site signage
- Logo placement on signage during tour / excursion
- Acknowledgement in social media post during the conference⁶

Pocket program sponsor will be entitled to receive:

- Logo on the front page of the pocket program⁷
- Acknowledgement in social media post during the conference

Speakers' gift sponsor will be entitled to receive:

- Acknowledgement in social media post during the conference

Fellow bag sponsor will be entitled to receive:

- Logo printed on the Fellow bag⁸
- Opportunity to include collateral⁹ in the Fellow bag
- Opportunity to provide a gift for inclusion in the Fellow bag
- Acknowledgement in social media post during the event

For further information or to proceed with a booking, please contact Annie Dunster, annie.dunster@iafl.com

⁵ Applies only to Welcome Reception, Welcome Dinner and the President's Dinner

⁶ Social media posts for tours / excursions for accompanying guests limited to facebook, Instagram and twitter

⁷ Subject to space

⁸ IAFL to source the delegate bag

⁹ Collateral to be agreed with IAFL European Chapter