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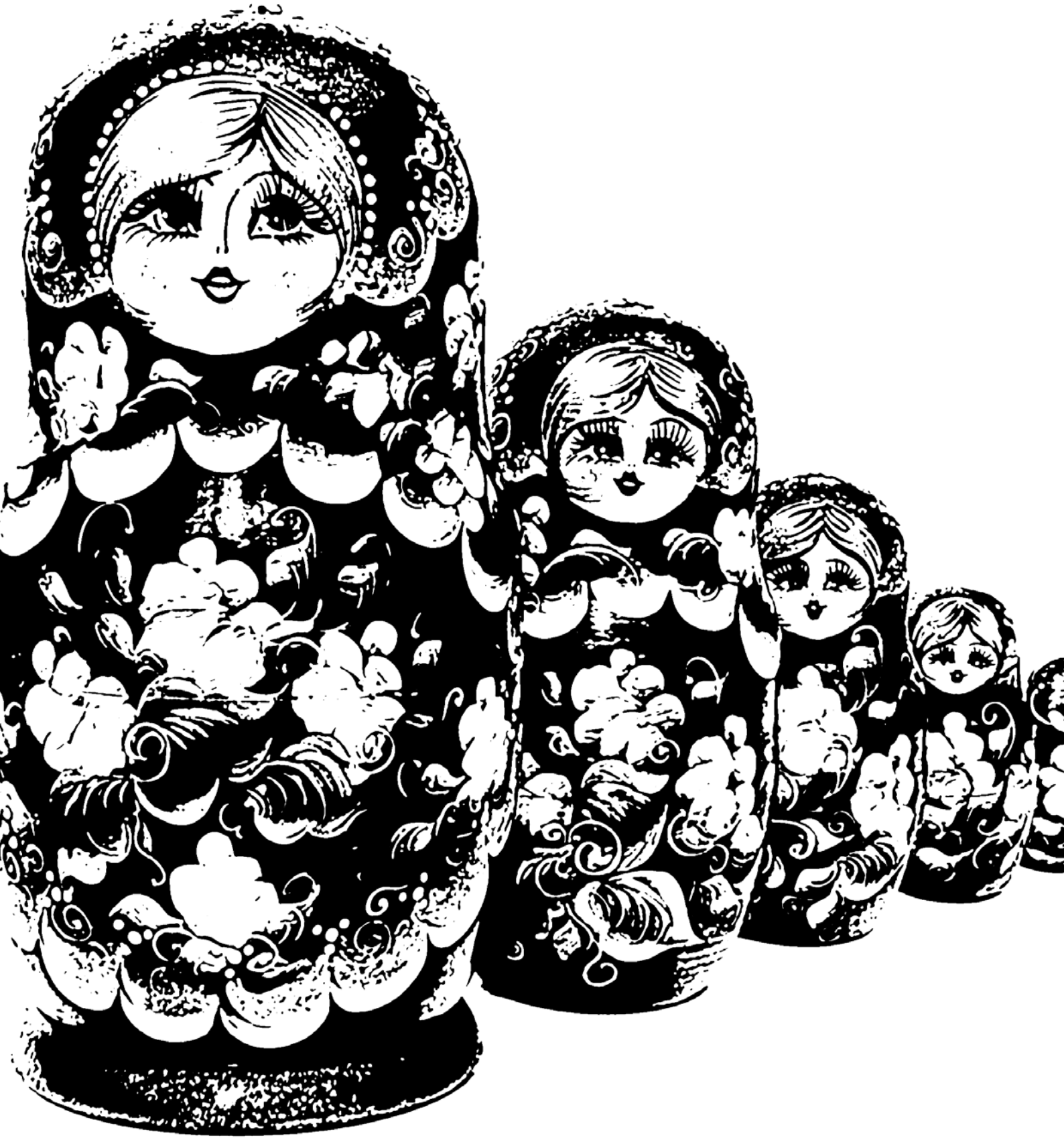
the legal profession

Family Law news

Newsletter of the International Bar Association Legal Practice Division

VOLUME 2 NUMBER 1 SEPTEMBER 2009



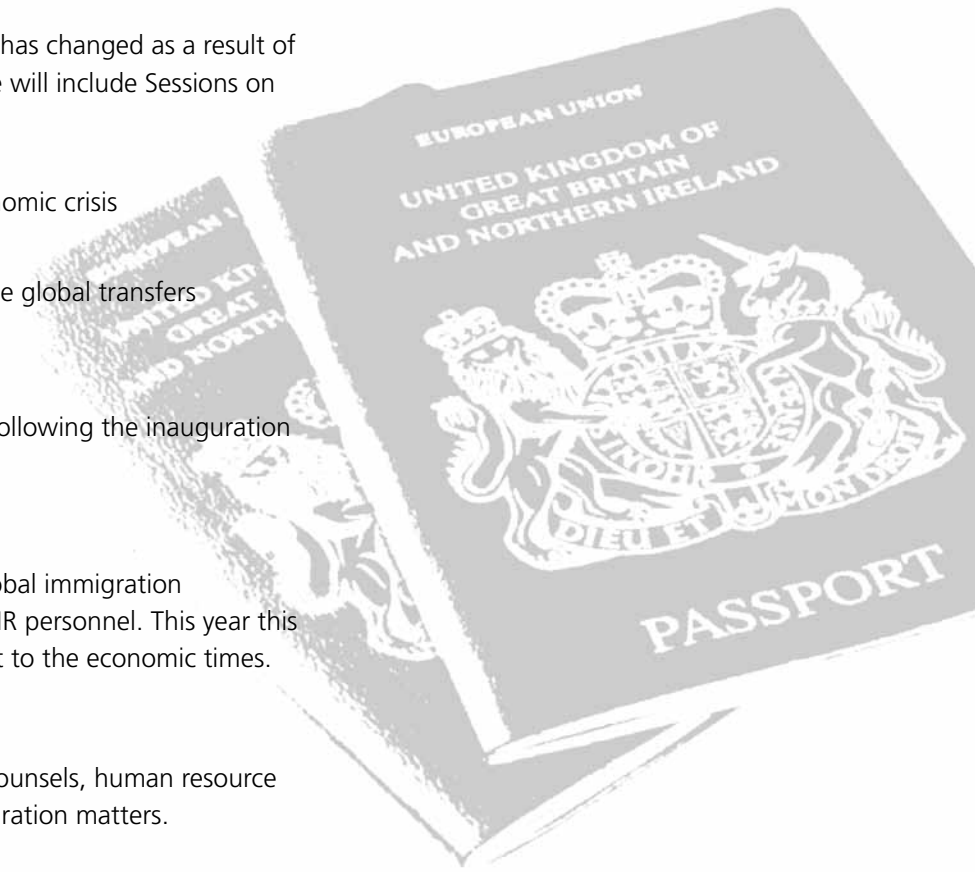
A conference presented by the IBA Immigration and Nationality Law Committee and supported by the IBA European Regional Forum (in association with AILA and ILPA)

4th Biennial Global Immigration Law Conference

19–20 November 2009 **Renaissance Chancery Court, London**

The global world for immigration professionals has changed as a result of the economic recession. This year's Conference will include Sessions on the following topics:

- The state of the nations at a time of economic crisis
- Business visitors – the do's and the don'ts
- Skilled workers – the highly skilled and the global transfers
- Entrepreneurs and investors
- The European immigration scene
- The new US immigration law landscape following the inauguration of Barack Obama
- Hot tips for the future



This conference is recognised as the leading global immigration conference for immigration professionals and HR personnel. This year this premier conference will explore topics pertinent to the economic times.

Who should attend?
Immigration lawyers, policy-makers, in-house counsels, human resource managers and other parties interested in immigration matters.

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For further information, please contact:

International Bar Association
10th Floor, 1 Stephen Street
London W1T 1AT
United Kingdom
Tel: +44 (0)20 7691 6868 Fax: +44 (0)20 7691 6544
E-mail: **confs@int-bar.org** Website: **www.ibanet.org**

Contributions to this newsletter are always welcome and should be sent to Jaqueline Julyan SC at the following address:

Vice-Chair and Newsletter Editor
Jaqueline Julyan SC
Durban Bar
1301 The Marine
22 Gardiner Street
4001 Durban, South Africa
jackyjul@law.co.za

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International Bar Association

10th Floor, 1 Stephen Street
London W1T 1AT, United Kingdom
Tel: +44 (0)20 7691 6868
Fax: +44 (0)20 7691 6564
www.ibanet.org

This newsletter is intended to provide general information regarding recent developments in family law. The views expressed are not necessarily those of the International Bar Association.

In this issue

Feature articles

From the Chair

Anne-Marie Hutchinson, OBE
Dawson Cornwell, London
amh@dawsoncornwell.com

I am delighted to welcome all committee members to our second newsletter. The Family Law Committee officers look forward to meeting and hearing from as many of you as possible in the coming year.

Annual Conferences

The last two years have been a very exciting time for the Family Law Committee which has seen itself rejuvenated. The officer slate consists of dedicated and hard-working practitioners who have embarked on their task with admirable fortitude. We have sported a full committee at the last two Annual Conferences and mid-year meetings.

The committee sessions at the Annual Conference in Singapore in October 2007 were a huge success, leading on to the conference last year in Buenos Aires, which was equally successful.

The forthcoming Annual Conference in Madrid promises to be excellent and has five separate family law sessions, on subjects ranging from the Judge's role in interviewing children during the court process, international mediation, international tracing of assets, 'big money' cases, conflicts of laws, and international child abduction (see page 11).

Member involvement

Articles and observations from members for the website and our newsletter are most welcome. The website is intended to be a resource tool for IBA committee members. Any suggestions that members have as to additional links or improvements that we might make to the website would be greatly appreciated. What we are most anxious to ensure is that the website is kept up to date with developments in family law which are of international interest. Please forward such information to Chawkat Houalla at **chawkat@adibandhoualla.com**

The re-launched Family Law Committee newsletter is to be published annually and is dependent on the provision of information from our committee members.

Proposals for conference and session subjects, papers and proposed speakers are also particularly welcomed. We wish for the Family Law Committee to be inclusive, interactive and geographically represented.

We are seeking to expand our raft of officers for the Family Law Committee. We wish to make it as geographically diverse as possible to ensure that it is representative of the worldwide family law community.

I call upon those of you who have the time and commitment and who would be interested in becoming an officer of the committee to contact either myself or any of the officers of this committee (see page 6).

We are particularly looking for officers from Eastern Europe, South America, South East Asia and North Africa, and young lawyers worldwide.

Forthcoming conferences

I look forward to meeting you all at the Madrid Conference – full details of our sessions are on page 11. Looking forward from Madrid, the next Annual Conference will be in Vancouver (October 2010).

We are also proposing two exciting family law conferences which we hope to hold next year. We are proposing an IBA conference in Asia, specifically on the issue of international child abduction/international movement of children. We also hope to co-host a family law conference in Cape Town relating to issues affecting children in Africa. Further developments will be posted on the IBA website.

Successful conferences require early planning. At this early stage any proposals for sessions, subjects, speakers and proposed papers would be greatly appreciated.

Jaqueline Julyan SC
Durban Bar, Durban
jackyjul@law.co.za

Looking back, looking forward

Looking back: IBA Annual Conference, Buenos Aires, 2008

The conference was a huge success and the hard work that the Family Law Committee has put into regenerating the committee came to fruition.

A joint session with the Individual Tax and Private Client Committee entitled 'Big Money Divorces: Pre-nuptial and Post-nuptial Agreements and Trusts' was exceptionally well attended, to the extent that the room allocated proved too small. A session on 'International Movement of Children', chaired by Anne-Marie Hutchinson OBE, considered the aspects of a Hague Convention (International Child Abduction) case and relocation jurisdiction. Henry Setright QC, one of the intended speakers, was not able to present his paper and a copy of that paper is included in this newsletter. 'Mediation in International Child Abduction Cases' was examined, by way of an interactive session, with Denise Carter OBE, of Reunite, and Marilyn Freeman of the London Metropolitan University, leading the session.

A breakfast meeting was well attended, much to the surprise of those who were aware of the crowded social schedule, and the number of cocktail parties there were to attend the night before.

Looking forward: IBA Annual Conference, Madrid, 2009

The Annual Conference, to be held 4–9 October 2009 in Madrid, features five sessions of the Family Law Committee.

The first session will be a joint session with the Judges' Forum, on the 'Participation of Children in Family Law Litigation and the Judge as an Interviewer of Children'.

The Hague International Child Abduction Convention then takes centre stage on Tuesday afternoon when a mock Hague trial, with outcomes for at least three separate jurisdictions, will be presented. Representatives from the judiciary, the Hague Secretariat and specialist international practitioners will conduct the mock trial.

Wednesday will see a joint session with the Individual Tax and Private Client Committee, styled 'Keeping it in the Family – the Role of the International Lawyer in Tracing and Disposing of Assets in case of Family Breakdown'. There will also be an afternoon session on the 'Brussels Regulation and Jurisdiction and Conflict of Laws', looking at the availability of fora, jurisdiction, applicability of foreign law, and the effects of Brussels regulations on European cases.

Mediation is the subject of a session on the Friday, with the focus on the voice of the child. This is a joint session with the Mediation Committee and the Judges' Forum and, following the successful roleplay that took place at the Buenos Aires Annual Conference, there will again be roleplay, this time with emphasis on the voice of the child and the role of the child.
There will be a breakfast on 7 October at 8.30 am at the Novotel Madrid, to which all Family Law Committee members are invited.

Other conferences

In the pipeline for 2010 is not only the Football/Soccer World Cup in South Africa, but also a Family Law Committee conference in Cape Town. The Family Law Committee is hoping also to host a conference in Japan in 2010.

This newsletter contains two articles on international child abduction, two articles on the effect of Islamic Law, and notes on forced marriage in the United Kingdom and recognition of foreign pre-nuptial agreements in England and Wales..

Committee officers

Chair
Anne-Marie Hutchinson OBE
Dawson Cornwell
16 Red Lion Square
WC1R 4QT
London, England
amh@dawsoncornwell.com

Senior Vice-Chair
Wendy Galvin
Galvin Law Partnership
PO Box 33-1000
Takapuna
Auckland, New Zealand
wendy@galvinlaw.co.nz

Vice-Chair and Newsletter Editor
Jaqueline Julyan SC
Durban Bar
1301 The Marine
22 Gardiner Street
4001 Durban, South Africa
jackyjul@law.co.za

Vice Chair
Gillian Rivers
Collyer Bristow LLP
4 Bedford Row
WC1R 4DF
London, England
gillian.rivers@collyerbristow.com

Secretary
Tina Wüstemann
Bär & Karrer AG
Brandschenkestrasse 90
8027 Zurich, Switzerland
tina.wuestemann@baerkarrer.ch

Associations and Committee Liaisons Officer
Zenobia du Toit
Miller du Toit Cloete Inc.
10th Floor
80 Strand Street
8001 Cape Town, South Africa
joan@millerdutoitcloete.co.za

Younger Membership Officer
Mikiko Otani
Otani Law Offices
8th Floor Mitsuhama Building
1-2-1 Yotsuya
Shinjuku-ku
Tokyo, Japan
motani@otanilawoffices.com

Islamic Interest Officer & Website Officer
Chawkat Houalla
Bechara El Khoury Boulevard
Majida Center
2nd Floor
1514
Tripoli, Lebanon
chawkat@adibandhoualla.com

LPD Administrator
Kelly Savage
kelly.savage@int-bar.org

Officer profiles

CHAIR

Anne-Marie Hutchinson, OBE

Dawson Cornwell, London, United Kingdom

Anne-Marie Hutchinson was admitted in 1985 and joined Dawson Cornwell in January 1998 as head of the Children Department.

Anne-Marie specialises in matters relating to children and in particular international custody disputes, child abduction and international adoption. She also acts for the victims of forced marriages.

She is accredited by Resolution (formerly the Solicitors Family Law Association) as a specialist family lawyer with particular specialities in child abduction and children law. She was awarded the inaugural UNICEF Child Rights Lawyer award in 1999 and received an OBE for her services to international child abduction and adoption in the 2002 Queen's New Year's Honours List.

She is a member of numerous associations and committees including the International Society of Family Law, the IBA, the Institute of Advanced Legal Studies Working Group on the Cross Border Movement for Children, the International Centre for Missing and Exploited Children, The Home Office Working Group on Forced Marriages and The Commonwealth Working Group on AIDS.

She is a regular speaker and lecturer both within the United Kingdom and abroad, and has made numerous television appearances. She is a previous consultant editor of *Children Law and Practice* by Hershman and McFarlane published by Family Law and an international correspondent for *International Family Law* published by Jordans. She is joint author of the textbook *International Parental Child Abduction.*

Anne-Marie is consistently named as one of the leading family lawyers in London in both Chambers and The Legal 500.

Anne-Marie is Chair to the Trustees of Reunite: International Child Abduction Centre.

The Board of Trustees to Reunite consists of lawyers (including the retired Official Solicitor for England and Wales) and members of the medical and education professions.

Anne-Marie has spent time in Pakistan and was a member of the committee which met to formulate the Anglo/Pakistan Protocol and its follow-ups.

Anne-Marie has represented clients in the leading child abduction/custody cases relating to Islamic states in the jurisdiction of England and Wales, including *Al Habtoor v. Fotheringham* [2001] 1 FLR 951 and *Re.J (Child Returned Abroad: Convention Rights)* 16.6.05 [2005] 2 FLR 802, a recent decision in this field.

She also visited Pakistan with the members of the judiciary and the Foreign & Commonwealth Office in order to raise awareness of the Anglo/Pakistan Protocol and to provide information and training to members of the legal profession and NGOs in Pakistan as to the protocol.

Anne-Marie has attended the meetings between the English judiciary and the judiciary from Bangladesh on issues of family law and likewise with a recent judicial visit from members of the judiciary of Algeria.

Anne-Marie attended both Malta I and Malta II conferences on behalf of Reunite.

SENIOR VICE-CHAIR

Wendy Galvin

Galvin Law Partnership, Auckland, New Zealand

Wendy Galvin is the principal of an all-women law firm in Auckland, New Zealand since 1988, a practice focused on all aspects of family law.

She is particularly interested in international family law issues and has appeared as counsel in cases involving Hague Convention and international relocation issues.

The New Zealand Family Courts has appointed her as Senior Lawyer for Children.

She has been a member of various law society committees and is presently a cost reviser for the Auckland District Law Society.

VICE-CHAIR

Gillian Rivers

Collyer Bristow, London, United Kingdom

Gillian Rivers was admitted in 1995. Gillian is a partner in the family law department of Collyer Bristow LLP, who have offices in London and Geneva. She has worked for a number of other firms including Stephenson Harwood LLP and Charles Russell LLP.

Gillian is a highly experienced family law practitioner who deals with all aspects of family law, including divorce, ancillary relief claims, child residence and contact disputes, applications for leave to remove from the jurisdiction, cross-border cases; applications for worldwide emergency injunctions to freeze assets; Schedule 1 applications under the Children Act; cohabitee disputes, pre-nuptial agreements and domestic violence applications.

Gillian is the family law correspondent for the Law Society Gazette and a regular contributor to BBC Radio on family law matters.

Gillian is a member of the Law Society of England and Wales, the IBA and Resolution (formerly the Solicitors Family Law Association).

VICE-CHAIR AND NEWSLETTER EDITOR

Jaqueline Julyan SC

Durban Bar, Durban, South Africa

Jaqueline Julyan is an Advocate with Senior Counsel status, practising at the Durban Bar.

Having graduated from the University of Stellenbosch, South Africa, with BA (Law) and LLB degree, she went on to read for the LLM degree at Cambridge University. She was admitted as an Advocate of the High Court of South Africa in 1986, but chose to lecture at the University of Natal, Durban, until joining the Bar in 1989.

She took Silk in 2004.

Her practice focuses on family law matters, including custody/care and contact/access cases, inter-country adoptions, Hague Convention applications and the patrimonial consequences of divorce.

She is a long-standing member of the IBA, a member of the International Society of Family Lawyers (ISFL), and a Fellow of the International Academy of Matrimonial Lawyers (IAML).

She has spoken frequently at conferences, both locally and abroad. Recent papers are *International Mobility of Spouses: Patrimonial Consequences for Divorce and Forum Shopping* at the IBA Conference in Singapore 2007, *The Changing Concept of Family* at the ISFL Conference in Chester 2007 and *Justice Undone?: A Psychological and Legal Analysis of a Case Study,* also at the Chester Conference. She recently chaired a session at the Miller du Toit/University of the Western Cape International Family Law Conference in Cape Town, in March 2009.

She has held acting appointments as a Judge of the High Court of South Africa.

She was also the recipient of Businesswoman of the Year (Professional category) for Kwazulu-Natal.

SECRETARY

Tina Wüstemann

Bär & Karrer AG, Zurich, Switzerland

Tina Wüstemann is a lawyer at Bär and Karrer, specialising in private clients trusts and estates. She is a Swiss citizen, born in 1964 and is married with two children.

Tina attended the University of Zurich (lic iur 1990), New York University, New York (LLM 1998) and has been a member of the New York Bar (not practising) since 2000.

She was admitted to the Bar in Switzerland in 1994.

Tina is a member of the Swiss Bar Association, Zurich Bar Association, IBA, ASA and STEP.

She became a partner with Bär & Karrer AG, Zurich (since 2004). She was an associate from 1998 to 2004. She advises Swiss and foreign private clients and service providers of private clients (such as banks, family offices, trust companies and foreign lawyers) regarding complex estate and wealth planning matters including trusts, on- and

offshore companies, pre-nuptial agreements and wills. She also provides specialist advice to Swiss and foreign clients on family law matters and acts for clients in complex divorce cases, including cross-border issues and asset tracing. Apart from estate and family law, she advises clients in international commercial arbitration proceedings (appointment as party counsel and as a member of arbitral tribunal in numerous ad hoc and institutional cases). Main areas of practice are international estate planning and family law matters and international commercial arbitration.

She was an associate with Froriep Renggli, Zurich (1994 to 1997), advising Swiss and international clients on commercial matters with a focus on trust and estate law, family law and international commercial arbitration. She was Secretary to the District Court of Zurich, Zurich (1990 to 1992), where she was exposed to a broad range of commercial cases predominantly in expedited and summary proceedings.

Tina's publications include the 'Legal Privilege' in Switzerland, in: *IACD* (*International Association of Defense Counsel)*; 'Multinational Survey on Legal Privilege', published in November 2007; 'Arbitration of Trust Disputes' in: *New Developments in International Commercial Arbitration*, Christoph Müller (ed), 2007, p 33-57, 'Untersuchungen durch unabhängige Beauftragte' (with R. Truffer), published 8 March 2007 in *NZZ* (*Neue Zürcher Zeitung*), 'Privilege across Borders in Arbitration – Multijurisdictional Nightmare or Storm in a Teacup?' (with Michelle Sindler), in: *ASA Bull. No. 4*, 2005, p 610-639; *Commentary to Swiss Rules of International Arbitration* (with Jesare Jermini and other co-authors), Zuberbühler/Müller/Habegger, ed, Zurich, 2005.

She has had numerous lecturing and teaching engagements, both in Switzerland and abroad in the area of estate and family law and international arbitration.

ASSOCIATIONS AND COMMITTEE LIAISONS OFFICER

Zenobia du Toit

Miller du Toit Inc, Cape Town, South Africa

Zenobia du Toit has a BA LLB (University of Stellenbosch), Department of Justice – Public Prosecutor. She was admitted as an attorney in April 1982 and has practised as such from 1982 to date.

She became a director of the firm of attorneys Miller du Toit Cloete Inc, specialising in family law, April 1998. Miller du Toit Cloete Inc annually presents a family law conference dealing with developing aspects of family law in South Africa and internationally.

Positions held include Trustee, Body Corporate Curzon Place (1985 to 1999); President, Soroptomist International of Lion's Head (1990 to 1991); Chairperson, Carinus Nursing College Council (October 1992 to 1994); Director AFSA (1991 to 1993); subcommittee convener, Women's Rights – Soroptomist International of Lion's Head; Committee member, Executive Women's Club (1992 to beginning 1994); Committee member, Cape Town Attorneys' Association (1992 to 1997) ; Woman's National Coalition – Education and Research subcommittee group (1992 to1994); Committee member, Cape Attorneys' Association of Family Lawyers Committee (1999 to date) ; Chair, Law Society of South Africa National Family Law Committee (2003); member of the Law Society of South Africa National Family Law Committee (2002 to date).

She was a member of the Technical Committee on the Transitional Executive Council at the Multi-Party Negotiating Process, Kempton Park (April to October 1993).

Zenobia has compiled and presented various papers on family law matters and gender equality and workshops on topics relating to family law and women's rights.

Her most recent papers are:

'Representation of children' at the Commonwealth Association and Law Societies Conference, London (2006), 'Domestic and same sex relationships and children' at the IBA Conference, Singapore (2007), workshops nationally for attorneys on 'Developments in Family Law and the new Children's Act' (2007 and 2008) for LEAD and the Cape Law Society Family Law Committee.

YOUNGER MEMBERSHIP OFFICER

Mikiko Otani

Otani Law Offices,
Tokyo, Japan

Mikoko Otani was admitted to the Tokyo Bar Association in 1990. Positions held include Family Affairs conciliator at the Tokyo Family Court; Member of the Family Law Section of the Tokyo Bar Association; Former Director of the Office of the International Affairs; Member of the Committee on International Human Rights of the Japan Federation of Bar Associations; Council Member of the International Human Rights Law Association; Regional Council Member and Member of Programme and Management Committee of Asia Pacific Forum on Women, Law and Development; Country representative of Japan at the Family Law and Family Rights Section of the LAWASIA; Fellow of the International Academy of Matrimonial Academy; BA in Law, Sophia University; Master of International Affairs in Human Rights and Humanitarian Affairs, Columbia University School of International and Public Affairs; LLM in International Law, the University of Tokyo Graduate School of Law and Politics.

ISLAMIC INTEREST OFFICER & WEBSITE OFFICER

Chawkat Houalla

Adib and Houalla Law Office,
Tripoli, Lebanon

Chawkat Houalla is Attorney at Law with the Bar Association of Tripoli. He is a trilingual (Arabic, English and French) practising lawyer in the jurisdiction of Lebanon. He is a member of the IBA and of the Chartered Institute of Arbitrators. Tenant of a 'Diplome d'Étude Supérieure' (equivalent to an LLM) in Private Law from Saint Joseph University, he runs his own firm, Adib & Houalla Law Office, in Tripoli, Lebanon, along with his partner.

He practises Islamic Family Law within the jurisdiction of Lebanon and has done pro bono work, especially in the field of child protection.

Family Law

Chair
Anne-Marie Hutchinson OBE *Dawson Cornwell, London, England*

The participation of children in family law litigation and the judge as an interviewer for children

Joint session with the Judges' Forum.

The role of the child within the family law process has become more complex and important. The United Nations Convention on the rights of the child provides for fundamental rights and is endorsed by almost all states across the world. What provision is there for the representation of the child's views within the family law court process? It is no longer sufficient merely to report on the voice of the child and children must be advocated for and their own case advanced. Experiences of practice from a number of states will be covered in the session.

MONDAY 1500 – 1800

The Hague Abduction Convention and the wrongfully removed child

There are now in excess of 75 members of the Hague Child Abduction Convention. International jurisprudence has evolved greatly.

A competent practitioner must be able to conduct a Hague trial for the plaintiff or defendant speedily, and be in a position to identify the assailant and relevant issues at an early stage in order to meet the strict timetables imposed by the convention.

The session will present a Hague trial with outcomes for at least three separate jurisdictions.

Representations of the judiciary, the Hague Secretariat and specialist international practitioners will conduct the mock trial.

TUESDAY 1500 – 1800

A breakfast meeting will be held to discuss matters of concern and interest to family law practitioners

WEDNESDAY 0830 – 1000

Keeping it in the family – the role of the international lawyer in tracing and disposing of assets in case of family breakdown

Joint session with the Individual Tax and Private Client Committee.

This session will deal with international discovery, asset tracing and access to information internationally in big money divorce and inheritance disputes. In particular the following topics will be addressed:

- how to obtain access to information regarding the targeted assets in the various jurisdictions;
- how to claim for recovery of assets – as part of the divorce or inheritance proceedings, where the assets are located or in the trust jurisdiction. What about the enforcement of foreign recovery orders in other jurisdictions ?
- What are the options for a party to a family dispute to dispose of assets? What are the remedies of the opposing party against such actions in the various jurisdictions?

WEDNESDAY 1000 – 1300

The Brussels II Regulation, jurisdiction and conflict of laws

A seminar designed to take a comparative look at competing family law claims in various jurisdictions around the world, to include the procedural advantages and disadvantages therein:

- available forums – what each country requires to establish jurisdiction;
- the relevance/applicability of foreign law (once jurisdiction is established);
- the effect of Brussels regulations on European cases;
- emergency/interim remedies (eg freezing injunctions);
- the availability and generosity of interim maintenance;
- the required approach to disclosure;
- likely timescale/expense of proceedings;
- inclusion/exclusion of inherited/pre-marital/post-separation assets; and
- available enforcement mechanisms for non-payers.

The session will focus on the practical aspects of conflict of laws and international litigation, and a discussion of these areas will be led by a panel of experts with plenty of opportunity for the audience to contribute to the discussion.

WEDNESDAY 1500 – 1800

Mediation in international children's cases with a focus on the voice of the child

Joint session with the Mediation Committee and the Judges' Forum.

Mediation in international children's cases is becoming increasing common and a number of pilot schemes are underway.

It remains a complex and sensitive area. One of the most sensitive aspects is the role of child within that process. Following on from the hugely successful role play that took place at the IBA Annual Conference in Buenos Aires, an in-depth role play in child abduction, with particular emphasis on the role of the child and the voice of the child, will be conducted. Reunite International Child Abduction Centre and specialist mediators and practitioners conduct the session.

FRIDAY 1000 – 1300

Developments in Hague Child Abduction cases – the English experience

Henry Setright QC
Barrister, 4 Paper Buildings, London

(Paper prepared for IBA Annual conference Buenos Aires, 2008)

Introduction

The 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the Hague Convention') has for many years provided parents and others in its numerous contracting states with an effective single standard means of securing the return of internationally abducted children. It is relatively compact and self-contained in form, and straightforward in its modus operandi – to provide a summary process for the return of children removed from or retained outside of their countries of habitual residence, where this has breached the custody rights of the applicant. Defences are defined and limited to consent or acquiescence to the removal or retention, or to an assertion that a return would place the child at grave risk of harm or in an intolerable situation. A subject child's objection can be a defence to a return, subject to age and maturity. If a claim is brought more than 12 months after the removal or retention, a settled child need not be returned.

It sounds very simple – and is intended to be. But 28 years after it came into being, and 20 years after it came into widespread regular use, the Hague Convention still produces cases of interest and difficulty, including at the highest level of national appellate courts. This short presentation is intended to illustrate some examples and developments in one jurisdiction, that of England and Wales, in which the Hague Convention has operated since 1986, and which has – because of its location, history, economics, and international links and movement of so many of its population – in relative terms a very high traffic in child abduction applications. It is constructed for this international audience – for English listeners, who know the detail, it perhaps also puts recent changes into a wider perspective.

Early days – keeping it (relatively) simple

But first, to set the scene. England and Wales was an early adopter of the Hague Convention – its incorporating legislation, the Child Abduction and Custody Act 1985, came into force in 1986[1], at which date only a relatively small number of states were active parties. From the start, the English approach as seen in the incorporating legislation and rules[2], and in judge-made law from the decided cases, was that a key to the successful operation of the Hague Convention was to safeguard and promote its (at least ostensible) speed and simplicity of operation. Accordingly, it was made the exclusive preserve of specialist High Court Judges, and carefully ring-fenced from the domestic welfare jurisdiction. Its procedure was special, with the aim being to achieve fast summary hearings (no adjournment longer than 21 days, determination within six weeks, fast-track appeals), with normally no oral evidence, no expert evidence, and no multiplicity of parties. Its few special concepts – 'habitual residence' and 'rights of custody' were interpreted broadly and purposively, in a way that consciously promoted worldwide compatibility. In contrast, its defences were given a high evidential threshold – 'clear and cogent' evidence was required before 'consent' could be established[3], 'acquiescence' was held to be subjective to the left-behind parent[4] – making it thereby very hard for the abducting parent to demonstrate - and a case in which a child's objections defence could succeed had to be 'exceptional'[5] if it was to succeed. The often attempted defence under Article 13(b) of grave risk of harm or intolerability was mitigated by the use of undertakings[6] – an English common law concept – to secure practical safeguards on the conditions of returns. This and a very high interpretive threshold[7] virtually eliminated the successful use of the defence.

As a result, Hague Convention cases were thus (and intentionally so) very hard to defend. Your author has been appearing in Hague Convention cases since they started in England. I remember vividly appearing for the applicant in one early example before the then President of the Family Division. There was a brisk contested final hearing which lasted all of 15 minutes, which culminated in a return order. During the trial the Judge met misguided attempts to raise welfare-based Article 13(b) submissions with the comment that this was a Hague Convention case, and the Convention was 'really administrative in nature'. In a world in which the comparative approach of Member States to the Hague Convention came to be viewed critically – particularly but by no means exclusively in response to the experiences of left-behind parents in the United States, following a number of well-publicised cases of non-returns - England and Wales rightly gained an international reputation as a jurisdiction that was 'firm' or 'rigorous'. This reputation has been maintained for two decades.

New influences

This purposive approach to the return of abducted children remains intact in England and Wales in 2008 – Hague Convention cases continue to be heard by specialist High Court Judges, continue to be fast-tracked through a crowded list, continue to be heard in a summary way, and continue in most cases to culminate in orders for a return. Yet the English approach has been subject to influences and changes which can make the process more complex, and can sometimes – albeit rarely- influence the final outcome.

There is a pattern to these changes to a robust and outwardly successful independent specialist jurisdiction, and they can be traced to the impact of the incorporation[8] of the European Convention on Human Rights ('ECHR') into English law. That Convention includes by Article 6 a broadly stated right to a 'fair hearing', and by Article 8 a right to 'respect for private and family life'. The Hague Convention had been ring-fenced from English domestic children's law, but was not impervious to the newly incorporated ECHR. Changes started, arguably, in the House of Lords, with a non-Convention abduction case. In *Re: J (Child Returned Abroad: Convention Rights)*[9] the tendency of English courts to apply Hague Convention policy and practice to cases involving non-signatory countries was emphatically disapproved. Hague policy and practice when applied to Hague cases was in no sense criticised. However, in part of the speech of Baroness Hale came an indication that Hague Convention cases were subject to the ECHR – Article 20 of the Hague Convention, which provides a reason not to return based on incompatibility with fundamental principles in the law of the state addressed had deliberately not been incorporated in the English 1985 Act. But, said Baroness Hale, the effect of the ECHR was to make the same principle applicable.

The voice of the child

This led, theoretically at least, to the possibility of a review of legal provision and its effects in individual cases upon a return – but the number of cases in which the deemed 'Article 20' would be even arguable was very small. The next year, the House of Lords went considerably further. In a Hague Convention case, *Re: D (Abduction: Rights of Custody)*[10] , although the decision itself concerned rights of custody, there was a wide-ranging review in the speeches of many aspects of English Hague procedure and practice. One area in particular led to a general procedural change. That part of Article 13 which allows a discretionary refusal of a return if a subject child objects, and has reached an age and degree of maturity at which it is appropriate to give weight to his or her views, has always aroused controversy. Children are often quite naturally aligned with their primary carers, and abducted children are no exception. A primary carer abductor can be in a powerful position to influence a child against the other parent, and a return. Manipulation to achieve an effective defence is plainly undesirable, and the temptation to manoeuvre a child into objecting caused English judges to be vigilant from the Hague Convention's earliest days. In domestic children's cases, since the introduction of the Children Act 1989, consideration of children's views, wishes and feelings has been a vital integral part of the decision-making process, and sophisticated means of bringing them to the attention of the court, ranging from written reports to full- scale separate legal representation for the subject child, are the norm, although the direct communication between children and judges which characterises many other European jurisdictions is very rare. In Hague Convention cases, a full investigation into

children's views, with perhaps separate representation or even expert psychological evidence as part of the process, has an obvious potential to extend and delay a 'summary' hearing. So in the English model, it was for the defending parent to (leadok?) evidence of children's alleged objections, which might in some cases then be investigated summarily by a welfare officer, who would then report orally or in a brief report limited to whether the child objected, and the child's maturity. Even if the child did object (although for a period from 2000[11] until six years later it corrected itself[12], the Court of Appeal appeared to hold a different view), the discretion not to return would only be exercised in an 'exceptional' case. Thus, the impact of the wishes and feelings of the subject child in a Hague Convention case was restricted, and even an objecting child was not necessarily likely to avoid a return.

By the time *Re: D* was heard in the House of Lords, a European Council Regulation universally known as 'Brussels II revised'[13] had been introduced across the European Union[14] as directly applicable law. Brussels II revised reflected the established approach of core continental European states in which codified domestic law incorporating ECHR principles had been in place for decades. In those states, children were routinely 'heard' in cases concerning them – although often by a short judicial interview. Brussels II revised set out to prevent forum competition in European children's cases, and to assist in cross-border compliance with orders, including in abduction cases. Its objective was also to ensure a rigorous approach to applications in intra-European Union cases for Hague Convention returns. It was logical, although mystifying to some English judges and practitioners, for it to provide, by Article 11.2 of the revised Regulation, that a child must be heard in a Hague abduction application to which the regulation applies. This was irrespective of whether or not a 'child's objections' defence was raised. In cases in which it was not raised, what was the point of hearing the child?

In *Re: D*, Baroness Hale affirmed that the Brussels II revised practice must be followed, and indicated that it should extend to seeking the views of children in *all* Hague cases – not just those within Europe. The result is that *all* children[15] in Hague Convention cases are now routinely seen by welfare officers, whether or not a child's objections defence has been raised. The welfare officers report to the Court on the children's wishes, as well as on any objections which they may express to a return. Baroness Hale also observed in *Re: D* that consideration might also be given to direct judicial interviewing of children. This is a controversial concept in England, but considerations of Human Rights, and the very high overall cost and delay resulting from routinely securing representation of children's views by other means have caused anxious attention to be given to it at the highest level.

In the subsequent case of *Re: F (A Child)* [2007] EWCA Civ 393, the Court of Appeal held in a Spanish abduction case that it had been a fundamental defect at the trial not to hear a seven-year-old child (by the usual means of a short welfare interview), notwithstanding the fact that no objections case had been raised, and neither party had made a sustained application for a report. The Court allowed the mother's appeal against the order for a return – remitting the case for re-hearing. The obvious rationalisation for this approach (beyond a literal adherence to Article 11.2) is that only by being heard does the child have the opportunity to raise an objection which may be unknown to, or not endorsed by, the parents, and which may constitute the basis for an effective defence against a return.

The child as a party

Before the case of *Re: D*, there had been restrictive developments in the separate representation of children in child abduction cases. The established test for separate representation had essentially been whether the child had a case which could not be effectively put by either of the parents. Cases were relatively rare but, in parallel with the more liberal approach to child representation in domestic cases, were perceived to be increasing in number. In the case of *Re: H (Abduction)* [2006] EWCA Civ 1247 [2007] 1 FLR 242, a 15-year-old child (who was therefore at the Hague Convention's upper age limit) was refused permission to be separately represented in an application for his return to South Africa. The Court of Appeal dismissed the appeal, holding that age alone was not an exceptional circumstance justifying separate representation, and that the child's views could be adequately expressed through a welfare report. The Court went on to observe that with the demands on the Family Division to hear

abduction cases within the six-week limit, a more, rather than a less, restrictive view should be taken of separate representation.

In *Re: D*, the House of Lords itself allowed the separate representation of an eight- year-old child, and criticised (in the speech of Baroness Hale) the suggestion of a more restrictive approach. In the case of *Re: C (Abduction: Separate Representation of Children)* [2008] EWHC 517 (Fam) [2008] 2 FLR 6, the proper test for the joinder of children as parties in a Hague Convention case was held to be,

> 'whether the separate representation of the child will add enough to the court's understanding of the issues that arise under the Hague Convention to justify the intrusion and the expense and delay that may result'.

This test plainly requires consideration on a case-by-case basis, goes far wider than hearing a child on a consideration of that child's objections alone, and is formulated in language compliant with the ECHR. It should be said that instances of a represented child in an English Hague Convention case are still relatively rare.

Article 13(b) does (occasionally) exist

In *Re: D* and in a later case, *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2008] 1 FLR 251, the House of Lords turned its attention to Article 13(b) defences – although this defence was not pivotal to its decision to overturn the affirmation of a return by the Court of Appeal in both cases. Baroness Hale in *Re: D* confirmed the basic correctness – in accordance with Hague Convention policy – of a restrictive approach to Article 13(b). She said that,

> 'It is obvious, as Professor Perez-Vera points out, that these limitations on the duty to return must be restrictively applied if the objection of the Convention is not to be defeated. The authorities of the requested state are not to conduct their own investigation and evaluation of what will be best for the child. There is a particular risk that an expansive application of Article 13(b), which focuses on the situation of the child, could lead to this result.'

However, Baroness Hale went on to say that,

> 'Nevertheless, there must be circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Convention to require it. A restrictive application of Article 13 does not mean that it should never be applied at all.'

Article 13(b) defences remain very hard indeed to substantiate in English courts. To the established principle that undertakings will be used to mitigate the effect of a return pending an inter-partes hearing in the court of the country of habitual residence has been added the principle, established in case law in *Re: H (Abduction: Grave Risk)* [2003] EWCA Civ 355, [2003] 2 FLR 141, and reinforced in intra-European Union Hague Convention cases by Article 11.4 of Brussels II revised, that the English court will look to see if safeguards are available in the state to which the return is proposed, and will refuse a return only if effective protection from Article 13(b) risks or intolerability is not possible. However, a landmark decision (albeit on the extreme factual basis of the abducting mother having been shot in the head and left psychologically weakened following an unsuccessful but serious assassination attempt in Venezuela) refusing a return on a pure Article 13(b) defence was affirmed by the Court of Appeal in the case of *Re: D (Article 13B: Non-return)* [2006] EWCA Civ 146, [2006] 2 FLR 305.

International communication

In that case, no realistically practicable provisions to secure the safety and protection of the mother and children were going successfully to mitigate the Article 13(b) risks and intolerability. In more usual cases, including where undertakings may not suffice, the principles in *Re: H* and Article 11.4 are facilitated by International Judicial communication, which has become an increasingly well-established part of English Hague Convention practice**,** encouraged by the formalisation of inter-country judicial links in Brussels II revised. The English Central Authority – the International Child Abduction and Contact Unit ('ICACU') - together with the Head of International Family Justice (Lord Justice Thorpe) facilitate this on a case-by-case basis. While many Hague Convention countries now have liaison judges, the success of communication depends predictably on the adequacy of local provision. Typically in a Hague Convention case, an English judge will communicate with a counterpart in the requesting state either electronically in writing, or over a voice link, to determine what safeguards

can be entrenched to protect the child (or the returning primary carer parent) upon a return, what the current state of any domestic litigation may be, and the practicality and timescale of future proceedings – perhaps those in a case in which relocation is sought.

This readiness to approach the foreign court echoes the development of Article 15 requests for assistance in determining relevant matters of foreign law – usually relating to provisions for the vesting of rights of custody – in the requesting state. At one time expert evidence was the preferred method – including by the expensive and sometimes flawed means of a video link – leaving the English judge and the English advocates to do the best they could with their assistance to understand and then construe laws which were necessarily unfamiliar. Article 15 of the Hague Convention allows a request for resolution to be passed to the foreign court, which plainly is (or at any rate by ordinary understanding should be) far better placed to give an authoritative – and speedy – view of what its own law really means. However, recourse to Article 15 was unattractive – as it appeared that it was open to an English court if it chose to take its own course and reject the foreign determination. This approach was reversed by the House of Lords in the case of *Re: D* and Article 15 determinations can be sought with confidence that they will be treated as authoritative. In the case of *Re: T (Abduction: Rights of Custody)* [2008] EWHC 809 FLR forthcoming, it was emphasised that, where the problem was a novel one never apparently decided in the courts of the state of habitual residence, an Article 15 request – rather than for an English judge to attempt to make the ground-breaking decision – was obviously the right course.

The coach and four

One area of English Hague Convention practice that has been fundamental to the treatment of Article 13(b) defences where abductions have been (as the vast majority of incoming English application are) by primary carer parents is the so-called '*coach and four*' principle. It has been a consistent theme running through the English cases from the earliest days of the Hague Convention that an abducting primary carer parent will not be permitted to create an Article 13(b) defence out of her or his own wrongful act. Thus if a primary carer mother abducts a very young child to England, and then indicates that she will not in any circumstances return with that child to the country of habitual residence, she cannot then be permitted to claim that to return the child alone would place that child at Article 13(b) risk or in an intolerable situation. To allow her to do this, said the English judges, 'would drive a coach and four through the Convention'.[16]

The force of this remains formidable – but the universality and correctness of this approach, particularly in the context of a consideration of the subject child's rights under the ECHR, has been questioned to some extent in the case of *S v B (Abduction: Human Rights)* [2005] EWHC 733 (Fam), 2 FLR 878 at para. [49] at 892. Perhaps more pointedly, underlying the speeches of Baroness Hale in both *Re: D* and *Re: M* was the view that moral reprobation of the individual abductor had limited scope in Hague Convention cases, once (as was inevitable if an Article 3 case was established) a wrongful removal or retention had been demonstrated. The Hague Convention is not a criminal or quasi-criminal sanction, but a device to secure the summary return of an abducted child to the country of habitual residence for litigation there on his or her future. Any moral judgements are (if relevant at all) primarily for the court hearing the welfare case. Nevertheless, an abducting parent who wilfully and irrationally refuses to accompany a child back is unlikely to find a receptive audience for an Article 13(b) case in England. Faced with this situation, an English judge might, however, wish the subject child to be independently represented.

Discretion

The key to many Hague Convention cases in which defences under Articles 12 (settlement) and 13(a) (consent and acquiescence), 13(b), and children's objections are advanced is the exercise by the court of its discretion to return, or not to return. Part of the 'rigorous' English approach was to emphasise that 'welfare' was only one of the considerations that the court had to bear in mind, and it was not paramount. Powerful emphasis had to be given to the policy and purpose of the Hague Convention. Thus, even in a case in which the child objected strongly to a return or (theoretically) if an Article 13(b) defence was established showing a grave risk to the child on a return, a court could still say that a return must take place. In the case of *Vigreux*

v Michel [2006] EWCA Civ 630, [2006] 2 FLR 1180, the Court of Appeal returned the subject child nowithstanding his objections, holding that the policy of the Convention and the need for comity must prevail, in what, the Court considered, was not an 'exceptional' case.

In the House of Lords, in the case of *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2008] 1 FLR 251, Baroness Hale took a diametrically different view. She said that,

> '…I have no doubt at all that it is wrong to import any test of exceptionality into the exercise of discretion under the Hague Convention. The circumstances in which return may be refused are themselves exceptions to the general rule. That in itself is sufficient exceptionality. It is neither necessary nor desirable to import an additional gloss into the Convention'.

So, what was the approach to be? Baroness Hale, consistently with the general approach to the interpretation of Conventions, and with the ECHR, was reluctant to establish overarching principles. Discretion was at large, but courts were entitled to take into account Convention policy, the circumstances that gave the court the discretion, and 'wider considerations of the child's rights and welfare'.

However, guidance was at hand on the interpretation of the policy of the Convention. Was it always to insist upon a return in every case? Baroness Hale observed that,

> '…the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.'

This not surprisingly means that it is hard to see how a discretion can easily be exercised to return a child who is 'settled' within the meaning of Article 12 – although the House of Lords did determine by a majority that a discretion does attach to a finding of settlement. Delay will also be highly relevant. In settlement cases, Baroness Hale said that,

> '…it must be borne in mind that the major objective of the Convention cannot be achieved. These are no longer "hot pursuit" cases. By definition, for whatever reason the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Convention would not necessarily point towards a return in such cases, quite apart from the comparative strength of the countervailing factors, which may well, as here, include the child's objections as well as her integration in her new community.'

In a true Article 13(b) case, the exercise of a discretion in favour of a return was to be considered a virtual impossibility. In Baroness Hale's words,

> '…as was pointed out in Re D (Abduction: Rights of Custody) [2006] UKHL 51, [2007] 1 AC 619]…it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate…'

In child's objections cases (of which *Re: M* was an example, and one in which the discretion had been exercised against the child's wishes) Baroness Hale said that,

> 'the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views…Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations

> referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.'

In contrast, in cases of consent or acquiescence, Baroness Hale said that,

> 'general considerations of comity and confidence, particular considerations relating to the speed of legal proceedings and approach to relocation in the home country, and individual considerations relating to the particular child might point to a speedy return so that her (sic) future can be decided in her home country.'

Thus a new, mature and ECHR-compliant approach to the discretion, which is also faithful to the principles of the Hague Convention itself, illustrates that, in Baroness Hale's words,

> 'the policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of the particular child…'

Conclusion – how much has changed

To the interested reader – and your author hopes you still are – what I have thus far described may seem like radical change, and may sound like a significant 'softening' in the English approach to abduction cases. To those who practise day to day presenting or defending English Hague Convention applications, it really does not have that effect. In genuinely appropriate cases it may now be more realistic to argue an Article 13(b) defence – but they are still an extreme rarity. A 'softer' line is not apparent. For example, within the last month an English judge rejected an Article 13(b) defence, and returned children to Zimbabwe. More children are represented in Hague Convention cases than hitherto – but it is by no means commonplace. The strong objections of a mature child are more likely to result in a non-return – but the objections will be rigorously appraised by an experienced welfare officer as well as by the court, both remaining vigilant for any sign of parental manipulation or indoctrination. Oral evidence perhaps is more frequently allowed – but it is time and issue limited. Some Hague Convention hearings have become relatively lengthy and complex, but these are a tiny minority – most are as truly summary as ever. The English system continues to aim at determination within six weeks, and recently the House of Lords introduced a formal fast-track for abduction cases. And so, for the vast majority of cases, the result will be the same. Undeniably, though, there is a new depth and seriousness about the way Hague Convention cases are approached, and a recognition that some will raise real issues, including of fundamental human rights.

There are of course other issues and changes developing in English Hague Convention work. For example, there is the question (currently in a case pending before the Court of Appeal) as to whether England should continue to apply the well-established worldwide test for 'habitual residence' or the European definition flowing from 'centres of interest' which may be required by the Brussels II revised regulation. International children's cases seem inevitably to produce unending challenges and limitless legal and academic interest, however much nations may strive for reliable and simple comity. Perhaps this is because of the endless and unpredictable variety of factual situations that can and do occur in the lives of individual children and their parents. It is the immediate impact on the lives of these real people that for this advocate makes this work so fascinating, and so important.

Notes

1 Incidentally, substantially pre-dating the comprehensive re-modelling of English domestic law in the currently applicable *Children Act 1989*.
2 The *Family Proceedings Rules 1991*.
3 See for example *Re C (Abduction: Consent)* [1996] 1 FLR 414; *Re K (Abduction: Consent)* [1997] 2 FLR 212; and *Re M (Abduction) (Consent: Acquiescence)* [1999] 1 FLR 171.
4 *In re H (Minors) (Abduction: Acquiescence)* [1998] AC 72, [1997] 1 FLR 872.
5 *Zaffino v Zaffino (Abduction: Children's views)* [2005] EWCA Civ 1012, [2006] 1 FLR 410.
6 See for example *Re O (Child Abduction: Undertakings)* [1994] 2 FLR 349; *Re M (Minors) (Abduction: Undertakings)* [1995] 1 FLR 1021
7 See for example *In Re C (Abduction: Grave Risk of Psychological Harm) [1999] 1 FLR 1145*
8 By the *Human Rights Act 1998*, coming into force on 2 October 2000.
9 [2005] UKHL 40, [2006] 1 AC 80, [2005] 3 WLR 14, [2005] 2 FLR 802, [2005] 3 All ER 291, HL – the 'Convention' in the title being the ECHR.
10 *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619.
11 By the case of *Re T (Abduction: Child's Objections to Return)* [2000] 2 FLR 192.
12 As it did in the case of *Zaffino v Zaffino (Abduction:*

Children's views) [2005] EWCA Civ 1012, [2006] 1 FLR 410.

13 *Council Regulation (EC) No 2201/2003 of 27 November 2003* concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing *Regulation (EC) No 1347/2000* .

14 Except Denmark.

15 Except those who are so young as to make the process impracticable.

16 *C v C (Minor: Abduction: Rights of Custody Abroad*) [1989] 1 WLR 645 sub nom Re C (A Minor) (Abduction) [1989] 1 FLR 403. at 410E.

Patrick C Campbell
Attorney, Oakland, United States of America

Mind the gap when litigating international child custody cases: jurisdictional problems abound

In an international child custody case that the author recently won, the California court was presented with interesting and important issues about jurisdiction that we would all be well to consider when handling such matters. The cooperation between the courts at different ends of the earth was surprising, but also it is disturbing that these important issues are sometimes all too often ignored by the courts. It is encouraging to see that the modifications regarding venue and appeal in the German court system that were brought in a few years after President Clinton made an issue of this, towards the end of his administration, seem to be bearing fruit.

Summary of case

The parties have two minor children, who were five years old and three years old at the time of the trial this past spring. The oldest son was born in Basel, Switzerland, and the youngest was born in San Jose, California. The oldest is a German citizen, and the youngest is a US and German citizen. The parents are German citizens, who were residing in Santa Clara County before the time of their younger son's birth. They moved there in April of 2004 for the father to pursue advancement opportunities with his employer, with whom he worked in Switzerland. The mother found employment in Santa Clara County, California too. The parents separated in September of 2005 and, while there was no court order in place, had been exercising joint legal and physical custody over the children. The custody timeshare was approximately 35 per cent of the time with the father and 65 per cent with the mother.

While the father's initial deployment to California was supposed to last two years, he did well, and his company at the time of the case was sponsoring him for permanent residence in the USA. The parents discussed their options prior to the original return, which would have been in April of 2006, and decided to remain in California. This was in spite of the fact that the parties had separated in September 2005. At that time, the mother consulted with California lawyers and reviewed the dissolution petition, summons and declaration under the Uniform Child Custody Enforcement and Jurisdiction Act[1] (UCCJEA) that must be filed to start dissolution proceedings in California.[2]

The parents discussed settling their issues, which included the possibility of returning to Germany in two to three years. A draft of a settlement agreement was provided to the mother, but she refused to sign it. Subsequently, the mother had her immigrant visa adjusted appropriately and continued to work at her same employer as well, while the father applied for green cards for the whole family. Everything necessary for the green cards was sent to the federal authorities, and they were and are being processed. The parties never reached a final agreement, signed a settlement agreement or agreed to a date certain to return to Germany.

In October 2006, the parties agreed that the mother would fly back to Germany to visit her family and take their sons with her. The mother left California on 16 January 2007 with the children for Germany. She agreed to return to California on or before 8 February

2007 with them. The father signed a form authorising this travel and return. She knew the significance of this form because she had signed one when he travelled with the children earlier that year.

German court proceedings

Only once the mother reached Germany did it become obvious that she did not plan to return to California. After much deceit, she told the father through a letter that he received from her German attorney that she intended to stay in Germany with their children. Her German attorney filed divorce proceedings in Germany that included requests for child custody, visitation and support and he wrote the father that the mother refused to return the children to California. The father retained German counsel and filed a petition with the appropriate German Amtsgericht (District Court) under the Hague Convention on the Civil Aspects of International Child Abduction dated 25 October 1980,[3] (Hague Child Abduction Convention), seeking the children's return. Both the Federal Republic of Germany and the United States of America have enacted this convention into their national laws.[4]

At the same time, the author filed a dissolution petition in California and sought temporary restraining orders for his client, the father, for full legal and physical custody of their sons and declaring that the children's habitual residence and home state were in California. The home state under the UCCJEA is the key term in determining jurisdiction under it and is akin to the habitual residence under the Hague Child Abduction Convention.[5] All of these requested orders were granted by the California Superior Court on an *ex parte* basis within 48 hours. A certified copy of that court's temporary restraining orders with a translation was sent to German counsel, and the process of serving the California dissolution petition and other pleadings on the mother on an expedited basis commenced.[6]

At the time of the hearing before the German Amtsgericht, the Richter (Judge) told the mother that she was holding the children illegally and should enter into an agreement to return the children or she would be ordered to do so. The parties entered into a stipulation, and the mother returned with the boys. The stipulation before the German Amtsgericht provided that the father would drop his request for supervised visitation and that the parties would share physical custody of the children with a 50/50 per cent timeshare upon their return to California. This was all made part of the written record of that court, and a conforming written order adopting the parents' stipulation was signed by the German Richter and entered by the Amtsgericht clerk. Of course, as most of us know, the German Amtsgericht had no authority or jurisdiction under the Hague Child Abduction Convention to enter such substantive child custody and visitation orders. In fact, it is the country of the children's habitual residence that does.

Initial California court proceedings

When the mother returned to California with the children, she reneged on her promise regarding the equal timeshare in the German Amtsgericht stipulation. Even though the father kept his end of the agreement and requested that a 50/50 per cent timeshare be implemented, the California Superior Court returned the parties to the status quo prior to the initiation of dissolution proceedings, although the father was granted sole legal and physical custody. Everyone agreed that the German Amtsgericht order was not enforceable in California because it lacked jurisdiction. At that hearing, however, the court did not grant the mother the timeshare that she claimed was in place prior to the abduction. It granted the father extended weekends with the boys every week and allowed the mother to have the children during the week. This resulted in the physical custody timeshare of approximately 43 per cent of the time with the father and 57 per cent with the mother.

The father had many problems contacting the children during their abduction in Germany. At the German court hearing, the mother's mother told the father that she could kill him in front of the oldest son. The mother claimed that she got bad legal advice from her German attorney about the courts there having jurisdiction in the child custody and dissolution of marriage proceedings. At the August 2007 hearing on the father's temporary restraining orders regarding the child abduction and related issues, the father again requested that he have a 50/50 per cent custody timeshare with the children. The mother continued to refuse; so in the

interests of compromise, a settlement was reached at that hearing that provided, among other things, that the current physical custody timeshare stay in place.

The mother said that she still wanted to return to Germany with the children, so the parents agreed on a court-appointed expert to conduct a child custody evaluation and to share the costs for this evaluation. Only once the court expert presented her custody evaluation and report in December 2007, in which it was recommended that, if the parties live near one another, there should be a 50/50 per cent custody timeshare with the children, did the mother agree to the same.

The mother said for some time that she would return to Germany with or without the children, and the court expert's report included two scenarios that also contained recommendations should the California Superior Court award physical custody to the parent who stays or leaves. Her custody evaluation clearly stated that losing contact with the father, if custody of the children were awarded to the mother and she moved to Germany, outweighed any gain in family contact that the children would have by living near their grandparents in Germany. It also stated that the mother could not always separate her own needs from those of the children and denied the father's importance in their children's lives. In her opinion, the father had also been the one who is more willing to compromise. And, also given the problems in the past, she recommended that the father continue to have sole legal and physical custody.

The parents had continued to care for the children on an equal basis since their return from the abduction. They communicated about the daily issues involving the children. However, in January 2008, the mother told the father that she had informed the children that she was relocating to Germany as she preferred to live there and she would become ill if she stayed in the US. The father wanted to ask advice from a psychologist to ensure this message was delivered appropriately and to be able to understand any practical details to allow the parties to answer the children's questions. The mother refused to take any notice of his concerns and told the children alone without any concern for the impact this would have on them. Then, on 26 February 2008, during a court hearing, to modify support due to her leaving, the mother suddenly decided to stay until the trial date. Her change in plans and conflicting information provided to the children caused such stress and trauma for them that they were both seeing their own therapists three times a week each.

California child custody trial

Because the mother had posed a danger to the health, safety and welfare of the children by moving them to and retaining them in a foreign country without the father's permission, the court found that the father should continue to have sole legal custody. She was unable to make decisions that were in the best interests of the children.[7] The health, safety and welfare of the children are the paramount policy of the State of California.[8]

If the mother were to stay in California, there would be joint physical custody.[9] The judge noted that it was only after the court expert's custody evaluation was completed that the mother agreed to create a custody timeshare plan that would ensure that the father had their boys equally and to ensure the 'frequent and continuing contact' that the law requires. The mother's refusal to accept a 50/50 per cent timeshare over the past year, after the parents agreed to do this with the German Amtsgericht once she returned to California, or share holidays or non-school days with the father, was not only unreasonable, but also showed that she is not the parent who would promote contact with the other.[10]

In any move-away (or relocation) case, the court must look to the detriment to children. When the California Supreme Court dealt with the modification of a prior custody order recently in a move-away case, it re-emphasised that one of the factors that the court must look to is the effect that the move-away (or relocation) would have on the non-moving parent's right to frequent and continuing contact with the children and the detriment that this might have on the children.[11] Also, the California Superior Court recognised that there is a strong public policy to promote stable custody arrangements in California.[12] It was the mother's desire to return to Germany that caused the instability. Based on these facts, the California judge awarded the father sole physical custody as well.

The difficult jurisdictional problems

In *Marriage of Condon*, a California court of appeals had already dealt with the myriad issues present in an international custody

case. The non-moving parent's right to frequent and continuing contact with the children and the detriment that this might have on the children was also found to be essential by the court of appeals in this case.[13] There, the mother was allowed to move with the children to Australia by the trial court. On this subject, the court of appeals held: 'The court's award of joint legal and physical custody of the minor children to [the parents] was technically feasible under its order allowing [the mother] to move away to Australia. The question remains whether it was in the children's best interest.'[14]

In that case, the mother had abducted the children to Australia, started dissolution proceedings in Australia and only returned with the children after Hague Child Abduction Convention proceedings were brought in Australia. It was important that the trial judge took this into consideration because 'the prior behaviour of the parties directly bears on custody determinations.'[15] The trial judge felt that the balance was tipped in favor of the mother moving to Australia with the children and granted her request to return with the children. However, '[r]ecognising the acknowledged importance of maintaining a meaningful and ongoing relationship between [the father] and his children across some 8,000 miles, the trial court imposed conditions which made that goal both logistically possible and financially feasible.'[16]

Jurisdiction issues are often the most difficult and yet most essential to any international custody case.[17] For example, if the California court granted joint legal custody, this would mean that the mother would have to be served under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters dated 15 November 1965[18] (Hague Service Convention), which has been ratified by the United States of America.[19] This would mean that any disagreement about school, religion, medical treatment, etc would be delayed and costly if there were no agreement between the parties.

In our case, because the mother does not have an attorney after the trial, the father would have to serve the order to show cause on her directly for child custody and visitation modification motions.[20] Article 10(b) and (c) of the Hague Service Convention permit service of judicial process personally on residents of a foreign country by being served 'directly through the judicial officers, officials or other competent persons of the State of destination'. Because the mother, a German citizen, lives in Germany, the father would have to do this because, when the Federal Republic of Germany ratified the Hague Service Convention, it refused to permit service of judicial process within its territory by mail.[21] The pleadings must be translated into German as well.[22] Improper service of California judicial proceedings on a German national that does not comply with the Hague Service Convention is insufficient to establish jurisdiction, and a motion to quash the service must be granted. Actual notice of the proceedings is not sufficient.[23]

In *Marriage of Condon*, the court of appeals held:

> 'In our view, a trial court confronted with a parent's request to relocate a child to a foreign jurisdiction should consider all three of the [below] factors, in addition to those affecting a domestic move-away.
> First, the cultural problem. In some cases, to move a child from this country to another is to subject him or her to cultural conditions and practices far different from those experienced by American citizens or to deprive the child of important protections and advantages not available in the other country.
> Second, the distance problem. Except for Mexico or Canada, foreign relocation cases in this state inevitably involve a move to a different continent - typically 8,000 miles or further and eight or more time zones away from California. With those great distances come problems of expense, jet lag, and the like. For a person of average income or below, an order relocating his or her child to a faraway foreign country is ordinarily tantamount to an order terminating that parent's custody and visitation rights.
> Third, and most difficult, is the jurisdictional problem. California court orders governing child custody lack any enforceability in many foreign jurisdictions and lack guaranteed enforceability even in those which subscribe to the Hague Convention on the Civil Aspects of International Child Abduction. Thus, the California courts cannot guarantee any custody and visitation arrangements they order for the non-moving parent will be honoured.'[24]

German jurisdiction

The third and most difficult problem, continuing jurisdiction over the children when they are in Germany, is the focus of this article. The client and the author share the court of appeals' view. There is a strong chance that, once the mother has the children in Germany, she could argue that its courts have jurisdiction under Article 13(b) of the Hague Child Abduction Convention, which provides that a grave risk of psychological harm for the children is a defence to a return order. She could also use the Hague Convention concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors dated 15 October 1961 to assert jurisdiction.[25] (Hague Protection of Minors Convention).

Both children are German citizens, and this is sufficient under the Hague Protection of Minors Convention, which the Federal Republic of Germany has ratified, but not the United States, for German courts to take jurisdiction and modify foreign courts orders.[26] Even though the California Superior Court will enter a final judgment regarding child custody and visitation here with whatever conditions it deems appropriate, based on a proper assertion of its jurisdiction and despite the fact that the youngest son was born in the United States, a German Amtsgericht can accept jurisdiction of the case because he is a dual citizen of the United States and Germany. Because the oldest son is a German citizen, this would be true for him too.

Article 1 and Article 13 of the Hague Protection of Minors Convention give the courts of a country jurisdiction to enter orders concerning measures to protect children where their habitual residence is. Clearly, the children's habitual residence would change to Germany if the mother were allowed to move the children to Germany or if they resided there for longer periods of time. Also, as the court notes in *Marriage of Condon*, the protections of the Hague Child Abduction Convention are only applicable for one year after the child has been removed from his or her habitual residence.[27] Further, there is no provision in the German legal system that provides for the registration of child custody and visitation orders as in Australia; only the termination of the marital status is registered with the appropriate state authority to show that the marriage has ended.

A German court would have further support for its jurisdiction under the German Law concerning Voluntary Jurisdiction.[28] Section 16a of this law provides that recognition of foreign judgments and orders is not required if the courts of the other state would not have had jurisdiction under German law. Here again, if the child has dual citizenship, a German Amtsgericht could have exercised such jurisdiction and entered similar orders, so the German Amtsgericht could recognise the California court's order. This was further supported by section 35b of that German Law concerning Voluntary Jurisdiction, which provides that German Family Courts always have jurisdiction when the children are German citizens, which is the case for both sons.

Article 2 of the Hague Protection of Minors Convention provides that the court is to apply its domestic law in reaching decisions and that it can change provisions as well. Thus, a German Amtsgericht would recognise the California court order regarding custody ordered in California, but also would have the jurisdiction to modify that order and could, granting the mother sole legal and physical custody and providing the father could only have supervised visitation in Germany if it felt that this was in the children's best interests. The court could do this under its general jurisdiction under section 1696 of the German Civil Code.[29] This section also gives it authority to act to modify child support orders if that is in the child's best interests.

California jurisdiction

While German courts more regularly recognise US custody decisions and return children under the Hague Child Abduction Convention, they still aggressively assert jurisdiction once the child's habitual residence has changed to Germany. This is especially true when German citizens are involved. This term and the child's best interests are then subject to the determinations of a German judge, over which the other parent has no control, and the added cost of litigation in another continent.

The UCCJEA would not give the California courts continuing jurisdiction if the mother were granted physical custody and the children were moved to Germany. Section 3421(a)(1) provides that the courts of this state are competent to decide child custody matters if this state was the home state of

the child within six months prior to the commencement of the proceedings and the child is absent and a parent continues to reside in this state, which would be the case. Section 4321 (c) sets forth that the physical presence of the child in the state is not required for the court to make a custody determination. And, under section 3405, foreign countries are to be treated as other states of the United States under the act.

Also, the parties cannot stipulate to the jurisdiction of the court. It is either present or it is not. Even though many court orders and marital settlement agreements include such provisions, they are not enforceable. Even the UCCJEA provides that a court can lose jurisdiction once the children have established contacts with another state. Section 3421 (a) (2) provides a further basis for jurisdiction in a state if the child and one parent have significant connections with this state and there is substantial evidence in this state concerning the minor child. Here, the opposite would be true if the children were in Germany. Thus, the California courts would lose jurisdiction once the children had established their habitual residences in Germany, and the German courts can modify the California judgment and orders as they see fit, even if they chose to recognise them.

There is a very real danger of the California court losing jurisdiction over this case. The mother is a German citizen and so are the children. If she had them in Germany for a sufficient length of time or found some excuse about their welfare and safety, she could petition a German Amtsgericht to take jurisdiction and modify this court's orders. 'The exclusive method of determining subject matter jurisdiction in custody cases in California is the Uniform Child Custody Jurisdiction [and Enforcement] Act (UCCJEA). The jurisdictional requirements of the UCCJEA must be satisfied whenever a California court makes a custody determination by initial or modification decree.'[30]

Pursuant to section 3421, there are four alternative bases to exercise subject matter jurisdiction and make an initial child custody determination: 1) this is the home state of the child for at least six months before the proceedings commenced, 2) significant connections exist with and evidence is available in this state, and other states refuse jurisdiction, 3) this state is found to be a more convenient forum, or 4) no other state has or will assume jurisdiction. A home state is 'the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.'[31] An initial determination 'means the first child custody determination concerning a particular child.'[32] Physical custody 'means the physical care and supervision of a child.'[33]

The father could not invoke section 3421(a) to justify the determination of physical custody because its requirements are not met. California would not be the home state of the two minor children because they would have moved to Germany. Thus, section 3421(a)(1) does not apply. Furthermore, section 3421(a)(2) can be excluded because the children would not have any connection to the State of California except for the father's presence here, and there would be no substantial evidence available in this state concerning the children's care, protection, training, and personal relationships. Finally, section 3421(a)(3) and (4) would also not be a basis for subject matter jurisdiction because the appropriate court in Germany would have had jurisdiction and did not decline to exercise it.

Additionally, even if the California court could exercise jurisdiction, it should decline to do so when the court here is not a convenient forum. Here, both children would be raised in Germany, the two children lived most of their lives together, they are going to school there, all their relatives and friends live around their residence, except their father, and all their health care providers would be located in Germany. These facts would show that the children had only limited contact with the State of California and not the substantial connections required under the UCCJEA.

The UCCJEA requires that, '[e]xcept as otherwise provided in subdivision (c), a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this part must be recognised and enforced… .'[34] 'Our trial courts must act with cautious restraint when jurisdiction is also pending and being exercised elsewhere. Clearly, as the aim of the Act is to promote cooperation in the best interest of the child, [this] court's refusal to decline jurisdiction on the basis of the [foreign] court's failure to stay its proceedings and to communicate cannot be upheld.'[35] Germany's child custody laws do not violate fundamental human

rights, so the stated exception does not apply.

The court of appeals in *Marriage of Condon* found that the trial court had acted properly by requiring that the mother obtain a bond before she was allowed to have the children in Australia and be required to contribute to a travel expense fund from the spousal and child support payments that would facilitate the added expense of visitation with the children. These are the types of things that the court of appeals found essential in upholding in part and remanding in part the trial court's decision in that case to ensure that the jurisdictional issue is properly addressed. All the evidence and legal authority showed that the California judgment would not be recognised in Australia; however, the trial court had not addressed this issue of retaining jurisdiction.'[36]

One option would be to have the court enter personal restraining orders against the parents, who are parties to the family law litigation, prohibiting them from litigating any issues related to child custody and visitation in a foreign jurisdiction. However, 'enjoining proceedings in another state requires an exceptional circumstance that outweighs the threat to judicial restraint and comity principles.'[37] This so-called 'anti-suit injunction' is applicable in commercial litigation involving foreign nationals. 'The parties need to claim the facts of this case establish… exceptional circumstances that outweigh notions of international comity and judicial restraint.'[38] Specifically, the courts have recognised that the following exceptional circumstances may apply: 1) the violation of constitutional rights, 2) the protection of the trial court's jurisdiction and the effectiveness of its rulings and 3) the protection of important California public policies.[39] Even though these are all self-evident in child custody and visitation proceedings, no reported case in California has applied the 'anti-suit injunction' in a family law proceeding.

Conclusion

The California judge denied our request for a bond. However, in order to ensure the California Superior Court orders will be recognised and enforced in Germany, the California judge required that the mother register the California custody and visitation judgment with the German Amtsgericht before any travel for visitation in Germany could occur. Visitation was to be for two weeks during the Christmas/New Year holidays and ten weeks during the school's summer vacation. While there is no such legal basis under German law for a German Amtsgericht to do this, the Richter who heard the Hague Child Abduction Convention petition in Germany did just that. Thus, she again acted beyond the scope of her jurisdiction, much as she did when the first stipulation and orders were entered concerning a 50/50 per cent custody timeshare.

Based on the advice of German counsel, the visitation was to be allowed to proceed in Germany. Obviously, it is in the children's best interests to have contact with their mother who did in fact return to Germany. The fact that the German Richter, who would hear a second Hague Child Abduction Convention petition in Germany because the case is venued there, was the same one as for the first petition would provide a speedy remedy if there were a second unlawful retention. Also, the mother was clearly warned by the California court that any such action on her part would lead to her losing any custody and visitation rights. In our imperfect world, this is about as good as it gets. Still, one must be careful to mind the gaps in jurisdiction and a court's seeming willingness to overlook or mistake its lack of competence in such international child custody cases. In any such case on a domestic or international level, only once the best interests of the children are paramount can one be assured that these gaps do not cause detriment to the children.

Notes

1 Cal. Fam. Code §§3400 *et seq.*

2 Family Law is controlled by the states under the U.S. Constitution because these specific powers were not granted to the federal government therein. In order to clarify the interaction between the states in such areas in which they have authority to act, a uniform law commission was established. One of its proposed uniform laws is the UCCJEA, which seeks to clarify jurisdictional issues in child custody matters such as this. These proposed uniform laws must be enacted by the individual state legislatures in order to be applicable. California and forty-five other states have enacted the UCCJEA, sometimes with modifications, into their local laws.

3 19 Int. Legal Materials 1501.

4 See Hague Conference on Private Int. Law, status table for Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, **http://hcch.e-vision.nl/index** [German ratification on 27 September 1990 & USA ratification on 29 April 1988].

5 See below "California Jurisdiction", p. 6, notes 30-34.

6 See below "The Difficult Jurisdiction Question", pp. 4-5, notes 19-22. Because of the emergency circumstances and due to the fact that I have continuing contact with the

German authorities who are charged with serving process on German citizens, we were able to complete service within 3 weeks. I have had this service of process take up to 3 months before.

7 Cal. Fam. Code §3006 & §3020(a).
8 Cal. Fam. Code §3020(c).
9 Cal. Fam. Code §3006 & §3020(a).
10 Cal. Fam. Code §3040(1)(a).
11 *Marriage of LaMusga* (2006) 32 Cal.4th 1072, 1087-89, 12 Cal.Rptr.3d 356.
12 *In re Marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1344, 33 Cal.Rptr.2d 871.
13 *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 551-52, 73 Cal.Rptr.2d 33.
14 *Ibid.* at p. 552.
15 *Ibid.* at p. 553.
16 *Ibid.* at p. 553.
17 *Ibid.* at p. 547-50.
18 Treaty No. 9432, 1969 U.N.T.S. 163.
19 'If the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies.' *Volkswagenwerk Aktiengesellschaft v. Schlunk* (1988) 486 U.S. 694, 731, 108 S. Ct. 2104. 'By virtue of the Supremacy Clause, U.S. Const., Art. VI, the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies.' *Ibid.* at p. 731.
'The only method of service under California law which does not require the transmission of documents abroad, and consequently does not implicate the Hague Service Convention, is service of summons by publication where the party's address remains unknown during the publication period despite the exercise of reasonable diligence.' *Kott v. Superior Court* (1996) 45 Cal.App.4th 1126, 1136, 53 Cal.Rptr.2d 215.
20 Cal. Fam. Code §215.
21 Ratification, 27 April 1979, 1979 U.N.T.S. 412, ¶4.
22 *Ibid.* ¶1.
23 *Dr Ing H.C.F. Porsche A.G. v. Superior Court* (1981) 123 Cal. App.3d 755, 760-62, 177 Cal.Rptr.155.
24 *Marriage of Condon*, 62 Cal.App.4th at pp. 546-47.
25 1969 U.N.T.S. 145.
26 See Hague Conference on Private Int. Law, status table for Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants, **http://hcch.e-vision.nl/index** [German ratification on 19 July 1971].
27 *Marriage of Condon*, 62 Cal.App.4th at p. 556.
28 Gesetz über die Angelegenheit der freiwilligen Gerichstbarkeit, § 16 - §35.
29 Bundesgesetzbuch, §1696.
30 *In re Marriage of Newsome* (1998) 68 Cal.App.4th 949, 955-56, 80 Cal.Rptr. 2d 555.
31 Cal. Fam. Code §3402(g).
32 *Ibid.* §3402(h).
33 *Ibid.* §3402(n).
34 *Ibid.* §3405(b).
35 *Plas v. Superior Court* (1984) 155 Cal.App.3d 1008, 1021, 202 Cal. Rptr. 490.
36 *Marriage of Condon*, 62 Cal.App.4th at p. 562.
37 *Advance Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal.4th 697, 708, 128 Cal.Rptr.2d 172.
38 *TSMC North America v. Semiconductor Mfg. Intern. Corp* (2008) 161 Cal.App.4th 581, 591, 74 Cal.Rptr.3d 328.
39 *Ibid.* at p. 591-92.

The system of conflict of confessional laws in Lebanon

Chawkat Houalla
Attorney, Adib & Houalla, Tripoli; Islamic Interest Officer & Website Officer, Family Law Committee

Lebanon, a small country of the Middle East[1] is, unlike its neighbouring countries where Islam is predominant and Sharia is the basic source of law, a country where all religions are recognised equally. The Lebanese constitution in its Article 9 stipulates that: 'The freedom of conscience is absolute. With compliments to God, the State respects all confessions and guaranty and protects their free exercise on the condition of not interfering with Public policy. It guarantees also to all populations, to whatever rite they belong, the respect of their Personal Statute[2] and their religious interest[3]'.

Ten years after the promulgation of the Lebanese constitution in 1926, the French High Commissioner, using his legislative powers, promulgated Decision no 60 LR[4] of 1936, in which were enumerated the historical communities in Lebanon. Nowadays. there are 18: one Jewish community, namely the Israeli community of Beirut; five Islamic communities, namely the Sunni, the Jaafari, the Ismaili, the Alawi and the Druze[5] ; and 12 Christian communities, namely the Maronite, the Greek Orthodox, the Greek Catholic, the Syrian Orthodox, the Armenian Gregorian (orthodox), the Oriental Assyrian Orthodox, the Evangelican, the Catholic Armenian, the Catholic Syrian, the Kaldean, the Latin and the Copt Orthodox[6]. In Lebanon, family matters such as marriage, its consequences and its obligations are left within the jurisdiction of the religious communities' authorities, each one of them applying a special religious law to its followers.

For example, all family matters of the people belonging to the Muslim Sunni

community are within the exclusive competence of the Sunni Sharia courts, who are affiliated to the *Dar El Fatwa,* the official religious authority for the Muslim Sunni community. On the other hand, the family matters of Maronite Christians are within the competence of the spiritual courts affiliated to the Maronite Patriarchate, being the official recognised religious authority for the Christian Maronite community. Due to this religious system of family law, almost 18 different religious jurisdictions applying 18 different laws are in conflict. This is why the Lebanese legislator had to interfere several times, starting with the above-mentioned Decision no 60 LR, to draw clearly the limits of competence of these respective religious courts and the way to resolve any conflict that might occur between the different spiritual and sectoral courts and between spiritual courts or sectoral courts among themselves. This system of conflict is called 'the Intercommunity Law'. Michel Shiha, in an article published in the newspaper *Le Jour,* on 30 July 1947, and while explaining the above-mentioned Article 9 of the Lebanese constitution, said: 'that the personal statute system in Lebanon is a regime of federal community law… the diverse Lebanese communities constitute between themselves a federal group having the same powers and same autonomy'[7]. It is widely recognised by Lebanese courts, even by the Lebanese Supreme Court, a secular court of the civil judiciary which has some limited competence in the matters of family law, that 'the Lebanese system of family law gives the priority to the religious system'[8].

In this article we will try to give a general overview of this special, if not unique system. The principle is that every religious authority and its affiliated court are competent over the family matters of the members of its community. Things would be simple if families were always composed of persons from the same community. What if a family is composed of persons from different religious communities? What if one of the spouses is a foreigner? What if one or two of the spouses change their community to adhere to another one? What if the spouses contracted a civil marriage abroad?

The Lebanese judiciary had to face these problems, among others. In practice, two kinds of conflicts can arise: the first one related to what is called in Lebanon the *mixed marriage*, the marriage between persons from different communities; the second one is more related to mobility conflicts, especially the ones occurring because of a change of community or nationality.

Mixed marriages

A mixed marriage is a marriage between a man and a woman from different communities. They can be from different religions, such as a marriage between a Christian and a Muslim, or from the same religion but with different rites. It is also considered to be a mixed marriage where the marriage is celebrated between a Lebanese and a foreigner.

The spouses are from the same religion but from different sects

This is the case of two Christians, a Maronite marrying a Greek Orthodox, or the case of two Muslims, a Sunni marrying a Jaafari (*Shi'a)*. Even if the solutions for this conflict have different legal sources, they remain almost the same. For the non- Muslim communities, Article 15 of the Law of 2 April 1951 stipulates that 'mixed marriages shall be concluded as a matter of principle in front of the spiritual authority to which the prospective husband belongs to unless they otherwise agree by choosing the spiritual authority of the prospective wife …'. Article 14 gave the spiritual authority organising the marriage the competence to oversee this marriage and its consequences. On the other side, Article 61 of the law organising the Sunni and Jaafari Sharia courts states that 'the religious court of the rite (sect) of the husband is competent to grant the authorisation to enter into marriage and to look over disputes related to marriage and separation and what is related to them if one of the spouses is a Sunni and the other a Shi'I'. Article 62 gives the right for the spouses to choose the religious authority of the community of the prospective wife.

The spouses belong to different religions in Lebanon

A Muslim man can marry a Christian or an Israeli. These marriages, by way of practice, are usually organised by Sharia courts and never in front of the Christian spiritual courts, since they refuse the marriage of a Christian with a non- Christian (unless the non-Christian converts to Christianity). As the spiritual courts refuse to organise

the marriage of a Christian and Muslim in church, the marriage of a Muslim man and a Christian woman can be concluded in Lebanon only in front of the Sharia courts. In this last case, by application of its law of competence and especially Article 61 above, the marriage and its consequences fall into the jurisdiction of these courts who apply the family law applicable to Muslims. The other option left for the mixed couple is to contract a marriage abroad in the civil form.

Marriage contracted abroad in the civil form between two Lebanese or between a Lebanese and a foreigner

Many couples planning to marry (and especially where a difference in religion exists) do not want a religious marriage. The reason may be that it is impossible to celebrate such a marriage without a forced change of faith (as in the case of a Muslim who wants to marry a Christian before the Christian spiritual courts), or because the future spouses want their marriage to be under the auspices of a neutral jurisdiction, or perhaps simply because of a lack in faith.

The Lebanese legislator on several occasions opened the way to the recognition of civil marriages concluded abroad[9]. The main texts regulating this matter are Article 79 of the Code of Civil Procedure and Article 25 of Decision no 60 LR. The first one clearly gives competence to the civil courts to judge over disputes arising from 'a marriage concluded in a foreign country between two Lebanese or a Lebanese and a foreigner according to the civil form as decided in the laws of that country', the applicable law being, according to Article 25 of Decision no 60 LR, the civil law, in case the personal statute system to which the husband belongs does not recognise this form of marriage nor its consequences[10]. Until the promulgation of a law instituting the civil marriage in Lebanon, the applicable civil law is the *lex loci celebrationis,* the law of the place of celebration[11].

The only exception to this rule of conflict of jurisdiction is when both spouses are Muslim and at least one of them is Lebanese. In this last case, the competence of the Sharia courts is reserved. In an interesting case where the Sharia courts declared incompetence to look over a dispute arising from a civil marriage, the Third Chamber of the Beirut Civil Court of Appeal, with authority, declared that 'the declaration of incompetence of the Sharia courts to look over a case do not give this competence to the civil courts…', and that 'in case a marriage is concluded in a foreign country in the civil form between two persons both belonging to a Muhammadi (Islamic) community and that at least one of them is Lebanese, the competence to rule over the disputes arising from this marriage is granted to the Sharia courts excluding the competence of the civil jurisdictions[12]'.

But the real difficulty occurs when two marriages are in conflict: a civil marriage abroad preceded or followed (the usual case) by a religious marriage concluded in Lebanon or in the foreign country.

Some civil courts recognised for themselves a competence to rule over such disputes, arguing for example that 'the religious courts, being unable to apply any other law than their proper laws, the religious laws, cannot decide the dissolution of a marriage celebrated outside the scope of the religious law'[13]. This position was strongly criticised by authorised scholars such as Pr Gannagé, who in his article about the marriages of Lebanese celebrated abroad in both civil and religious forms[14] considered that the religious celebration of marriage between Lebanese shall exclude the application of Article 25 of Decision no 60 LR, and that by concluding voluntarily a religious marriage the parties show sufficiently that the religious law is not against their convictions.

Other arguments were raised in favour of the competence of the Lebanese civil courts and the law of celebration, especially when one of the spouses is a foreigner. For example, the Third Chamber of the Lebanese Court of Appeal decided in 2005 in the case *Talin vs. Honein* that the civil courts are competent to rule over a case involving two marriages between a Lebanese Maronite man and a German woman (Christian), the first one being celebrated in the civil form in Germany and the second one in the religious form in front of the Catholic Church in Germany also. The civil marriage was the one registered by the parties in the official registries. The court raised, as a motivation for the solution it took, Decision no 109 LR of 1935, that expressly gave the civil courts competence over family cases involving one foreigner, where at least one of the couple is a citizen of a state where family matters are subject to civil laws. Article 10 of Decision no 60 LR, by which the Lebanese legislator subjected foreigners to their national law even

if in their country they belonged to a religious community recognised in Lebanon; Article 79 of the Code of Civil Procedure, which expressly gave competence to civil courts when a marriage is concluded in a foreign country in the civil form by two Lebanese or by a Lebanese and a foreigner (ignoring the fact that this marriage was followed by a religious marriage), and at last pushed forward an argument taken from the rule of autonomy that the parties, by registering only their civil marriage, have shown their intention to have the civil rules applied to their marriage[15].

The Court of Cassation, the Supreme Court of Lebanon replied quickly to this decision, approved by some[16] and disapproved by others[17] and annulled the decision of the Court of Appeal, deciding that the competence of the civil courts, according to above-mentioned Article 25 of Decision no 60 LR, is exceptional and is subject to the condition that the husband's system of personal tatute does not recognise this form of marriage and its consequences. The Court decided that the cause behind the recognition of the civil foreign rules is waived if the civil marriage is doubled by a religious marriage, opening the way for the general rule of priority of the religious system which constitutes the base of the family system in Lebanon to be applied. Lately, in 2007, the same chamber of the Court of Cassation confirmed its jurisprudence. So the wide majority of jurisprudence and doctrine in Lebanon considers that, in the case of two marriages concluded, one in the civil form and the other in the religious form, the religious rules shall be applicable to the substance of the dispute concerning the marriage and its consequences, and by way of consequence the concerned religious court is considered to be competent.

One last interesting situation that the Lebanese courts had to face is the situation where three different marriages are in conflict, a civil marriage, and two religious marriages celebrated in front of two different religious authorities. In a very interesting decision,[18] the Fifth Chamber of the Court of Cassation decided that the application of a religious law is premised on the existence of one law applicable over all the relations, since it is impossible to apply multiple and contradictory laws over the same dispute, and that neither the laws nor the practice offered any criteria to prefer one religious law over the others. It concluded that the applicable law shall be the law of celebration (of the civil marriage) and the competent court shall be the civil court according to Article 79 of the Code of Civil Procedure.

The impact of the change of religion on the rules governing the consequences of the marriage

Lebanon is a country where conscience is free. A person can move freely from one religion to another. All religious communities are equal in rights and obligations.

Therefore it is not rare to see persons moving from a religion to another, sometimes because of faith, but much more in order to search for a religious system that suits them in their family matters, especially in matters related to marriage and its consequences such as divorce, alimony or custody of children

This case can be described as a case of mobility conflict, which is usually regulated by the private international law rules of each country. Basically, in civil law systems, the mobility conflict is resolved by application of the transitional rules which lead for example, to apply the French law to a family who acquired French nationality. The question is whether these rules of mobility conflict are applicable to the cases where there is a change of religion?

Two major texts claim applicability in the case of change of religious community. The first one is Article 23 of Decision no 60 LR of 1936 and the second is Article 14 of the Law of 2 April 1951 determining the competence of the Christian and Israeli spiritual authorities.) A distinction whether the change of religion is unilateral (1), operated by one of the spouses only, or operated by both spouses (2) is to be made.

1) In the case where the change of religion is unilateral, as per Article 23 paragraph 1, when only one of the spouses converts from a community to another, the marriage and its consequences stays under the scope of application of the law under which the marriage was celebrated. In other words, the changing spouse cannot impose his new situation on his family in general and especially not on his spouse. In consequence, the courts affiliated to the authority that celebrated the marriage retain competence and will apply its specific substantive religious rules to the marriage itself and to all family matters related to this marriage, such as the validity of or the dissolution of the

marriage, maintenances and alimonies, visitation rights, custody of children, matrimonial obligations, succession.[19] For example, in 1997, the plenary assembly of the Lebanese Court of Cassation decided that the custody of a child is a consequence of marriage and that the competent court to determine this matter is the tribunal affiliated to the religious authority that celebrated the marriage (the Maronite Church), even if the father changed his religion (to Muslim)[20] on the ground of pre-mentioned Article 14 only. The Court of Cassation decided to annul a decision of the Sunni Sharia court in Mount Lebanon that accepted its competence, granted the custody of the children of the marriage to the father and decided that the father is not obliged to pay alimony for his children.

2) As a matter of fact, Sharia courts refuse to apply the rules stated in Article 23 paragraph 1, considering that Decision no 60 LR is not applicable to Muslims since 1939. This is why Sharia courts continue to give effect to the unilateral change of religion from Christianity into Islam, as in the case discussed above. The Sharia courts thus derogate from the constant jurisprudence of the Plenary Assembly of the Court of Cassation who consider that Article 23 and Article 14 of the Law of 2 April 1951 are applicable, and censure the quasi-totality of the decisions of the Sunni Sharia courts by depriving them of their enforceability and by annulling them as rendered by a non-competent judicial authority[21].

3) If both spouses leave their community, then their marriage, its consequences and the obligations related to it fall under the scope of the new community's system, commencing on the date the change of community is transcribed in the official public registries of the State. This solution is clearly given by Article 23 paragraph 2 of Decision no 60 LR of 1936, and is constantly repeated by the Lebanese Court of Cassation. The declared reason behind this determination is that as the marriage is a contract, the spouses should be able to change the rules applicable to that contract jointly.

Even if this solution seems to be obvious, in practice solutions are not so easy. A number of arguments were raised against the applicability of Article 23 paragraph 2, which can be grouped in two categories.

The first category of arguments used the theory of fraud. Some decisions rendered in the fifties used the *fraus omnia corrumpit* rule to decide the applicability of the *lex loci celebrationis* and the competence of the authority that celebrated the marriage. For example, in a very well-known decision of 1955[22], the Court of Cassation (the Lebanese Supreme Court) decided that the competence of the authority in front of which the marriage was celebrated should be maintained even if both spouses converted their religion, when this conversion constitutes a fraud to the law. In that particular case, the facts were shocking: the spouses who converted from Maronite (a Catholic sect that does not recognise divorce) to Islam filed for divorce a few days after the transcription of the community transfer in the registries. This argument based on the theory of fraud was, if not directly, indirectly set aside by the decisions of the Court of Cassation, sometimes based on lack of proof, sometimes- and this is relevant- because the fraud was committed by both parties who cannot benefit from their own fraudulent actions in their recourse[23].

The second category of arguments uses the Law of 2 April 1959. According to Justice Monah Mitri,[24] Article 14 of the Law of 2 April 1951, stipulating a general competence of the tribunal affiliated to the religious authority in front of which marriage was celebrated, is applicable to all communities in Lebanon. For him, this authority is always the competent authority over the disputes even if one or both spouses converted or changed their religion. He based his opinion on two facts. The first fact is that, since 1994, the Plenary Assembly of the Court of Cassation refers only to Article 14 of the Law of 1951 to decide about the competence of the celebrating authority and its religious substantial rules, without any reference to Decision no 60 LR and its Article 23[25]. It is to be noted that these decisions to which Justice Mitri refers concern unilateral changes of religion. The second fact is based on the effect, the consequences, given by Article 19 of the Law of 1951 to the change of nationality, considering that it does not produce any consequence over the rules and procedures stated in that law and among them the rules of competence and conflict of jurisdictions. So the religious courts and their substantial rules applicable to family disputes cannot lose their competence by way of a changed nationality of one or both spouses.

Conclusion

To conclude I shall affirm that the reader should not forget that the inter-community section of the Lebanese legislation is one of the most difficult, since it is mostly technical and borrows its rules from more than one discipline of the law, but mostly from the techniques of conflict of laws and jurisdiction used by Private International Law. In my opinion, things would be simplified if a facultative civil marriage were introduced by the Lebanese legislator. It would help a lot in matters of mixed marriages and in cases where more than one marriage is in conflict. It will reduce the number of civil marriages celebrated by Lebanese abroad and will offer to the Lebanese courts a local law to be applied to those Lebanese married in the civil form as their personal law, more understandable by the Lebanese judiciary, and also by the population.

Notes

1 10,452 km2.
2 By 'Personal Statute' the Lebanese constituent meant statutes, laws applicable to religions and rites.
3 This text was voted at the time of the French mandate in 1926 and is still valid today. France governed Lebanon between 1918 and 1946. During this period of mandate the French High Commissioner had legislative powers. He had the power to promulgate decisions having the power of law.
4 LR means '*Loi réglementaire*', or 'Regulatory Law'.
5 The Islamic communities were removed from the area of application of Decision no 60 LR in 1939 but are still considered to be, by their special laws, Lebanese historical communities.
6 Added to the addendum of the decision as a recognised community in 1996.
7 As cited by Me Ibrahim Traboulsi, 'The latest developments in matters of personal statutes in Lebanon and Egypt' *in Colloques du Cedroma*, Vol. I, 2004, p. 215.
8 *C.cass., 5th Chamber, no 159,* 4 Jul. 2006, Rihani vs Rassi, Al Adl 2007, II, p. 167.
9 But unfortunately the law on civil marriage that was proposed in the mid-nineties by the President of the Republic during that period, Elias Heraoui, was not voted into the Lebanese parliament because all the religious authorities firmly opposed the project.
10 In fact, all religious legislations in Lebanon consider civil marriages as null.
11 In the same meaning, Civ. Cass, 5th Ch., 29 Mar 2005, *Amarzian vs. El Hage,* Al Adl 2006 p. 665
12 Beirut Civil Court of Appeal, 3rd Ch, 23 Feb 2006, *Mneimneh vs. Hafez,* Al Adl 2006, p. 711.
13 Tr. Of 1st Inst. of Beirut, 14 Aug 1964 (unpublished) cited by Pr Gannagé, *The marriages of Lebanese celebrated abroad in both civil and religious forms* (in French), *Etude de Droit Libanais* 1965 no 2 p. 307 and, in *Le Pluralisme de Statuts Personnel dans (les?) Etats multicommunautaires* p.125; Civ. Cass. (Pl. Ass.), 15 Oct 1963, *Lebanese Judicial Review* 1964 p. 93, *Muhami Review* 1963, p. 239.
14 *Op. cit.*
15 Beirut Court of Appeal, 3rd Ch, 11 May 2000, *Talin vs. Honein,* Al Adl 2000, p. 448.
16 Justice M. Mitri, in his note under Civ. Cass. 5th Ch., 29 Mar 2001, Al Adl 2001 p. 73.
17 Pr Marie-Claude Najm, in her notes under Beirut Court of Appeal, 11 May 2000, *op. cit.* and Civ. Cass. 29 Mar 2001, *op.cit.*
18 Civ. Cass. 5th Ch., 24 Jan 2006, *Minkara vs. Minkara,* Al Adl, 2006, p. 1075.
19 I will ignore matters related to succession because it is outside the scope of this article dealing only in matters of family law.
20 Civ. Cass. (plen. Ass.), 5 Dec 1997, *Dib vs. Asmar,* Proche Orient Etude Juridique (POEJ) no 52-53, 1999 -2000, p.41
21 In a famous case, the Court of Cassation annulled a second marriage celebrated by a Christian married man who converted to Islam because of the rules of competence stipulated in Art. 23 of Decision no 60 LR and Art. 14 of the law of 2 Apr. 1951, and consequently withdrew the Lebanese nationality from the second wife who was naturalised by effect of marriage with a Lebanese according to Lebanese immigration laws.
22 Civ. Cass. 29 Sep. 1955, *Lebanese Judicial Review* 1955 p. 780
23 Civ. Cass, 9 Apr. 1970, *Moawad vs. Hanna, Lebanese Judicial Review* 1970 p. 1115 and C.Cass, Plen. Ass., 27 Apr. 1972, *bashaian vs. Ashkhanian,* Al Adl 1972 p. 161.
24 Mounah Mitri, *The role of the Lebanese Supreme Courts in matters of Personal Statutes,* (in French) in Les cours judiciaries suprêmes dans le monde arabe, Bruylant 2001, p.121 and cited by Prof. I. Traboulsi, *'The latest developments in matters of personal statutes in Lebanon and Egypt'* in Les conférences du Cedroma, Vol. I,Bruylant 2004, p. 222.
25 C.Cass. (Plen. Ass.), 31 Jan 2000, Proche Orient Etude Juridique no 55 – 2002, p. 118; C.Cass. (Plen. Ass.), 5 Dec 1997, *Dib vs. Asmar, op. cit.*

Matrimonial law in Pakistan

Mian Muhibullah Kakakhel
Senior Advocate, Pakistan

Matrimonial laws, being the product of the civilization of mankind, are of paramount importance both to society and the individual. Equally important is the need to know the rules governing the legal wedlock called marriage. It is generally understood that marriage amongst Muslims is not a sacrament, but more in the nature of a civil contract. Such a contract undoubtedly has spiritual and moral overtones and undertones but legally, in essence, it remains a contract between the parties which can be the subject of dissolution for good cause. In this respect, Islam, the dinul-fitrat, conforms to the dictates of human nature and does not prescribe the binding together of a man and woman in what has been described as holy wedlock.

As a result of the report of the Commission of Marriage and Family Laws, published in the *Gazette of Pakistan*, extraordinary, dated 20 June 1959, Muslim Family Laws Ordinance, 1961 was promulgated, the policy of which seems to be to provide some curbs on too easily obtained pronouncements of divorce and unnecessary or unjustified plural marriages.

Under the West Pakistan Family Courts Act, 1964, Family Courts were established and were conferred with exclusive jurisdiction for expeditious settlement and disposal of disputes relating to marriage and other family affairs connected therewith. These Family Courts have also been conferred with the powers of magistrate first class for the purposes of awarding maintenance to a wife due her husband. These courts are legally bound to adjudicate upon, as quickly and urgently as possible, matters relating to the dissolution of marriage, dowry, maintenance of wives and children, restitution of conjugal rights, custody of children, guardianship and the jactitation of marriages.

A wife who, unluckily, finds that she is not in peaceful wedlock with her husband and is desirous of getting a divorce has a statutory right to get divorced as the law does not believe in hateful unions - although 'it does not admit impediments in the marriage of true minds'. However, in our society it is extremely difficult for a wife to ask for her pronounced, guaranteed and statutory rights. Besides living in a male-oriented and male-dominated society, she is psychologicallyy debarred from having access to the statutes enumerating and ensuring the right to getdivorced under certain circumstances. Section 2 of the Dissolution of Muslim Marriages Act permits divorce on any one or more of the following grounds *viz*:

(i) that the whereabouts of the husband have not been known for a period of four years;
(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;
(iii) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961;
(iv) that the husband has been sentenced to imprisonment for a period of seven years or upwards;
(v) yhat the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
(vi) that the husband was impotent at the time of the marriage and continues to be so;
(vii) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
(viii) that she, having been given in marriage by her father or other guardian before she attained the age of 15 years, repudiated the marriage before attaining the age of 18 years; provided that the marriage has not been consummated;
(ix) that the husband treats her with cruelty, that is to say:
    (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment; or
    (b) associates with women of evil repute or leads an infamous life; or
    (c) attempts to force her to lead an immoral life; or
    (d) disposes of her property or prevents her exercising her legal rights over it; or
    (e) obstructs her in the observance of her religious profession or practice; or
    (f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran.

However, hasty divorces have been controlled by section 7 which says that:

1. Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq in any form whatsoever, give the chairman a notice in writing of his having done so, and shall supply a copy thereof to the wife.
2. Whoever contravenes the provisions of sub-section (1) shall be punishable with simple imprisonment for a term which may extend to one year, or with a fine which may extend to five thousand rupees, or with both.
3. Save as provided in sub-section (5), talaq, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety (90) days from the day on which notice under sub-section (1) is delivered to the chairman.
4. Within thirty (30) days of receipt of notice under sub-section (1), the chairman shall constitute an arbitration council for the purpose of bringing about a reconciliation between the parties, and the arbitration council shall take all steps necessary to bring about such reconciliation.
5. If the wife is pregnant at the time that talaq is pronounced, talaq shall not be effective until the period mentioned in sub-section (3) of the pregnancy, or whichever is the later, ends.
6. Nothing shall debar a wife whose marriage has been terminated by talaq effective under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

To the same end, section (6) of the same ordinance enunciates that a man contracting another marriage during the lifetime of his first wife without her consent shall be punishable with imprisonment for one year and/or a fine up to 5,000 rupees, should the first wife lodge a complaint, feeling aggrieved by the second marriage of the husband. Moreover, the husband will also be bound to pay the entire amount of dowry to his wife in such an eventuality. This section of law permits a wife to remarry her husband after pronouncement of talaq by him without an intervening marriage.

The law recognises the right of a wife to repudiate her marriage on attaining puberty, if she was married by her parents or guardians when she was a minor. This right in Islam is called *khayar-i-baloogh*.

The wife also has a statutory right to have the marriage dissolved on the grounds of *khula* if she cannot live with the husband, whom she does not like. The word *khula* literally means 'to put off', as a man is said to *khula* his garment when he puts – or takes - it off. *Khula* therefore means the putting off or doffing of the cloth of marriage. There are two classes of *khula*:

(i) by mutual agreement;
(ii) by order of the Court Qazi and dissolution of marriage taking place by the husband pronouncing talaq in the first class of cases, and by the order of the Qazi or the Court in the second class of cases.

The Quran (holy book of Muslims) declares: 'Women have rights against men similar to those against them'.

According to well-known rules of equity, it should therefore be surprising if the Quran did not provide for the separation of spouses at the insistence of the wife in any circumstances. The Quran expressly says that the husband should either retain his wife according to the well-recognised custom or release her with grace. The word of God rejoined the husband not to cling to the woman in order to cause her injury. Another Hadith declares: 'Let no harm be done, nor harm be suffered in Islam'.

> 'Such divorce may be pronounced thrice, either retain them in a becoming manner or send away with kindness and it is not lawful for you that you take anything of what you have given them, unless both fear that they cannot observe the limits prescribed by Allah. And if you fear that they cannot observe the limits prescribed by Allah then it shall be no sin for either of them in what she gives to get her freedom. These are the limits prescribed by Allah; it is they that are wrongdoers'.

Islam does not force on spouses a life devoid of harmony and happiness, and if the parties cannot live together as they should, it permits a separation. If the dissolution is due to some fault on the part of the husband, there is no need of any restitution. If the husband is not in any way at fault then there has to be restoration of the property received by the wife and, ordinarily, it will be of the whole of the property. However, the judge may take into consideration reciprocal benefits received by the husband, and 'continuous living together' may also be a benefit received.

According to the latest judgments of the Superior Courts of Pakistan, a wife is not bound to return to the husband any thing or any dowry in the case of dissolution of marriage on any ground including *khula*. Moreover, the woman has not only been given a right to be divorced, but she can also claim the return of her dowry articles, bridal gifts and custody of her children through the family courts.

A note on forced marriages

Rhiannon Lewis
Solicitor, Dawson Cornwell, London

The Forced Marriage (Civil Protection) Act 2007 came into force on 25 November 2008. Anne-Marie Hutchinson OBE, Chair of the Family Law Committee of the IBA, acted for Dr Humayra Abedin in one of the very first cases under the Act.

This high profile case, which attracted extensive TV and newspaper coverage worldwide, brought the plight of the victims of forced marriage to the attention of the wider public. Dr Abedin had been held captive, drugged by her family in Bangladesh and forced to marry against her will. Following orders obtained in the English Courts, Dr Abedin was recovered and safely returned to England. Anne-Marie Hutchinson has for many years been a tireless defender of the victims of forced marriage, creatively developing legal remedies to protect them using the High Court's inherent jurisdiction, prior to the introduction of the Act. Her work has often been carried out on a *pro bono* basis.

As well as providing her free expertise and support to the Forced Marriage Unit at the Foreign & Commonwealth Office, she also assisted in the drafting of the Forced Marriage (Civil Protection) Act 2007 and the Law Society's information leaflet on forced marriage for practitioners.

More recently, Anne-Marie was invited to Strasbourg to speak at a press conference at the Parliamentary Assembly of the Council of Europe prior to the Parliamentary Debate.

Dr Abedin gave a courageous account of her own experiences in the hope that this would encourage other women in a similar predicament to take action. Anne-Marie Hutchinson drew attention to the fact that there are many other women faced with forced marriage and other practices incompatible with human rights, particularly when the women in question are returned to their country of origin and find themselves isolated, without any legal protection, or any possibility of returning to their usual country of residence.

Anne-Marie Hutchinson OBE with Dr Humayra Abedin and the Council of Europe Parliamentary Assembly press conference:

Russell Bywater
Dawson Cornwell,
London

Recognition of foreign pre-nuptial agreements in England and Wales

I was the fortunate recipient, gleefully accepted, of an invitation to speak at the IBA conference in Buenos Aires as one of the otherwise glittering array of panellists gathered together by the equally glittering Jacqueline Julyan S.C. to discuss pre/ante nuptial agreements and inter alia the enforceability of those contracted in one jurisdiction if a subsequent divorce was conducted in a different jurisdiction.

The object of Miss Julyan's carefully crafted case study, 'George', is a hypothetical Wall Street attorney who 'has it all' (not only a beautiful fiancée but a Cayman Island discretionary trust). However, I concluded he was likely to be less than fortunate if he undertook a divorce through English courts whatever his US pre-nuptial or RSA ante-nuptial might indicate. Indeed I opened my advice to George with the words 'what do you want first, the bad news or the really bad news?' It has been interesting to follow The Court of Appeal in England's much anticipated decision (handed down 2 July 2009) in *Radmacher v Granatino* [2009] EWCA Civ 649. It is proving difficult to keep up. In our case study, 'George' who, after relocating to Europe, had a picture in his mind of chaperoning his beautiful new wife to London theatres, sipping Pimms with her at the Henley Regatta and quaffing strawberries with vintage bubbly at the tennis, saw that beguiling image dissolve before his eyes to be replaced with Switzerland; his other alternative bolt hole having the much more pre-nuptial-friendly legal environment. All that now appears to have changed. The *Radmacher* case continues and is scheduled for a revival at our brand new Supreme Court; the House of Lords rebranded.

Whatever the outcome, this is the most significant decision to date on the effect of pre-nuptial agreements in English law. The facts are the following: the parties had entered into an agreement under German law which importantly included a clause purportedly preventing either from making any claim against the capital or income of the other in the event of divorce. The law of some jurisdictions does not permit spouses to contract out of maintenance claims. It is always necessary to study the terms of any agreement and the law under which it has been made in order to understand its intended application. Assumptions were made that the agreement would be upheld by a German divorce court at both first instances (where the trial judge admitted it as a factor even though departing from its terms). However, it appears that in the Court of Appeal, this assumption may be wrong.

More importantly, other problems arise with the decision that leaves the English law on pre-nuptial agreements far from certain. Certain principles advanced in *Radmacher* clash with the position taken by the Privy Council in *MacLeod v MacLeod* [2009] 1 All ER. Although *MacLeod* was an appeal from the Isle of Man (a separate legal jurisdiction from England), the law of ancillary provision in the Isle of Man is on all fours to those in the Matrimonial Causes Act in England. De facto the decision of the Privy Council is the same as a decision of the House of Lords and should bind the Court of Appeal. The points of interest are:

1 There is some attempt to recognise foreign law here (particularly the different approach in Europe) when traditionally we have always shied away from a 'conflict' of laws approach.
2 If an agreement makes inadequate provision for a spouse as parent, the agreement doesn't fail as was once though. Those aspects that conflict with the concept in English law of 'fairness' can be remedied by making an award to a primary carer limited to the term of the children's dependency on a similar basis to settlements under Sch. 1 Children Act 1989 as between non-marital parents. In effect the court can 'patch up' those aspects of the settlement ship that leak rather than letting the whole thing flounder below the waves.
3 Some of the disclosure, timing and advice criteria which if not observed can severely undermine even English pre-nuptials were waved away on the basis that their absence

would have been unlikely to make any difference to the existence per se or the terms of the agreement itself.

4 In *MacLeod* the Privy Council distinguished between pre- and post-nuptial agreements. The Privy Council focused in part on S.34(5) Matrimonial Causes Act 1973 as applying only to post- but not pre-nuptial agreements. This statutory provision which prescribes any post-nuptial attempt to limit maintenance claims as unlawful was described by LJ Wilson as 'dead letter' law when it has been in a statute from its original form which is in force, and this provision has been left untouched despite various other amendments to the statute. The Court of Appeal asserts that post- and pre-nuptial agreements should be viewed in much the same way.

5 Lip service is now only paid to hitherto long standing public policy objections to pre-nuptial agreements. Pre-nuptials appear to have evolved in a relatively short period of time from being an irrelevance to being if not a determinative, then a key factor.

Watch this space because if the case is heard by the Supreme Court, it is difficult to see how our superior appellant court can uphold the Court of Appeal in *Radmacher* without more or less the same judges effectively contradicting their own previous decision when applying the same law in *MacLeod*. Our wandering Wall Street lawyer 'George' might still be well advised not to throw the tweeds into his portmanteau just yet.